SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

JOYCI BOROVSKY and HOUSE OF KAVA INC.,

Plaintiffs,

-against-

VANESSA LOPEZ,

Defendant.

X

DECISION / ORDER

Index No. 516318/2019
Motion Seq. No. 4
Date Submitted: 6/16/2022

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant's motion for summary judgment dismissing the complaint and for summary judgment on her counterclaim.

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed…….	94-102
Affirmation in Opposition and Exhibits Annexed.....	105-113

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Background

Plaintiff House of Kava Inc. ("HOK") is a New York corporation which operated a bar In Bushwick, Brooklyn, that served "kava-derived products as a health alternative to alcoholic beverages." Plaintiff Borovsky allegedly formed, owned, and operated HOK in 2016 with her partner, non-party Grant Roberts. The business has been closed since sometime in June or July of 2019. In early 2018, defendant allegedly invested money in the plaintiff's business, and allegedly purchased a 20% ownership stake in a new business venture, a kava bar to be opened in Miami, Florida ("HOK Miami").[1] Shortly thereafter, in April 2018, defendant was hired by plaintiff to serve as the general manager of the Brooklyn HOK.

[1] According to the Florida Division of Corporations' public website, non-party House of Kava Miami Inc. was established on February 6, 2018. Roberts, Borovsky and Lopez are listed as the officers.

In June 2019, the parties had a falling out. Defendant apparently "resigned" from her position as manager of HOK [Brooklyn] on Tuesday, July 2, 2019. The papers aver that when defendant Lopez resigned as general manager of HOK Brooklyn, "Borovsky determined . . . to temporarily close HOK . . . so that [she] could" open HOK Miami before returning to New York. HOK [Brooklyn] then allegedly laid off the entire staff, who Borovsky claims were all defendant's "friends and roommates." Defendant Lopez then allegedly "created a fake business Instagram account, which made a purported parody of Borovsky and HOK," for the "sole purpose of diminishing HOK's customer base and tarnish[ing][Borovsky's] reputation in the community." Plaintiffs then commenced the instant action.

Plaintiffs initially asserted four causes of action in the amended complaint. In a prior decision, the court granted defendant's pre-answer motion to dismiss the first and second causes of action, for libel *per se* and for copyright infringement, and directed her to answer the amended complaint with regard to the other two causes of action. Now, in motion sequence #4, defendant moves for summary judgment dismissing the two remaining causes of action and for summary judgment on her counterclaim. The third cause of action alleges unfair competition and the fourth alleges that defendant breached the parties' contracts.

Discussion

On a motion for summary judgment, the moving party has the burden to establish "a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 985 N.Y.S.2d 448, 8 N.E.3d 823 [2014], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). If the moving party

meets this burden, the burden then shifts to the non-moving party to "establish the existence of material issues of fact which require a trial of the action" (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503, 965 N.E.2d 240, 942 N.Y.S. 2d 13 [2012]).

Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601, 953 N.Y.S. 2d 259 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 852, 476 N.E.2d 642, 487 N.Y.S. 2d 316 [1985]). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to the opponents of the motion (*Giraldo v Twins Ambulette Serv., Inc.*, 96 AD3d 903, 946 N.Y.S.2d 871 [2d Dept 2012]). Further, "[t]he court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115, 898 N.Y.S. 2d 590 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685, 873 N.Y.S. 2d 726 [2d Dept 2009]). The court must apply these principles to the motion.

1. Unfair Competition

The allegations in the amended complaint [Doc 96] are that "67. Plaintiff, as House of Kava's single largest shareholder and operator, has the exclusive right to use that name for social media accounts and advertisements. 68. After resigning from HOK, Defendant was no longer affiliated HOK. 69. Nevertheless, Defendant created the Fake Account [@house_of_kava_bk] to deceive the public by misappropriating Plaintiff and HOK's identities to palm off Defendant's comments as that of Plaintiff's and HOK's in Defendant's efforts to destroy HOK's goodwill with the community." Further, "71. Additionally, on or around July 7, 2019, Defendant used the Fake Account to post a photo of HOK's most ordered menu item, so people viewing the post would believe the post was endorsed by

Plaintiffs. In the comments, she wrote, “Feelin' cute might drink kratom and exploit workers later :-)” 72. Defendant made the post viewable to her followers, some of which were HOK’s regular customers, so they would choose sides in Defendant’s hope that HOK’s regular customers would start to disassociate therefrom. 73. Also, on that date, Defendant continued to use the Fake Account to deceive the public into thinking Plaintiffs were making the statements posted thereto.”

However, the amended complaint asserts that HOK is a business that plaintiff Borovsky closed when defendant resigned as its manager (E-File Doc 32, ¶¶ 37-39). She states that it was closed temporarily, so she could open the one in Florida. However, it was acknowledged at oral argument that plaintiff did not return to NY and did not re-open the business. Paragraph 5 of defendant’s statement of material facts states that it was closed on or about July 2, 2019. In opposition, plaintiff’s attorney says this statement is false, with no further information. In his affirmation, he states, “And irrespective of whether Plaintiff HOK is no longer doing business at the location where Defendant worked, Plaintiffs still have exclusive rights in the name “House of Kava” and in their trade secrets concerning their formulation of kava and the operations of a kava bar. Plaintiffs allege that Defendant misappropriated those trade secrets in violation of the Employment Contract NDA, and is using such secrets to sell kava products to the public, enriching herself to the exclusion of Plaintiffs.”

It is necessary, for an unfair competition claim to state a cause of action, that the plaintiff be faced with competition by defendant. If plaintiff shuttered her business before this suit was commenced, she cannot pursue a claim for unfair competition.

There are two theories of common-law unfair competition—palming off and misappropriation (*see ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 880 N.E.2d 852, 850 N.Y.S.

2d 366 [2007]; *see also Caldera Holdings LTD v Apollo Global Mgt, LLC*, 2019 NY Slip Op 33734[U] [Sup Ct, NY County 2019]). "Under the 'misappropriation theory' of unfair competition, a party is liable if they unfairly exploit the skill, expenditures and labors of a competitor. The essence of the misappropriation theory is not just that the defendant has 'reap[ed] where it has not sown,' but that it has done so in an unethical way and thereby unfairly neutralized a commercial advantage that the plaintiff achieved through 'honest labor'" (*EJ Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 449, 80 N.Y.S.3d 162, 105 N.E.3d 301 [2018]). "Allegations of a 'bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information' can give rise to a cause of action for unfair competition" (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56, 6 N.Y.S.3d 7 [1st Dept 2015]; (*Cont. Indus. Group, Inc. v Ustuntas*, 2020 NY Slip Op 34344[U], *16-17 [Sup Ct, NY County 2020]). However, if plaintiff was not in business in New York at all at the relevant times, it may not be claimed that defendant competed with plaintiff unfairly. Plaintiff does not assert that there were any patent or trademark registrations for its name or its products, it is noted.

The ‘palming off” theory of unfair competition, is described as “the sale of the goods of one manufacturer as those of another” (*ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 471 [2007]). This refers to, for example, fake or counterfeit watches or handbags, described in case decisions as “trade pirates” (*Electrolux Corp. v Val-Worth, Inc.*, 6 NY2d 556 [1959]). This theory of liability is inapplicable to a beverage, unless it was bottled, packaged and marketed.

Accordingly, the branch of defendant’s motion to dismiss the third cause of action asserted by the plaintiffs, for unfair competition, is granted and this cause of action is dismissed.

2. Breach of Contract

In the amended complaint, plaintiffs allege that defendant signed a nondisclosure agreement, and then breached it. The papers in opposition to defendant's motion provide three agreements ostensibly signed by defendant, "Employment Contract NDA", "Trade Secret NDA" and "Business Plan NDA." In support of this motion, defendant avers [Doc 99] that she did not sign "it." In her attorney's memo of law, he states "Defendant denies ever signing the alleged non-disclosure and non-compete agreement," citing defendant's Aff ¶ 10, and says "Assuming, arguendo that Defendant did sign the agreement, Plaintiffs' claim still must be dismissed. Since Plaintiff JOYCI closed HOK Brooklyn, Plaintiffs have not suffered any damages as a result of Defendant LOPEZ's alleged breach of the non-compete agreement." This is purely conclusory.

Whether or not defendant signed the documents at issue cannot be determined in a motion for summary judgment. Credibility issues are for a jury or fact finder to determine after hearing live testimony, not for the court to decide on papers. If the agreement was signed, an attorney cannot simply allege that the adverse party sustained no damages so the action should be dismissed. There must be evidence submitted in admissible form to establish that there are no issues of fact which require a trial, not a legal conclusion by an attorney.

The elements of a breach of contract claim include "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp*, 79 AD3d 425, 426, 913 N.Y.S.2d 161 [1st Dept 2010]). Plaintiffs have alleged these elements in the amended complaint, and defendant has not made a prima facie case for summary judgment dismissing this cause of action.

3. Summary judgment on defendant's counterclaim

Defendant asserts in her counterclaim that the parties entered into an agreement on 2/16/18 which is annexed as Exhibit A to the answer, and which provides, according to the counterclaim, "Defendant made a $50,000.00 (the "Funds") payment to non-party House Of Kava Miami Inc. 7. The Agreement provides that Defendant is entitled to a 20% share interest in HOUSE OF KAVA MIAMI INC. 8. Pursuant to the terms of the Agreement, if the parties and non-party GRANT ROBERTS fail to enter a subsequent agreement on or before March 15th, 2018, Defendant is entitled to a refund of the Funds ($50,000.00) upon request. 9. The parties and non-party GRANT ROBERTS failed to enter a subsequent agreement on or before March 15th, 2018. 10. On July 1, 2019 Defendant, pursuant to the terms of the Agreement requested a return of the Funds. 11. Plaintiff has failed to return the Funds to Defendant, despite demand thereof." Therefore, defendant claims she is entitled to summary judgment against plaintiff for $50,000 with interest from July 1, 2019.

The annexed agreement is ostensibly signed but was not notarized. To prove compliance with all prerequisites for summary judgment with regard to this document requires extrinsic evidence, which was not provided. It is solely supported by defendant's affirmation under CPLR 2106(b). Are the agreements at Doc 110-112 the agreements contemplated by this document? Was there a demand for repayment? Was there a payment by defendant of the sum she claims she paid? There are no receipts, cancelled checks, or other evidence.

Further, plaintiff's reply to the counterclaim states in part that the sum paid was defendant's investment in the business, not a loan, and that defendant "has acquired a 20% interest in the company". Of course, copies of the alleged share certificates are not provided. The court notes that the "company" is not plaintiff HOK, but a non-party Florida

corporation, “House of Kava Miami Inc.”. Plaintiff, it is noted, avers in her affirmative defenses in the reply to the counterclaim that any sum awarded to defendant should be set off against plaintiffs’ damages in the main action.

The court finds and determines that the motion for summary judgment on the counterclaim must be denied, as defendant has not established, as a matter of law, that it should be granted.

Accordingly, it is **ORDERED** that the branch of defendant’s motion for summary judgment dismissing the third cause of action in the complaint is granted, and the branch of defendant’s motion for summary judgment dismissing the fourth cause of action is denied.

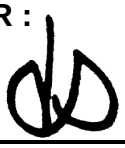
IT IS FURTHER ORDERED that the branch of defendant’s motion which seeks an order granting her summary judgment on her counterclaim is denied.

Any other relief requested but not addressed herein is denied.

This shall constitute the decision and order of the court.

Dated: August 23, 2022

E N T E R :



Hon. Debra Silber, J.S.C.