

P.J., Inc. v Williams

2006 NY Slip Op 30225(U)

June 13, 2006

Supreme Court, New York County

Docket Number: 0602277/2005

Judge: Rosalyn H. Richter

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

PRESENT: ROSALYN RICHTER
Justice

PART 24

P.J. Inc.

INDEX NO. 602277/2005

- v -

MOTION DATE _____

C. Randolph Williams, Jeffrey Richardson,
Starkman & Associates, and Eric Starkman

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

is decided in accordance with the attached memorandum decision. A preliminary conference is scheduled for July 12, 2006 at 10 am in Part 24, Room 418 at 60 Centre Street.

FILED
JUN 19 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/13/2006

Rosalyn Richter

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

HON. ROSALYN RICHTER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

-----x
P.J., INC.,

Plaintiff,

-against-

DECISION & ORDER
Index No. 602277/2005
Motion Seq. 1

C. RANDOLPH WILLIAMS, JEFFREY
RICHARDSON, STARKMAN & ASSOCIATES
AND ERIC STARKMAN, Individually and as an
Officer of STARKMAN & ASSOCIATES,

Defendants.

FILED
JUN 19 2005
NEW YORK
COUNTY CLERK'S OFFICE

-----x
RICHTER, J.:

Defendant Jeffrey Richardson moves to dismiss the complaint pursuant to CPLR § 3211(a)(1), (a)(5), and (a)(7) arguing that plaintiff's claims are barred since there is not a writing sufficient to satisfy the statute of frauds and that plaintiff has failed to state a cause of action. Plaintiff, P.J. Inc, argues that the complaint clearly sets forth the causes of action of breach of contract, unfair competition, and conspiracy among the defendants to defraud the plaintiff by stealing plaintiff's "commercial good will."

Plaintiff brought this action seeking damages which arose from the alleged breach of an employment agreement by defendants C. Randolph Williams and Jeffrey Richardson. Plaintiff also alleges that defendants Williams and Richardson conspired with defendants Starkman & Associates and Eric Starkman to use confidential information gained while employees of plaintiff to recruit plaintiff's clients.

Plaintiff P.J., Inc., a public relations firm, alleges that the oral and written employment agreement prohibited defendant Richardson from being employed by a competitor of plaintiff,

from soliciting from any clients on behalf of any competitor of plaintiff, and seeks a permanent injunction against defendant Richardson to prevent the continued breach of these provisions. Plaintiff also alleges that defendant Richardson utilized confidential information belonging to plaintiff, including customer lists and other specialized information concerning plaintiff's customers, and conspired with the other defendants to use this confidential information to recruit plaintiff's clients, specifically the Toy Industry Association and n'Tag. Plaintiff also argues in its motion papers that defendant Richardson violated his duty of loyalty, which is unrelated to the oral employment agreement, when he solicited customers using confidential information gained while an employee of plaintiff.

Defendant Richardson became employed by plaintiff in April 2003 and held the position of Director of Media Relations. Defendant Richardson did not sign an employment agreement at any point during his employment with plaintiff. In September 2004, defendant Richardson was promoted to Vice President of plaintiff's agency, accepted a \$20,000 raise and discussed terms of a possible employment agreement. Plaintiff alleges that in January 2005, defendant Richardson negotiated an oral employment agreement with the plaintiff which was memorialized in writing in May 2005. It is undisputed that this agreement was not signed by Richardson, which Richardson argues contained terms that were different than previously discussed with plaintiff. Defendant Richardson resigned in June 2005, when he accepted employment with defendant Starkman & Associates.

Defendant Richardson moves to dismiss arguing that plaintiff's claims are barred since there is not a writing sufficient to satisfy the statute of frauds as the employment agreement produced by plaintiff was not signed by Richardson. *See Mendelsohn v. Levine*, 24 A.D.2d 1007

(2nd Dept. 1965). In opposition, plaintiff argues that the oral employment agreement is removed from the statute of frauds because of plaintiff's partial performance. Specifically, plaintiff alleges that based on Richardson's representation that he would execute the employment agreement and "in exchange for his commitment not to compete and not to solicit the prior employees or clients of plaintiff corporation...he received and accepted a \$20,000.00 raise from the plaintiff corporation, received and accepted a \$1,750.00 tax bonus from the plaintiff corporation and received and accepted a \$1,750.00 loan from plaintiff corporation...." Plaintiff argues that the restrictive covenant provisions in the employment agreement are valid and enforceable because plaintiff performed its side of the bargain with defendant Richardson and defendant Richardson received enhanced compensation, bonuses, benefits, and expenses.

The employment agreement is for a term of two years and contains restrictive covenants which prohibit plaintiff from working for a competitor for a period of five years after termination of employment with plaintiff. Therefore, it is not capable of being performed within one year and falls within the provisions of General Obligations Law § 5-701(a)(1). Moreover, even if plaintiff established that defendant Richardson orally agreed to sign the employment agreement, the agreement would still be void: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged...if such agreement...[b]y its terms is not to be performed within one year from the making thereof." *Cunnison v. Richardson Greenshields Sec., Inc.*, 107 A.D.2d 50, 51-52 (1st Dept. 1985).

Plaintiff's assertion of partial performance does not remove the alleged oral agreement from the statute of frauds. "The exception to the statute of frauds for part performance applies to General Obligations Law § 5-703, which deals with real estate transactions, but it has not been

extended to General Obligations Law § 5-701.” *Stephen Pevner, Inc. v. Ensler*, 309 A.D.2d 722, 722 (1st Dept. 2003); *see also Messner Vetere Berger McNamee Schmetterer Euro RSCG, Inc. v. Aegis Group PLC*, 93 N.Y.2d 229, 234 n.1 (1999); *Valentino v. Davis*, 270 A.D.2d 635, 637-638 (3rd Dept. 2000). In any event, even if the exception applied, “[t]he doctrine of part performance may be invoked only if plaintiff’s actions can be characterized as unequivocally referable to the agreement alleged. The actions alone must be unintelligible or at least extraordinary, explainable only with reference to the oral agreement. The acts performed must be clear, certain, and definite to remove an oral agreement from the Statute of Frauds.” *James v. Western N.Y. Computing Sys.*, 273 A.D.2d 853, 854-855 (4th Dept. 2000) (internal quotation marks and citations omitted). Plaintiff argues that its part performance is specifically referable to numbered paragraphs in the unsigned employment agreement, i.e. defendant Richardson received his substantial raise (paragraph 2) and his compensation, benefits, and expenses (paragraphs 6-16). However, plaintiff does not allege facts that are sufficient to show that the acts performed by plaintiff such as paying defendant’s increased salary, tax bonus, and personal loan are “unequivocally referable” to the two year employment agreement. *See Id.* Defendant Richardson could have accepted the \$20,000 raise in reference to his new position as Vice President. The other actions upon which plaintiff relies upon as proof of partial performance, the tax bonus and personal loan, are not mentioned in the written employment agreement.

However, not all of the duties defendant Richardson owed to plaintiff arose from the alleged employment agreement. *See Bender Ins. Agency, Inc. v. Treiber Ins. Agency, Inc.*, 283 A.D.2d 448, 450 (2nd Dept. 2001). The allegations raised in plaintiffs’ pleadings are sufficient, for pleading purposes, to constitute a causes of action for breach of duty of loyalty and unfair competition as to whether defendant Richardson used proprietary and confidential information gained while an employee at plaintiff to recruit clients for his new employer, defendant Starkman

& Associates. See *Wallack Freight Lines, Inc. v. Next Day Express, Inc.*, 273 A.D.2d 462, 463 (2nd Dept. 2000). Plaintiff alleges that defendant Richardson stole plaintiff's confidential customer lists and contact information. See *Advanced Magnification Instruments of Oneonta N.Y., Ltd. v. Minutemen Optical Corp.*, 135 A.D.2d 889, 889-890 (3rd Dept. 1987). "It is well established that an employee is prohibited from acting in any manner inconsistent with his or her employment and must exercise good faith and loyalty in performing his or duties...and may not use his or her principal's time, facilities, or proprietary secrets to build a competing business." *Mega Group, Inc. v. Halton*, 290 A.D.2d 673, 675 (3rd Dept. 2002) (internal quotation marks and citations omitted). In a supporting affidavit, defendant denies that he possesses or had access to any confidential information of plaintiff. Defendant Richardson also submits an affidavit from Julie Livingston, the Director of Marketing Communications at Toy Industry Association, a former client of P.J. Inc., in which she seeks to refute plaintiff's claims. These factual affidavits go to the merits of the claims, but do not establish that plaintiff has failed to plead a cause of action at all. Whether the customer list is entitled to judicial protection and whether this alleged conduct disadvantaged plaintiff, see *Minutemen Optical Corp.*, 135 A.D.2d at 890, is an issue of fact that is not appropriate for this type of motion.

Defendant Richardson also moves to dismiss plaintiff's claim of conspiracy arguing that plaintiff has failed to state a cause of action. This part of defendant's motion is granted. "[A] mere conspiracy to commit a [tort] is never of itself a cause of action...[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986) (internal quotation marks and citations omitted). To survive defendant's motion to dismiss, plaintiff must specifically allege that at least one defendant committed the wrongful act, the theft of customer lists and other confidential and proprietary information, and that the remaining defendants agreed

to the theft. *See Reo v. Shudt*, 144 A.D.2d 793, 795 (3rd Dept. 1988). Here, although plaintiff has sufficiently pled the causes of action for breach of loyalty and unfair competition, plaintiff has failed to show that defendants “‘planned and perpetrated’ the acts in concert.” *Id.* Plaintiff does not identify anything the other defendants did as part of the planning or identify any specific acts that would show they knew that defendant Richardson was using confidential information. The conclusory statements in the complaint and supporting affidavit that “defendants conspired” to use plaintiff’s confidential information are insufficient to state a claim for conspiracy. *Id.*

Accordingly, it is ordered that defendant Richardson’s motion to dismiss is granted in part and denied in part. Defendant Richardson’s motion is granted as to plaintiff’s claims which arise out of the alleged breach of the employment agreement and the restrictive covenants. Plaintiff’s conspiracy claims are also dismissed. Defendant’s motion to dismiss is denied without prejudice to renew upon the completion of discovery as to plaintiff’s claims for breach of duty of loyalty and unfair competition.

All defendants are directed to answer the complaint within twenty days. A preliminary conference is scheduled for July 12, 2006 at 10 am in Part 24, Room 418 at 60 Centre Street.

June 13, 2006


Justice Rosalyn Richter

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