

Michael G. Kessler & Associates, Ltd. v White
2004 NY Slip Op 30115(U)
December 17, 2004
Supreme Court, Suffolk County
Docket Number: 1002642/2000
Judge: Robert Webster Oliver
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 18 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT WEBSTER OLIVER
Justice of the Supreme Court

MOTION DATE 5/21/04 (#005)
MOTION DATE 5/25/04 (#006 & #007)
ADJ. DATE 7/8/04
Mot. Seq. #005 - MotD
Mot. Seq. #006 - MD
Mot. Seq. #007 - XMotD

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MICHAEL G. KESSLER & ASSOCIATES, LTD., :

Plaintiff,

- against -

JOSEPH K. WHITE,

Defendant.

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment; motion to dismiss; cross mot. on for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-6; 7-14; Notice of Cross Motion and supporting papers 15-23; Answering Affidavits and supporting papers 24; Replying Affidavits and supporting papers 25; 26; Other plaintiff's memorandum of law; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant (Mot. Seq. #005) for an order granting partial summary judgment dismissing the second, third, and fourth causes of action in the third amended complaint, the further motion by defendant (Mot. Seq. #006) for an order pursuant to CPLR 3211(a)(7) and CPLR 3212 dismissing the first cause of action in the third amended complaint, and the cross motion by plaintiff (Mot. Seq. #007) for an order pursuant to CPLR 3212 granting summary judgment in its favor on its second and third causes of action and pursuant to CPLR 3103 granting a protective order, are hereby consolidated for purposes of this determination; and it is further

ORDERED that the defendant's motion (Mot. Seq. #005) is granted to the extent of dismissing the fourth cause of action in the third amended complaint, and is otherwise denied; and it is further

ORDERED that the defendant's motion (Mot. Seq. #006) is denied; and it is further

ORDERED that the plaintiff's cross motion (Mot. Seq. #007) is granted to the extent of regulating disclosure of plaintiff's tax returns in the manner set forth below, and is otherwise denied.

The plaintiff is a forensic accounting and investigative firm which investigates such matters as employee defalcations, product diversions, product counterfeiting, cyber-crime, and other kinds of property misappropriations for multinational corporations. The defendant is a former detective with the Suffolk County Police Department. On or about August 29, 2000, the parties entered into a written agreement whereby the defendant accepted employment from the plaintiff. Pursuant to paragraph 5 of the agreement, the defendant agreed "not to accept employment elsewhere in a similar business for a period of two (2) years within the counties of the City of New York, and Nassau and Suffolk Counties (State of New York) after the termination of this Employment Agreement." The defendant also agreed, pursuant to paragraph 10, "to take all steps reasonably necessary to preserve and protect the confidentiality of any and all 'confidential information', trade secrets, or intelligence learned by the Employee during the course of his Employment as it pertains to clients of the Employer and as it pertains to the business of the Employer itself."

In September 2000, or approximately one month after the defendant became an employee of the plaintiff, his employment was terminated for what he describes as a violation of the plaintiff's computer log-off policy and what the plaintiff terms "violations of company policy and breaching certain computer security measures." According to the defendant, following his termination, he worked "casually as an independent contractor providing investigation-related services" as he "pursued a career in real estate." The plaintiff, however, claims that the defendant actually accepted employment as an investigator at two competing firms—one in Suffolk County, and the other in New York City at which he held a position as "Long Island Bureau Chief"—thus violating the terms of the parties' agreement. The plaintiff also claims that the defendant divulged to third parties names of the plaintiff's clients and non-public, sensitive information with respect to such clients. The plaintiff commenced this action in or about November 2000.

The plaintiff alleges four separate causes of action in its third amended complaint. The first cause of action, sounding in defamation, alleges that the defendant maliciously uttered false statements to two U.S. Postal Inspectors to the effect that the plaintiff is a "fraud," that the plaintiff's office addresses and listings are "phony," that the plaintiff "fraudulently billed [a client] for services not performed," that the plaintiff's president "did not possess a CFE credential," that the plaintiff operates "over thirty fictitious companies out of its offices and receives mail for the same," and that the plaintiff causes its officers and directors to use "aliases" for fraudulent and illegal purposes; that these statements were known by the defendant to be false and defamatory when he uttered them; that they were made willfully and maliciously and with intent to injure the plaintiff's good name and reputation and to cause injury and loss; and that they were republished after they were made to at least one of the plaintiff's clients. The plaintiff's second cause of action is for breach of restrictive covenant and alleges that the defendant violated the terms of the employment agreement by divulging to third parties non-public information concerning the plaintiff's clients. The third cause of action, likewise for breach of restrictive covenant, alleges that the defendant improperly accepted employment in a similar business

within the geographic and temporal limits set forth in the agreement. The fourth and final cause of action alleges that the defendant's conduct as set forth in the previous causes of action constitutes a breach of his fiduciary duty of loyalty.

The defendant now moves for partial summary judgment dismissing the second, third, and fourth causes of action. As a matter of law, the defendant claims that the plaintiff is not licensed as a private investigator and, therefore, is not entitled to enforce the restrictive covenants, which he claims are unduly onerous in any event.¹ The defendant contends that the plaintiff has not established the loss of any clients or income as a result of the claimed breach. The defendant also contends that, during the brief period of his employment with the plaintiff, he performed only perfunctory tasks for a few clients and thus did not become familiar with any trade secrets; that he was not privy to any confidential customer lists or any other confidential information; and that, following his termination, he did not solicit the plaintiff's clients or otherwise compete with the plaintiff. The defendant claims that since he only worked casually as an independent contractor providing investigation-related services after his termination, he may not be said to have accepted employment from a competing company in violation of the parties' agreement.

The defendant also moves by separate counsel, *inter alia*, for summary judgment dismissing the plaintiff's first cause of action. The defendant claims that because hearsay assertions will not support a claim for defamation, the plaintiff has failed to state a cause of action upon which relief can be granted. The defendant further contends that statements made to law enforcement officers, as here claimed, are subject to a qualified privilege and, as such, are not a proper subject for suit; that there is no proof that whatever was said was published to clients or caused any harm to the plaintiff; and that the plaintiff has failed to plead special damages.

The plaintiff cross-moves for summary judgment on its second and third causes of action and for a protective order with respect to the defendant's demands for disclosure of the plaintiff's tax returns. The plaintiff contends that the defendant's disclosures of confidential client information not only violated the parties' agreement but also caused clients such as Quaker Oats to cease doing business with the plaintiff. As for the third cause of action, the plaintiff contends that due to the nature of its business, it is not unreasonable to preclude former employees with access to sensitive information and matters from being employed by another investigative firm for a reasonable time and within reasonable geographical limits. The defendant concedes having worked at investigative firms in the restricted geographic areas within a few months following his termination. Whether the defendant's subsequent employment was full-time or part-time is irrelevant since the agreement makes no such distinction. The plaintiff also contends that it should not have to disclose its corporate tax returns because such disclosure will not lead to any relevant evidence, i.e., it will not show any loss of income attributable to the loss of Quaker Oats as a client.

¹ The plaintiff, in opposition, has annexed to its cross-moving papers copies of licenses issued by the New York State Department of State indicating that the plaintiff is in fact licensed to transact business as a private investigator. Since the defendant does not revisit the issue in reply, the Court assumes that the defendant has abandoned the argument.

To the extent that the defendant seeks dismissal of the plaintiff's first cause of action, his motion (Mot. Seq. #006) is denied. Even if the plaintiff's assertions regarding the allegedly defamatory statements are hearsay and would otherwise be insufficient to raise a triable issue of fact, the defendant does not deny that the statements were made and has produced no evidentiary proof establishing lack of publication (*compare, e.g., Snyder v Sony Music Entertainment*, 252 AD2d 294, 684 NYS2d 235 [1999]; *Barber v Daly*, 185 AD2d 567, 586 NYS2d 398 [1992]). Nor has the defendant produced any proof refuting the plaintiff's claim that it lost Quaker Oats as a client as a result of the defendant's actions. "[A] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615, 585 NYS2d 894, 895 [1992]). Thus, the defendant has failed to make a prima facie showing of entitlement to judgment as a matter of law. The Court rejects the defendant's characterization of the allegedly defamatory statements as nonactionable opinion since each may be objectively verified (*see generally, Gross v New York Times Co.*, 82 NY2d 146, 603 NYS2d 813 [1993]; *Immuno AG v Moor-Jankowski*, 77 NY2d 235, 566 NYS2d 906, *cert denied* 500 US 954, 111 S Ct 2261 [1991]). The Court also rejects the defendant's claim that the statements were protected by a qualified privilege. While such a privilege may attach to a communications made to a law enforcement official (*Toker v Pollak*, 44 NY2d 211, 405 NYS2d 1 [1978]), the individual asserting the privilege must establish that the allegedly defamatory statement was made "in a reasonable manner and for a proper purpose" (*id.*, at 219, 405 NYS2d at 5; *Kehm v Murtha*, 286 AD2d 421, 422, 730 NYS2d 243, 244 [2001]). Here, the record is devoid of evidence as to the purpose of the statements and the circumstances under which they were made. Absent such proof, the Court is constrained to find an issue of fact as to whether a qualified privilege applies. As for the defendant's claim that the complaint is deficient for failure to plead special damages, the Court notes that where, as here, a defamation cause of action is premised on statements tending to injure a plaintiff in its profession or business, special damages are presumed by law and need not be pleaded or proved (*see, e.g., Liberman v Gelstein*, 80 NY2d 429, 590 NYS2d 857 [1992]).

Both the defendant's motion (Mot. Seq. #005) and the plaintiff's cross motion are denied to the extent they seek relief with respect to the plaintiff's second and third causes of action. The Court finds that there is a material factual dispute, sufficient to defeat summary judgment on the second cause of action, as to whether and to what extent the defendant had access to confidential client information and, if so, whether he divulged such information to third parties to the detriment of the plaintiff's business. As for the third cause of action, while it appears that the defendant did violate the covenant not to compete, the Court finds material issues of fact as to the nature of the defendant's job duties and the services he provided during his brief employment as well as the geographic area in which the plaintiff conducted business, both of which bare on the enforceability of the covenant, i.e., whether it was reasonably limited to the extent necessary to protect the plaintiff's legitimate interests or whether it imposed an unreasonable burden on the defendant (*see generally, Columbia Ribbon & Carbon Mfg. Co. v A-I-A Corp.*, 42 NY2d 496, 398 NYS2d 1004 [1977]; *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 386 NYS2d 677 [1976]).

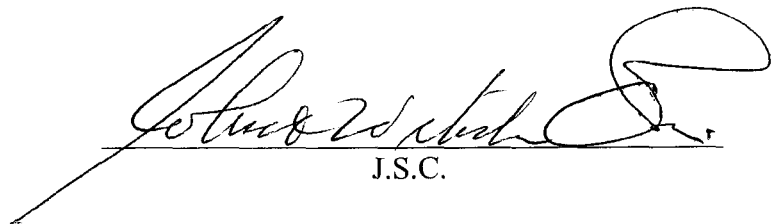
The defendant's motion (Mot. Seq. #005) is granted, however, to the extent of dismissing as duplicative the plaintiff's fourth cause of action for breach of fiduciary duty, as it fails either to plead a tort independent of the alleged defamation or to allege conduct in breach of a duty other than that

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contractually established between the parties (*see, Kaminsky v FSP Inc.*, 5 AD3d 251, 773 NYS2d 292 [2004]; *Sheehy v Clifford Chance Rogers & Wells*, 1 AD3d 225, 769 NYS2d 1 [2003]).

The plaintiff's cross motion is also granted to the extent of directing that the production of the requested tax returns be supervised by the Court, which shall redact therefrom all information which is unrelated to the plaintiff's damage claim (*see, Kovacs v Dr. Bloom & Dr. Costin Med. Assoc.*, 267 AD2d 357, 699 NYS2d 922 [1999]). The plaintiff shall deliver the requested tax returns to the Court within 20 days of the date of this order.

Dated: December 17, 2024



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION