

**Willis Re, Inc. v Hudson**

2005 NY Slip Op 30009(U)

September 26, 2005

Supreme Court, New York County

Docket Number: 0604073/2003

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Herman Calin  
Justice

PART 49

WILLIS RE INC

INDEX NO.

604073/03

MOTION DATE

5/2/05

MOTION SEQ. NO.

002

MOTION CAL. NO.

002

- v -  
SIMON M. HUDSON

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE .....**

**FILED**

**SEP 26 2005**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Dated: 9/26/05

Herman Calin

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

RECEIVED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49

-----X

WILLIS RE, INC.,

Index No. 604073/03

Plaintiff,

-against-

SIMON M. HUDSON and JOHN B. COLLINS  
ASSOCIATES, INC.,

Defendants.

-----X

**CAHN, J.**

Motion sequence nos. 002 and 003 are consolidated for disposition.

This is an action against an employee for claimed breach of a non-compete clause and improper solicitation of customers during the term of his employment, and against his new employer for aiding and abetting the breach and interfering with contractual and business relationships.

Plaintiff Willis Re, Inc. moves for partial summary judgment (CPLR 3212[e]) as to liability on its second cause of action against defendant Simon M. Hudson for breach of fiduciary duty and against defendant John B. Collins Associates, Inc. for its alleged role in the breach. Defendants move for summary judgment dismissing the complaint against them in its entirety.

[\*5]

FACTS

The facts are taken from the parties' respective Rule 19-A Statements of Material Undisputed Facts and the affidavits and exhibits accompanying the motions.

Plaintiff Willis Re is a reinsurance broker that procures reinsurance to cover insurance policies that its clients issue to their policyholders. Defendant Collins is a reinsurance broker that similarly procures reinsurance on behalf of insurance companies to cover the policies they issue to their policyholders. Willis and Collins are competitors in the reinsurance market.

From 1987 to 1997 defendant Hudson worked as an underwriter for CAN Re, Inc. In May 1997, Hudson was hired by Willis Corroon Corporation of Illinois ("WCCI"), a retail insurance broker, to help develop insurance business in the health care industry. Hudson executed an Employment Agreement effective May 5, 1997, which contained the following "Employee Loyalty, Noncompetition and Nonsolicitation" clause:

Employee agrees to devote Employee's entire business time and best efforts to the furtherance of the business of Employer during the term of this Agreement. All references in this paragraph to "Employer/Willis Corroon" shall be understood to refer to Employer and Employer's parent, sister, and subsidiary companies, as well as their successors and assigns. Upon termination of this Agreement and for a period of two years thereafter, Employee agrees that Employee shall not:

[\*4]

A. Directly or indirectly solicit, accept, or perform other than on Employer's behalf, insurance or bond brokerage, agency risk management, claims administration, self-insurance, consulting or other business performed by the Employer from or with respect to (I) clients of Employer/Willis Corroon with whom Employee had business contact or provided services to (either alone or with others) while employed by Employer and, further provided, such clients were clients of Employer/Willis Corroon as of either the date of termination of Employee's employment with Employer or within twelve (12) months prior to such termination and (ii) active prospective clients of Employer/Willis Corroon with whom Employee had business contacts within six (6) months prior to termination of Employee's Employment with Employer.

The Employment Agreement provided that its enforcement would be governed by Illinois law.

Also on May 5, 1997, Hudson executed a confidentiality agreement (the "Confidentiality Agreement") in favor of WCCI.

In March 1999, Hudson was advised that his employment was being terminated by WCCI. In May 1999 he accepted employment with Willis Re, then known as Willis Faber North America, Inc. In connection with that employment, Hudson signed a "Mutual Revocation of Severance Agreement and Release" which provided as follows:

On or about May 3, 1999, Simon Hudson and Willis Corroon

Corporation of Illinois entered into a Severance Agreement and release (the "Severance Agreement") which contemplated a "Separation Date of April 30, 1999 . . . . However, shortly thereafter, the parties agreed that Simon Hudson would transfer to the employment of a sister company of Willis Corroon Corporation of Illinois, Willis Faber North America, Inc. effective May 1, 1000. A condition of employment with Willis Faber North America, Inc. is the mutual revocation of the Severance Agreement.

Upon joining Willis Re, Hudson retained certain seniority, vacation and insurance benefits.

Prior to his departure from WCCI, Hudson met non-party Kiernan Dempsey ("Dempsey"), who was interested in placing insurance coverage for nursing homes through the London market. Hudson told Dempsey that, using the personal relationships that he had established with Lloyd's underwriters when he worked at CAN Re, he believed he could place nursing home coverage for Dempsey. In 2001 Dempsey founded Sapphire Blue LLC ("Sapphire"), an underwriting services company that procures insurance coverage for a group of nursing homes. Hudson thereafter serviced Sapphire as a client of Willis Re.

Hudson began exploring other employment opportunities in the fall of 2003. During that year Patrick Denzer, the CEO and President of defendant Collins, learned about Hudson from two Collins employees. They told Denzer they believed Hudson might

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be a suitable candidate to head a New York office for Collins. Denzer contacted Hudson in late October 2003 and met with him for the first time in New York on October 28, 2003. Hudson also met with Denzer and Sapphire principal Dempsey in Chicago on November 25, 2003. Hudson conducted employment discussions with Collins from late November 2003 until early December 2003.

On December 3, 2003, Collins made an offer of employment to Hudson which he accepted. On December 4, 2003, Hudson resigned from Willis Re. On December 9, 2003, Collins sent Willis Re a "broker of record" letter from Sapphire, wherein Sapphire appointed Collins as broker of record "for the purpose of placement and servicing of all programs upon which Sapphire Blue LLC is named and operates as 'Underwriter.'" On December 15, 2003, the American Eagle Insurance Company, RRG, another client of Willis Re serviced by Hudson, designated Collins as its broker of record.

The Complaint:

The complaint sets forth eight causes of action. Against defendant Hudson, plaintiff asserts claims for breach of contract, breach of fiduciary duty, and unjust enrichment. Plaintiff interposes a claim for interference with contract against defendant Collins, and joins both defendants in claims for interference with business relationships, unfair competition, misappropriation of confidential information and conspiracy.

DISCUSSION

Defendants' motion for summary judgment is granted to the extent of dismissing all causes of action except the second claim against Hudson for breach of fiduciary duty and the sixth claim against him for unjust enrichment. Plaintiff's motion for partial summary judgment is denied in its entirety.

Defendants' Motion to Dismiss

The first cause of action, for breach of contract, seeks to enforce the terms of the May 5, 1997 Employment and Confidentiality Agreements that Hudson executed with WCCI, and specifically the covenant not to compete. Under both New York and Illinois law, such covenants are to be strictly construed and may not be extended beyond their literal terms (see, Gramercy Park Animal Center, Inc. v Novick, 41 NY2d 874 [1977]; Hagerty, Lockenvitz, Ginzkey & Assocs v Ginzkey, 85 Ill App 3d 640 [Ill App 1980]). By its terms, the covenant in the Employment Agreement does not extend to Sapphire or American Eagle. It only applied to clients that Hudson serviced or had business contacts with while working for the "Employer," and prospective clients he had contact with within six months prior to his termination from the "Employer." The term "Employer" is specifically defined as WCCI only, as opposed to "Employer/Willis Corroon" (which also included WCCI's parent, sister and subsidiary companies). There is no dispute that neither Sapphire nor American Eagle existed

when Hudson's employment was terminated by WCCI in April 1999. Accordingly, since Hudson did not have contact with them in connection with his employment with WCCI, those entities were not covered by the covenant. Although plaintiffs' dispute whether Hudson's employment was "transferred" to Willis or whether the Employment Agreement was assigned, they do not dispute, or even address, the plain language of the covenant relating to the definition of "Employer."

Furthermore, Willis Re cannot enforce either agreement because it was neither a successor to, nor assignee of, WCCI. It was not a successor to WCCI because Willis Re did not purchase any WCCI assets, and WCCI remained a separate, active corporation (see, Gismondi, Paglia, Sherling, M.D., P.C. v Franco, 206 F Supp2d 597 [SDNY 2002]; Hexacomb Corp. v GTW Enter., 875 F Supp 457, [ND Ill 1993]). The record also defeats any claim to an assignment. There was concededly no contemporaneous written assignment. Although Willis Re has submitted an affidavit asserting that WCCI "orally assigned" its rights in the agreements, it does not supply the words of the alleged assignment, the corporate employee who uttered them, the employee who accepted the assignment, or the date of the assignment. Moreover, the offer of employment executed by Hudson specifically anticipated the execution of new agreements, notwithstanding plaintiffs' claim that such language was left in by mistake.

In view of this result, the third cause of action for interference with contract must fail. A claim for tortious interference with an existing contract must plead (1) a valid contract between plaintiff and a third party (2) defendants' knowledge of such contract, (3) defendants' wrongful, intentional procurement to breach or render performance impossible, and (4) damages (see, Lama Holding Co. v Smith Barney, 88 NY2d 413 [1996]; Kronos, Inc. v AVX Corp., 81 NY2d 90 [1993]). Because plaintiff has not established the existence of a valid existing contract with Hudson, the claim against Collins for interference may not be maintained.

The second cause of action is interposed against Hudson for breach of his fiduciary duties as an employee of Willis Re and against Collins for aiding and abetting that breach. It is well-established under New York law that an employee is "prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties" (Lamdin v Broadway Surface Adv. Corp., 272 NY 133, 138 [1936]; see, CBS Corp. v Dumsday, 268 AD2d 350 [1<sup>st</sup> Dept 2000]; Bon Temps Agency, Ltd. v Greenfield, 212 AD2d 427 [1995]; Maritime Fish Prods., Inc. v World-Wide Fish Prods., Inc., 100 AD2d 81 [1<sup>st</sup> Dept 1984]). Where an employee "engages in a business which, by its nature, competes with the employer's a double breach of duty occurs . . .

10] ,

[n]ot only is the principal deprived of the services for which he has contracted, but he finds these services turned against himself" (Maritime, supra at 88). Nevertheless, an employee may stake "preliminary steps" to enter into a competitive business without committing a breach of fidelity (Feiger v Iral Jewelry, Ltd., 41 NY2d 928, 928-29 [1977]; Mal Dunn Assocs., Inc. v Kranjac, 145 AD2d 472 [2d Dept 1988]). Thus, "an agent may secretly incorporate a competitive business prior to his departure as long as he does not use his principal's time, facilities or proprietary secrets to build the competing business" (Maritime, supra at 88; Chemfab Corp. v Integrated Liner Tech., 263 AD2d 788, 790 [3d Dept 1999]).

The standard for establishing an aiding and abetting claim against a third party is higher than that required to recover against the employee. "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator" (Kaufman v Cohen, 307 AD2d 113, 126 [1<sup>st</sup> Dept 2003]). Such assistance "occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur . . . [h]owever, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (Id.). Aiding and abetting a breach of fiduciary duty cannot be based

11] upon constructive knowledge of breach; actual knowledge is required (Kaufman, supra at 125). Conclusory allegations of such knowledge are insufficient (Id.)

Plaintiff has submitted sufficient evidence that defendant Hudson may have breached his duty of loyalty to it by conducting meetings and negotiations with Collins during business hours, and otherwise using its facilities. In particular, there is evidence that Hudson's various meetings with Collins on November 25, 2003 and his introducing Collins to Sapphire, one of Willis Re's most significant reinsurance clients, were done while he was employed by Willis Re, and using its resources. Hudson disputes the purpose of those meetings, but from the surrounding circumstances a trier of fact could reasonably infer that Hudson was attempting to procure employment at Collins with promises that he could move business over to his new employer. Questions of fact thus preclude summary judgment for either party on this claim. For the same reason, the sixth cause of action for unjust enrichment against Hudson is not dismissed.

Defendant Collins, however, is entitled to dismissal of the aiding and abetting claim. Plaintiff has established nothing more than that Collins engaged in routine employment negotiations. Plaintiff had no fiduciary obligation to report these contacts to Willis Re, even if Hudson's conduct breached his separate duty of loyalty to his employer. And while Hudson's

[\* 12 ] ,

volunteering of information regarding his relationship and his employer's relationship with Sapphire may have breached that duty insofar as it constituted part of the solicitation, Collins cannot be charged with aiding and abetting merely for having entertained such disclosures.

The fourth and fifth claims, for tortious interference with prospective business relationships and unfair competition relating to the Sapphire and American Eagle accounts, are dismissed. A claim for tortious interference requires a showing of the use of wrongful means, such as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, or some degrees of economic pressure, or that defendant acted for the sole purpose of harming the plaintiff (see, NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d 614 [1996]; Guard-Life Corp. v S. Parker Hardware Mfr. Corp., 50 NY2d 183 [1980]). Unfair competition requires egregious conduct such as misappropriation of the plaintiff's trade secrets (see, CBS, supra). Plaintiff has not alleged or proven conduct satisfying either cause of action. Nor, in connection with the seventh cause of action, does plaintiff allege that defendant Hudson has retained any of its confidential information. The only claim in that regard is that he made various disclosures regarding Sapphire, which, as noted, are relevant only insofar as they constituted a part of

[\* 13 ]  
the solicitation on company time in connection with the second cause of action for breach of fiduciary duty.

Finally, the eighth claim for civil conspiracy is dismissed insofar as the claims against Collins have failed. New York does not recognize a separate tort of conspiracy, such allegations being necessary only "connect a defendant with the acts of his co-conspirators where without it he could not be implicated" (Cuker Industries, Inc. v William L. Crow Constr. Co., 6 AD2d 415, 417 [1<sup>st</sup> Dept 1958]). Plaintiff does not attempt to connect Collins with any tortious conduct other than that previously alleged, unsuccessfully, against that defendant directly. The ninth cause for action, for a permanent injunction, has been abandoned by plaintiff.

Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgment is denied, and it is further

ORDERED, that defendants' motion for summary judgment dismissing the complaint is denied as to the second and sixth causes of action as against defendant Hudson, and otherwise granted, and it is further

[\* 14]


ORDERED, that defendants' motion for summary judgment is granted as to all claims against defendant Collins, and the action as against that defendant is severed and dismissed, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly, and it is further

ORDERED, that the remainder of the action shall continue.

Dated: September 26, 2005

ENTER:

  
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J.S.C.

**FILED**  
SEP 26 2009  
NEW YORK  
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