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

PRESENT: KAREN SMITH PART 44

Index Number : 600521/2005
TRUSTFORTE CORP.
VS
EISEN, JOSHUA
Sequence Number : 1
DISMISS

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 ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order

FILED
AUG 10 2005
COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 7/18/05

KAREN SMITH J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

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TRUSTFORTE CORPORATION, HALCYON TECHNOLOGY, INC., RUSSIAN AND SLAVIC AND SLAVIC TRANSLATION SERVICES, INC., and THE LAW OFFICES OF BARRY SILBERZWEIG, P.C.

Index no.: 600521/2005
Motion seq.: 001
Motion date: May 13, 2005

Plaintiffs,

-against-

DECISION AND ORDER

JOSHUA EISEN, IVAN CIMENT, JOSHAU ROSMAN, MORNINGSIDE EVALUATIONS AND CONSULTIN, INC., TEKADEMIC HOLDINGS, INC., TEKADEMIC, INC. AND JOHN DOES 1-10,

Defendants.

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PRESENT: KAREN S. SMITH, J.S.C.:

Defendant Ivan Ciment's motion, pursuant to CPLR § 3211(a)(7), to dismiss the claims against him is granted in part and denied in part, as more fully set forth below.

In this action, plaintiffs Trustforte Corporation, Halcyon Technology, Inc., Russian and Slavic Language Services, Inc., and the Law Offices of Barry Silbersweig, P.C. seek damages against defendants Joshua Eisen, Ivan Ciment, Joshua Rosman, Morningside Evaluations and Consulting, Inc., Morningside Translations, Inc., Tekademic Holdings, Inc., Tekademic Inc., and John Does One through Ten on nine separate causes of action, including breach of contract, theft of trade secrets, unfair competition, breach of duty of loyalty, unjust enrichment, conversion, tortious interference with contract, and tortious interference with prospective business relations. The causes of action for breach of contract and breach of duty of loyalty are alleged against defendant Joshua Eisen only. All the other causes of action are alleged against all the defendants. Defendant Ciment now moves to dismiss all the causes of action against him on the grounds that plaintiffs have failed to allege any causes of action against him as a matter of law.

The relevant facts alleged in the complaint are as follows. Plaintiff Trustforte Corporation ("Trustforte") is engaged in the business of evaluating academic credentials and work experience

of foreigners seeking to work or to continue their education in the United States. These services are purchased by universities, law firms, professional licensing boards, businesses, and individuals. Trustforte is also engaged in the foreign language translation, language instruction, and academic advisory services. In furtherance of its equivalency evaluation business, Trustforte has developed a proprietary method of evaluating credentials and producing reports, giving them a competitive advantage over other members of the field. Trustforte takes steps to ensure this method remains confidential.

In 1997, Trustforte hired defendant Eisen to manage a computer consulting business called Halcyon Technology Associates, an entity that later became plaintiff Halcyon Technology, Inc ("Halcyon"). As his employment would expose him to a variety of confidential and proprietary information, defendant Eisen was required to sign a confidentiality, non-circumvention and non-competition agreement with all of the plaintiffs. The agreement expressly forbids Eisen from disclosing any confidential information acquired during the course of his employment, using information to solicit plaintiffs' clients or competing with plaintiffs for a period of five years following the termination of his employment within a 100 mile radius from plaintiffs' offices.

In February of 2000, Eisen was discharged for cause. The complaint alleges that, in the months leading up to his termination, Eisen copied all of Trustforte's confidential and proprietary business information, including client information, for the purpose of developing his own businesses with defendants Ciment and Rosman to compete directly with plaintiffs. After his termination, Eisen, Ciment, and Rosman used plaintiffs' confidential information to form defendants Morningside Evaluations and Consulting Inc, Tekademic Inc, and Morningside Translations Inc. ("Defendant Corporations") and solicit clients from plaintiffs. The complaint alleges specifically that defendant Ciment knew that Eisen had stolen proprietary information from plaintiffs and that Eisen was contractually bound not to divulge that information.

Defendant Ciment now moves to dismiss the complaint against him on the grounds that the complaint fails to state a cause of action against him as a matter of law. Specifically, Ciment contends that plaintiffs have failed to allege that he, in fact, conspired with defendant Eisen to steal plaintiffs confidential information. Ciment alleges that he was unaware of the non-compete and confidentiality agreement between plaintiffs and defendant Eisen at the time the defendant

corporations were formed. Ciment further claims that, when he learned that such an agreement existed, he was informed by Eisen that Eisen had signed no such agreement and that a principal of plaintiffs had forged Eisen's signature on the agreement. Ciment also contends that, even if a non-compete agreement had been signed, it would be unenforceable as a matter of law. Ciment contends that plaintiffs have commenced this action in retaliation to a lawsuit filed by defendant Eisen against plaintiff Law Offices of Barry Silberzweig, P.C. As such, Ciment contends that plaintiffs have failed to set forth any cause of action against him.

On a motion under CPLR § 3211 (a) (7), the court's role is to determine whether plaintiffs' pleadings set forth cause of action. (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). If any cause of action can be discerned from the pleading's four corners, the motion must be dismissed. (*Id.*) The complaint is liberally construed and any factual allegations contained therein are accepted as true. (*Id.*)

Before examining the substance of defendant Ciment's arguments, the court notes that New York does not recognize a cause of action for conversion of intangible property. *(MBF Clearing Corporation v. Shine*, 212 AD2d 478, 479 [1st Dept. 1995]). Plaintiffs have not alleged that defendants have appropriated any physical property. Accordingly, defendant's motion is granted on that ground.

The court notes that, at the outset, defendant Ciment's allegation that he had no knowledge of the agreement between Eisen and plaintiffs has no bearing in a motion to dismiss. Plaintiffs have specifically alleged that defendant Ciment knew that defendant Eisen stole plaintiffs trade secrets and confidential information and that defendant Eisen's actions were an express violation of his confidentiality agreement with plaintiffs. The court is obligated to accept the facts as alleged in the complaint as true. Thus, to the extent the defendant Ciment's basis for dismissal rests upon issues of the veracity of the pleadings, the court will not consider those grounds.

Defendant Ciment does contend that plaintiffs have failed to allege that defendant Ciment conspired with defendant Eisen to steal plaintiff's confidential information. While the pleading may not use the word "conspire" it does allege that defendant Eisen discussed his plans to steal plaintiffs' confidential information and to establish defendant corporations with defendant Ciment, that defendant Ciment cooperated with Eisen in the establishment and operation of those business, that

defendant corporations used plaintiffs trade secrets and confidential information to compete with plaintiffs, and that defendant Ciment knew that defendant Eisen was bound by the agreement with plaintiffs both not to disclose or use their confidential information or to compete directly with them. The court will now consider each of the causes of action against defendant Ciment to determine whether the facts as pleaded support them.

Theft of Trade Secrets and Unfair Competition – The elements that make out a claim for theft of trade secrets and unfair competition are very similar and will be considered together. An action for misappropriation of trade secrets lies when a defendant uses trade secrets he acquired from an individual who had an obligation not to disclose those trade secrets and the defendant knows or has reason to know that the information constitutes a trade secret. (Restat. 3rd of Unfair Competition §40.) A trade secret is any formula, pattern, device, or compilation of information which is used in ones business, and which gives him an opportunity to gain an advantage over competitors who do not know it or use it. (*Ashland Management v. Janien*, 82 NY2d 395, 407 [1993]). A cause of action lies for unfair competition where one party has misappropriated benefits or property rights belonging to another. (*Dior v. Milton Industries* 9 Misc. 2d 425, 431 [New York County, 1956][aff'd 2 AD2d 878 [1st Dept. 1956]]). A claim that a defendant induced plaintiff's employee to breach a confidentiality agreement and disclose privileged information, and that the defendant subsequently used that information for its own gain, has been held to support a claim for unfair competition. (*Spiselman v. Rabinowitz*, 270 AD 548 [1st Dept. 1946]). Here, plaintiffs have alleged that defendants Ciment and Rosman knew that defendant Eisen had stolen plaintiffs' proprietary and confidential business information in direct violation of a confidentiality agreement. Plaintiffs allege that they developed that information over many years at considerable expense and that they went to great lengths to guard its secrecy. Plaintiffs further allege that they worked with Eisen to develop a business using that information and that they did start such a business that competed directly with plaintiffs. Although the complaint does not specifically state that defendant Ciment actively participated in the actual theft of the secrets, or that defendant Eisen would not have stolen the secrets were it not for Ciment's actions, it does allege that Ciment encouraged the theft of the secrets by facilitating their use in a profitable business venture. Giving their allegations the requisite liberal construction, plaintiff has set forth a cause of action for unfair competition.

Unjust enrichment – A cause of action for unjust enrichment contemplates a situation where one party receives benefits which, in fact, belong to another party, creating a quasi-contractual obligation of restitution for the receiver of the benefits. (*Marcraft Recreation Corp. v. Frances Devlin Co.*, 459 F. Supp. 195, 197 [SDNY 1978][*citing Bradkin v. Leverton* 26 NY2d 192 [1970]). The quasi-contractual relationship rests upon equitable principles and is not contingent upon the existence of an express or even an implied agreement. (*Id.*) Here, plaintiffs have alleged that defendants, including Ciment, gained a material benefit, in this case valuable contracts from former existing clients of plaintiffs as well as contracts from other clients who would have otherwise used plaintiffs services, by using trade secrets they had wrongfully appropriated from plaintiffs. Plaintiffs allege that they developed these trade secrets at significant expense and that they are entitled to receive the benefits of the competitive advantage these trade secrets provide. That plaintiffs have not alleged specifically that Ciment conspired with Eisen is not relevant to this cause of action. On these facts, plaintiffs would have an equitable right to defendants' profits and have, as such, set forth a cause of action for unjust enrichment

Tortious Interference with Contract – A cause of action for tortious interference with a contract requires a showing of (a) the existence of a valid contract between plaintiff and a third party, (b) defendant's intentional procurement of the third party's breach of that contract without justification, (c) an actual breach of that contract, and (d) damages as a result of that breach. (*Lama Holding Co. v. Smith Barney, Inc.*, 88 NY2d 413, 424 [1996]). In this action, plaintiffs have alleged two separate instances of defendant Ciment's tortious interference with a contract. First they allege that Ciment and Rosman intentionally procured defendant Eisen's breach of his agreement with plaintiffs. To support this claim, plaintiffs allege that Ciment and Rosman made plans with Eisen to use plaintiffs' proprietary information to compete directly with plaintiffs in direct violation of Eisen's confidentiality and non-compete agreement with plaintiffs. These allegations support plaintiffs' action for tortious interference with plaintiffs' contract with Eisen. Plaintiffs' failure to allege that Ciment "conspired" with Eisen to steal the secrets does not affect this claim.

Secondly, plaintiffs contend that all defendants induced plaintiffs' clients to breach existing contracts with plaintiff. To support this claim, plaintiffs allege that defendants used plaintiffs' proprietary business information, as well as plaintiffs' customer lists, to actively solicit plaintiffs'

clients by offering services identical to plaintiffs' at lower prices. Plaintiffs allege that, as a result, certain of their clients have started using defendant corporations' services instead. Defendant's Ciment's contention that this ground should be dismissed for failure to allege a conspiracy between Ciment and Eisen has no bearing on this cause of action. However, regardless of the defects in Ciment's argument, plaintiffs have not met their burden as a matter of law, as they have not alleged that their clients breached existing contracts with them. Instead, plaintiffs merely allege that certain of their clients have terminated their relationships with plaintiffs and have entered into contractual relationships with defendants. The mere existence of business relationship is not the same as a contract. As such, this cause of action must be dismissed as against all defendants.

Tortious Interference with Prospective Business Relationships – To establish a cause of action for wrongful interference with prospective business relationships, a plaintiff must demonstrate it would have entered into an economic relationship, but for defendant's wrongful conduct. (*Snyder v. Sony Music*, 252 AD2d 294, 299-300 [1st Dept. 1999]). Here, plaintiffs have alleged that defendants have used plaintiffs' proprietary business information and costumer lists, wrongfully appropriated by defendant Eisen, to offer services identical to those offered by plaintiff at lower prices and to solicit clients from plaintiffs. Plaintiffs allege that defendant corporations have procured business from specific clients of plaintiffs. One could reasonably assume that these clients would have continued to use plaintiffs' services had it not been for the actions of the defendants, including Ciment. These claims make a sufficient showing of tortious interference with prospective business relationships and plaintiffs' failure to allege a conspiracy to steal plaintiffs' information has no affect on the validity of this cause of action.

Defendant Ciment's contention that plaintiffs' non-compete contract with defendant Eisen is overly broad and therefore void as a matter of law, thus shielding Ciment from liability, is without merit. Restrictive covenants which would prevent an employee from seeking a similar position after termination are disfavored by law, and will only be enforced if reasonably limited temporally and geographically. (*Columbia Ribbon and Carbon Mfg. Corp. v. A-1-A Corp.* 42 NY2d 496, 499 [1977]). However, they will be enforced to the extent necessary to protect an employer from unfair competition which stems from an employee's use or disclosure of trade secrets. (*Id.*) Here, plaintiffs have not merely alleged that defendant Eisen went into competition with them after they terminated

his position. They have alleged that Eisen stole confidential, proprietary information from them to develop his competing businesses. Moreover, both plaintiffs and defendant corporations' offices are located in New York City and plaintiffs allege that defendant corporations began actively pursuing plaintiffs clients within months of Eisen's termination. These are precisely the circumstances in which a court will enforce a non-compete agreement. While the contract may, by its terms, be unenforceable in certain circumstances, the facts pled here are not such circumstances. Furthermore, defendant Ciment has not set forth how the unenforceability of the non-compete agreement would affect his liability on any of the causes of action other than tortious interference with a contract and it is not clear to the court that it would have a preclusive effect on that cause of action. The main thrust of plaintiffs' pleadings is that Ciment worked with Eisen to use plaintiffs' confidential business information and subsequently profited from the unauthorized and wrongful use of that information. These acts are covered not under the non-compete portion of the agreement but rather under the confidentiality portion of the agreement. At most, the unenforceability of the non-compete agreement would affect the cause of action for tortious interference with a contract as it would pertain to defendant Ciment's inducing defendant Eisen to go into competition with plaintiffs.

Accordingly, it is hereby

ORDERED that defendant Ciment's motion to dismiss this action as against him is granted only as to plaintiffs Sixth and Eighth Causes of Action, and is denied as to the remaining causes of action, and it is further

ORDERED that defendant Ciment shall serve an answer to the complaint no later than August 19, 2005.

This constitutes the decision and order of the court.

Dated: July 18, 2005

New York, New York

ENTER:

KAREN S. SMITH, J.S.C.