

UtiliSave, LLC v Kanayev
2017 NY Slip Op 30986(U)
May 10, 2017
Supreme Court, New York County
Docket Number: 160139/14
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

_____ X

UTILISAVE, LLC,

Plaintiff,
-against-

INDEX NO. 160139/14

Motion Seq. No. 001

SASHA KANAYEV, and ENERGY
SPECTRUM, INC.,

Defendants.
_____ X

OSTRAGER, J:

In this post-note of issue motion for summary judgment pursuant to CPLR § 3212 by the defendants Energy Spectrum, Inc. (“ESI”) and Sasha Kanayev (“Kanayev”), on the eve of a jury trial scheduled for May 17, 2017, the Court is asked to decide whether there are triable issues of material fact to submit to a jury in connection with this employment-related dispute. In considering the arguments raised by the parties and the evidence adduced during discovery and annexed to the motion papers, the Court grants summary judgment in favor of the defendants, dismissing all claims against them in the Complaint, for the following reasons.

In December 2004, shortly after graduating from Pace University with a Master’s degree in Finance, defendant Kanayev began his employment with plaintiff, UtiliSave, LLC (“UtiliSave”), a company that provides utility auditing services to private and non-profit businesses (Kanayev Affidavit, ¶¶5, 13). Kanayev had no experience in utility bill auditing prior to joining UtiliSave (opposition papers, Dennis Affirmation, Exh. J). In connection with his hiring at a salary of \$40,000, Kanayev signed a Confidentiality, Non-Disclosure, and Non-Solicitation Agreement (“Confidentiality Agreement”) dated December 7, 2004 (moving papers, Solomon Affirmation, Exh. N). After 10 years of employment, Kanayev decided to pursue other employment opportunities at a higher salary, particularly after

UtiliSave's Chief Executive Officer, Michael Steifman, expressed dissatisfaction with Kanayev's performance during an annual employee performance in late 2013 or early 2014 (Kanayev Affidavit, ¶¶19-20).

Kanayev states that he applied to several positions utilizing his *Monster.com* account and connected with a recruiter, Michael Russomanno of Energy Search Partners, who has been engaged by defendant Energy Spectrum, Inc. ("ESI"), which also provides utility auditing services. ESI was seeking to fill a position for a Senior Utility Bill Auditor (Kanayev Aff, ¶20); (Neiburg Aff., ¶12). After a round of interviews, ESI extended a job offer to Kanayev on April 10, 2014 (Neiburg Aff., ¶13, Exh. H), and on April 15, 2014, Kanayev accepted the job for the base annual salary of \$75,000 plus bonuses (Kanayev Aff., ¶22).

Kanayev tendered his resignation notice to ESI's Human Resources Department by email on April 15, 2014, and the next day, on April 16, 2014, sent an email to ESI's president, David Neiburg, and another person which states the following:

David, Michael,

I sent resignation email this morning with 2 weeks notice. Spoke with HR person – everything seams [sic] okay at the moment, however Michael Steifman currently is not in town. He supposed to be back sometime next week. I will keep you posted as I get more updates.

I obtained a copy of confidentiality, non-disclosure agreement that I have signed back in 2004 (please see attached). [...]

(Dennis Affirmation, Exh. N).

Several months later in October 2014, Utilisave commenced this action for breach of contract, tortious interference with contract, misappropriation of trade secrets, and unfair competition against Kanayev and ESI, claiming, among other things, that Kanayev disclosed confidential and proprietary information to ESI, in contravention of Kanayev's Confidentiality Agreement, and that ESI recruited

Kanayev for the express purpose of exploiting Kanayev's knowledge of UtiliSave's "confidential and proprietary processes and methodologies" (Complaint, ¶1). UtiliSave's Complaint (¶13) asserts that the "confidential and proprietary" information that Kanayev allegedly misappropriated for ESI's benefit includes:

strategies and know-how concerning the compilation of information relating to state and local gross receipts tax imposed on utilities and passed on to their customers, computation of gross receipts tax, and the presentation and submission of information to relevant authorities concerning the gross receipts tax.

The gravamen of plaintiff's Complaint concerns the process for calculating Gross Receipt Tax ("GRT") refunds for institutional non-profit customers. Simply stated, Section 186-a of the New York State Tax Law, as amended in 2010, and Section 11-1101 of the Administrative Code of the City of New York provide reimbursement of the gross receipts tax charged by Consolidated Edison ("ConEd") and other utility providers to non-profit businesses who buy energy and later re-sell it to their for-profit tenants (Compl., ¶¶13-14); (Neiburg Aff., ¶¶4, 21). To obtain such reimbursements, non-profit businesses or third-party vendors like Utilisave and ESI must remit, on a monthly basis, Tax Remission Certificates ("TRCs"), on pre-printed forms and with the requisite backup data. Upon satisfactory receipt of the TRCs and data concerning the re-sold energy or "load," utility providers like ConEd then reimburses customers' accounts for the gross receipts taxes that were assessed on the re-sold load (*see* Neiburg Aff., Exh. E). For example, an email by Ms. Anna Stark, a ConEd employee in ConEd's Corporate Customer Group describes the process in a brief email dated February 20, 2014 to an ESI principal and even includes as an attachment necessary forms for the TRCs (*id.*).

As described by Kanayev (Aff., ¶28), and corroborated by emails from Ms. Stark of ConEd and Lee Friend of the New York State Department of Finance that describe the process at a higher level (*see e.g.* Neiburg, Exhs. E and G), the GRT auditing process includes: (1) reviewing customer documents, such as bills, tax exempt certificates, sub-meter data, lists of spaces and associated use, and campus

layout maps; (2) preparing TRCs and summary reports by computing the energy usage of a tenant of a non-profit business through sub-metering or a simple calculation of usage-to-space ratio, as well as computing the cost of energy and the amount of re-sold energy; and (3) submitting the TRCs and summaries to energy providers like ConEd for reimbursement. Kanayev states that he utilized an auditing software program called Utility Management Application (“UMA”) to perform these type of audits while employed by UtiliSave.

Plaintiff UtiliSave does not controvert Kanayev’s claims that he joined ESI through a recruiter (Steifman Aff., ¶29). Neither does UtiliSave controvert Kanayev’s assertion that Kanayev did not solicit UtiliSave customers while employed by ESI (Kanayev Aff., ¶2). Plaintiff also does not refute that Kanayev did not retain or disclose to ESI or any third-party any documents, business records, or computer software belonging to UtiliSave. Kanayev claims that he has used a computer software at ESI that is “visually similar” to UtiliSave’s UMA program, and the auditing process at ESI is similar to that used by UtiliSave (Kanayev Aff., ¶25). Further, UtiliSave does not dispute that Kanayev was an “at will” employee, or that the Confidentiality Agreement does not bar Kanayev from working in another utility auditing company as the Agreement does not contain a non-competition restriction.¹ Notably, Section (j) of the Agreement acknowledges that

... KANAYEV’s experience and capabilities are such that the provisions of this Agreement will not prevent KANAYEV from earning a livelihood once Kanayev is not [sic] longer employed by UTILISAVE.

Instead, in an affidavit in opposition to this motion, Steifman, Utilisave’s CEO, repeats in a conclusory manner that the GRT audit process is a unique, proprietary and confidential method for

¹ The Agreement states in broad terms that Kanayev will have access to confidential information that is proprietary to UtiliSave and that Kanayev agrees not to disclose, reveal or use any such information “during and after” his employment with Utilisave, and that Kanayev further agrees not to solicit any existing or prospective UtiliSave customers, or solicit any UtiliSave employees for 18 months after Kanayev’s termination of employment.

obtaining GRT credits for customers (Steifman Aff., ¶5). Steifman cites to Kanayev's April 15 and 16, 2014 emails as some evidence of collusion between Kanayev and ESI (*id.*, ¶¶20-22). Steifman also attempts to tie the timing to Kanayev's move from UtiliSave to ESI (i.e. May 4, 2014) and ESI's near-simultaneous expansion into the GRT audit business in late 2013 and early 2014 (*id.*, ¶25); (*see also* Neiburg Tr. 37:5-14). For example, Steifman points to the email communication between Ms. Stark of ConEd and ESI's David Ahrens on February 20, 2014 relating to TRCs submissions (Neiburg, Ex. E); (Steifman Aff., ¶26). Steifman also points to ESI's limited experience with GRT audits when Ms. Stark in an email dated March 11, 2014, notified ESI of an incorrect TRC that ESI remitted on behalf of its client, United States Tennis Association ("USTA") (Steifman Aff., ¶27); (Dennis Aff., Ex. Q).

In addition, at oral argument on May 9, 2014, plaintiff's counsel mentioned the transition of the Columbia University ("Columbia") account from UtiliSave to ESI in connection with Kanayev's transition, but neither the opposition brief nor Steifman's affidavit advance such a claim. By contrast, Neiburg states in his affidavit that Columbia was already an ESI client on other energy-related matters when Kanayev joined ESI. The record reflects that in September 2013, Columbia sent ESI a Request for Proposal ("RFP") in connection with bill auditing services (Neiburg Aff., ¶18-19; Ex. J). Although defendants did not annex to the motion papers documentation pertaining to the Columbia RFP, there are email communications from March 11, 2014 and thereafter evidencing ongoing communications between Columbia and ESI representatives (*see* Neiburg Aff., Ex. J):

Plaintiff notes that starting in 2006, ESI used a third-party vendor, Luthin Associates ("Luthin"), to perform utility audits and that ESI began performing GRT audits "in house" around the same time Kanayev joined ESI (*see* Memorandum of Law in Opposition at 10); (Neiburg, Aff., Ex. C). Neiburg concedes that ESI referred one of its client, Montefiore Medical Center, to Luthin in 2006 to perform GRT audits because, at that time, ESI "was focusing on other areas of its energy consulting business"

(*id.*, ¶7). Neiburg acknowledges that ESI sought to expand into GRT auditing in the beginning of 2013, and Ahrens's email to Ms. Stark in February 2014 marked the initiation of ESI's plans to expand its business (*id.*, ¶9).²

CPLR § 3212 provides that summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." It is well settled that a party may obtain summary judgment when it has been clearly ascertained that there is no triable issue of fact outstanding. The proponent of a summary judgment motion must make 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. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact, which require a trial of the action." *Id.*

Defendants met their burden of proof for summary judgment in this case. The proof submitted on this motion establishes that there are no material issues of fact which warrant a trial and that would prevent the dismissal of all of UtiliSave's causes of action.

The first cause of action sounding in breach of contract is dismissed because plaintiff failed to show that Kanayev breached his Confidentiality Agreement. To sustain a breach of contract claim, plaintiff must establish the existence of a contract, plaintiff's performance under the contract, the

² Curiously, Utilisave commenced an action against Luthin in 2006 for misappropriation, conversion, unfair competition, and tortious interference with contract and business relationship, seeking injunctive relief and money damages. In that action, UtiliSave alleged that Luthin improperly solicited an UtiliSave client, Sloan-Kettering, in connection with GRT audit services (*see* Solomon Affirmation, Exh. O). Judge Rudolph of Westchester County Supreme Court, Commercial Division, granted summary judgment in favor of Luthin and dismissed UtiliSave's claims, finding that UtiliSave's opposition to the motion was "conclusory, replete with surmise and conjecture and fail[ed] evidentially to raise any genuine issues for a trier of the facts." (*id.*, Exh. P).

defendant's breach, and damages (*see Sud v Sud*, 211 AD2d 423 [1st Dept 1995]). The evidence adduced by defendants established that Kanayev did not disclose "confidential information" to ESI or solicit UtiliSave clients, and Kanayev, who was an "at will" employee without a non-compete restriction, was free to work for an industry competitor. Plaintiff failed to satisfy the elements for breach of contract and failed to come forward with admissible evidence to suggest there are material issues of fact in connection with its breach of contract claim.

The second cause of action for tortious interference with contract is also dismissed. To sustain the claim, plaintiff must demonstrate: (1) the existence of a valid contract; (2) ESI's knowledge of the contract; (3) ESI's intentional procurement of Kanayev's breach without justification; (4) actual breach of contract; and (5) damages caused by the breach (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Plaintiff failed to establish that Kanayev breached its contract with UtiliSave or that ESI attempted to induce Kanayev to breach the Confidentiality Agreement. It is undisputed that ESI did not solicit Kanayev for employment but rather that Kanayev applied for a position through a recruiter. Further, Kanayev did not breach his Confidentiality Agreement.

The third cause of action sounding in misappropriation of trade secrets is dismissed. The New York Court of Appeals has defined "trade secrets" as "any formula, pattern, device or complication of information which is used in one's own business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Mgmt., Inc., v Janien*, 82 NY2d 395, 407 [1993]) ("As these considerations demonstrate, a trade secret must first of all be secret"). There is nothing proprietary or exclusive about the GRT auditing process used by UtiliSave. Like most other auditing services, the work entails compilation of data, analysis, and submitting the right forms to the right entities. GRT audit services are provided by others in the industry like Luthin Associates and NuGreen (*see Neiburg Aff.*, ¶29). In addition, the information or experience that an employee acquires

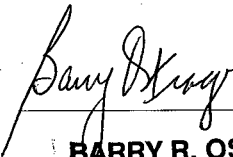
during the course of his or her employment is neither protected nor protectable (*see Reed, Roberts Assoc. v Strauman*, 40 NY2d 303 [1976]; *see also, Buhler v Michael P. Maloney Consulting, Inc.*, 299 AD2d 190 [1st Dept 2002]).

The fourth cause of action sounding in unfair competition is dismissed. The thrust of such a claim is bad faith misappropriation of a commercial advantage belonging to another by the exploitation of proprietary information or trade secrets (*Comprehensive Community Dev. Corp. v Lehach*, 223 AD2d 399 [1st Dept 1996]). Plaintiff failed to demonstrate an element of bad faith on the part of the defendants, or exploitation of “proprietary information” or “trade secrets.”

Accordingly, it is hereby

ORDERED that the defendants’ motion for summary judgment is granted and the Clerk is directed to enter judgment dismissing the first, second, third, and fourth causes of action against the defendants.

Dated: May 10, 2017



BARRY R. OSTRAGER J.S.C.
JSC