Alarmex Holdings, L.L.C. v Pianin
2005 NY Slip Op 30139(U)
August 18, 2005
Supreme Court, New York County
Docket Number:
Judge: Helen E. Freedman
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SCANNED ON 8/19/2005

[* 1]

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

PRESENT: ______________ PART ______

Index Number : 601987/2005

ALARMEX

vs

SCOTT PIANIN

Sequence Number : 002

DISMISS ACTION

INDEX NO. ______________

MOTION DATE ______________

MOTION SEQ. NO. ______________

MOTION CAL. NO. ______________

The following papers, numbered 1 to ______ were read on this motion to/for ______________

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum of law.

FILED
AUG 10 2005

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

Dated: Aug. 18, 2005 ______________ J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

- -X

ALARMEX HOLDINGS, LLC.,

Plaintiff,

-against-

Index No. 601987/05

SCOTT PIANIN,

Defendants.

- -X

HELEN E. FREEDMAN, J:

In this action, plaintiff, Alarmex Holdings, LLC ("Company") sues the former president of its Company, who had been terminated as an officer several months before but who still has a substantial ownership interest in the company claiming that defendant Pianin had "converted" and "criminally used" his laptop computer to misappropriate trade secrets and other confidential proprictary information of the Company. Plaintiff claims defendant had unlawfully used the username and password of his former colleague (underling) to access her Company e-mail account and obtain (or use) trade secrets garnered from e-mails. Plaintiff's first five causes of action are premised upon Article 156 of New York's Penal Law, which makes it a crime to alter or destroy computer data and to unlawfully duplicate computer related material. The other causes of action are for unfair competition and tortious interference with a business relationship. The final causes of action are for punitive and compensatory damages and are not really separate claims, rather requests for relief.

Defendant moves to dismiss the claims against him on the ground that New York Penal Law 156 does not provide for a private cause of action, that he has, pursuant to Court Order, given the laptop to his attorney and no longer has possession of it, that there is no evidence that

defendant competed with plaintiff at all or interfered with any business relationship, and that even assuming plaintiff's claims are true, no damages can be shown.

For the foregoing reasons, defendant's motion is granted and the complaint is dismissed. The first five causes of action based on Penal Law §§ 156.10 to 156.35 are dismissed because those statutes do no afford a private right of action. In order for a private right of action to exist under a criminal statute, a party must demonstrate the existence of three factors: (1) that the plaintiff is one of the class for whose benefit the statute was enacted; (2) that recognition of the private right must promote the legislative purpose; and (3) that creation of such a right would be consistent with the legislative scheme. *Carrier v. Salvation Army,* 88 N.Y.2d 298 (1996); *Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629 (198). The third factor is generally the "most critical", *Sheehy v. Big Flats Community Day*, supra. Looking at the express language of Section 156, it appears that the legislature did not intend to create a private right of action under Penal Law 156, which talks in terms of computer crimes. See *Mckinneys Consolidated Laws; Practice Commentary-William C. Donnino.* A number of federal courts have reached the conclusion that no private right of action exists under sections156 et seq. of the Penal Law. *Casey Systems , Inc. v Firecom, Inc.*, 94 Civ. 9327 1995 WL 704964(J. Duffy, SDNY 1995); *Shoemaker v. Am. Broadcasting Companies, Inc.*, No. 99 CIV 2610, 1999 WL 1084247 (J. Batts SDNY 1999); *Daniel v. Safir,* 135 F. Supp. 367 (EDNY 2001). To the extent that *Blissworld v. Kovack,* 2001 WL 940210 (Sup. Ct. N.Y. Co. 2001) is to the contrary, this Court declines to follow it.

Defendants also claim that even if there were a private right of action, plaintiff could not establish the various elements contained in the Penal Law sections at issue. For example, Penal

Law 156.05 states that a person is guilty of unauthorized use of a computer when he knowingly uses it without authorization. Defendant avers that his use was authorized until notice was given and that he did not use it after that time. Before notice was given, it was his computer, purchased for his use. Any unauthorized use, therefore was unknowing. While those defenses may also be valid, the Court need not be concerned with them in view of its finding that the Penal Law does not authorize a private right of action.

The cause of action ro unfair competition also fails. Plaintiff has set forth no facts indicating that Pianin, who was an officer until December 2004 and a Director until April 2005, has engaged in any competition or use of any trade secrets. See *Calip Dairies, Inc. v. Penn Station News Corp.*, 262 A.D.2d 193, 695 N.Y.S.2d 70 (1st Dept. 1999) holding that parties must be in competition before a claim in unfair competition will lie. See also *Wiener v. Lazard Freres & Co., 241* A.D.2d 114, 672 N.Y.S.2d 8 (1st Dept. 1998), holding that possession of trade secrets must be shown before any unfair competition may be inferred. Unlike *CBS Corp. v. Dumsday* et al., 268 A.D.2d 350 (1st Dept. 2000), defendant had no non compete agreement, nor is there any basis to infer that his possible obtaining of information concerning a tank top pricing would be used for competitive reasons. Mere possession of a few e-mails concerning pricing of tank tops and t-shirts that plaintiff believes to be unauthorized is certainly insufficient. The laptop has been turned over to counsel and defendant has been instructed not to access Company e-mails, thus no risk remains concerning future competition.

The cause of action for tortious interference with a business relationship (the seventh cause of action) must also be dismissed. In order to set forth a claim for tortious interference with a business relationship, plaintiff must allege a business relationship between the plaintiff and a

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third party, intentional interference with that relationship by defendant, actions committed for the sole purpose of harming plaintiff or malicious acts, and an injured relationship. *NBT Bancorp, Inc. v. Fleet/Norstar Fin. Group,* 87 N.Y.2d 614 (1996). Plaintiff has not alleged or set forth any facts involving any third party, much less made any demonstration of malice or purposeful harm. See also *Vigoda v. DCA Products Plus Inc.*, 293 A.D2d265, 741 N.Y.S.2d 20 (1st Dept. 2002). Nor has plaintiff shown any damage as a result of the alleged harmful acts of defendant.

Based on the foregoing, it is hereby

ORDERED that the clerk is directed to dismiss the within complaint in its entirety.

Dated: August 18, 2005

Enter:

Helen E. Freedman, J.S.C.

FILED
AUG 1 8 2005
NEW YORK
COUNTY CLERK'S OFFICE