

Alarmex Holdings L.L.C. v Pianin

2006 NY Slip Op 30243(U)

March 20, 2006

Supreme Court, New York County

Docket Number:

Judge: Helen E. Freedman

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

PRESENT: Helen K. Freedman

PART 39

Index Number : 601987/2005

ALARMEX

vs

SCOTT PIANIN

Sequence Number : 003

AMEND

DEX NO. _____

OTION DATE _____

OTION SEQ. NO. _____

OTION 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

*to reargue and dismissal and
add new causes of action all
denied as per accompanying memorandum
of law*

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

FILED
MAR 23 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/20/06

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
ALARMEX HOLDINGS L.L.C.,

Plaintiff,

Index No. 601987/05

-against-

SCOTT PIANIN,

Defendant.
-----X

Helen E. Freedman, J.S.C.

In this action, Alarmex Holdings, L.L.C. (“Alarmex”) sues its former president and current owner of an equitable interest in the company, Scott Pianin (“Pianin”), claiming that Pianin has wrongfully used his laptop computer and accessed the company’s e-mail system in order to unfairly compete with Alarmex and to tortiously interfere with Alarmex’s business relations. This action is one of four actions between Alarmex and Pianin where the parties are litigating the circumstances surrounding Pianin’s termination and the corporate buy out of his equitable interest. In an order entered on August 18, 2005, this court dismissed the complaint in its entirety because Article 156 of the NY Penal Law does not recognize a private cause of action for the computer crime alleged, and plaintiff alleged insufficient facts to state claims for tortious interference and unfair competition.

Alarmex now moves for leave to amend the complaint, asserting that it has new information to support its unfair competition and tortious interference claims, and seeks to add a new cause of action under the federal Computer Fraud and Abuse Act (“CFAA”). Alarmex originally alleged that Pianin accessed e-mail accounts to misappropriate information and garner trade secrets to Alarmex’s detriment. Specifically, the complaint alleged that Alarmex issued Pianin a laptop computer with Lotus Notes software so that he and another Alarmex employee, Mary Vogt (“Vogt”), could access

their corporate e-mail accounts when they traveled on business trips together, and that after Pianin's employment terminated, he continued to access Vogt's corporate e-mail account to garner Alarmex's proprietary information. In the proposed amended complaint, Alarmex alleges that after Pianin's employment with Alarmex terminated, he and a partner formed a competing company Worldwide Sourcing L.L.C. ("Worldwide"), that Pianin accessed Vogt's e-mail account to obtain information regarding product pricing and production issues, and that Pianin used that information to lure Alarmex's key customer, Wal-Mart, away from Alarmex and persuade it to place orders with Worldwide.

Alarmex also seeks to add Simon Kim ("Kim") as a defendant, claiming that Kim, a former Alarmex employee, aided Pianin's unfair competition by helping to access e-mail accounts and obtain proprietary information. Alarmex alleges that after this court ordered Pianin to cease accessing Alarmex's e-mail accounts, Pianin engaged Kim to access the accounts and report back to him. The proposed amended complaint asserts five causes of action: unfair competition as against Pianin, aiding and abetting that unfair competition as against Kim, breach of the employee duty of good faith and loyalty as against Kim, violation of the CFAA as against Pianin and Kim, and tortious interference with business relations as against Pianin. Alarmex alternatively moves for renewal of its opposition to Pianin's motion to dismiss the original complaint. Pianin opposes the motion and cross moves for sanctions, contending Alarmex's proposed pleading does not cure the deficiencies of the already dismissed complaint, and the instant motion is frivolous and baseless, warranting sanctions.

For the foregoing reasons, Alarmex's motion seeking leave to amend the complaint or, alternatively, renew its opposition is denied, and Pianin's cross motion for sanctions is denied.

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Discussion:

Although leave to amend complaints should be liberally granted, in order to conserve judicial resources, it is necessary to examine the merits of the proposed pleading and deny leave to amend when the proposed pleading does not state a cause of action. *See Konrad v. 136 East 64th Street Corp.*, 246 A.D.2d 324 (1st Dept. 1998). When the proposed pleading does not cure the deficiency of the already properly dismissed complaint, leave to amend should be denied. *See Tri-Star Int'l. Management, Inc. v. Int'l. Merchandising Corp.*, 188 A.D.2d 387 (1st Dept. 1992).

In the original complaint, Alarmex claimed that Pianin's alleged unauthorized access of Alarmex's e-mail accounts violated Article 156 of the NY Penal Law computer crime provision. The August 18, 2005 order dismissed that claim because the NY Penal Law does not recognize a private cause of action. Alarmex now seeks to add a claim under the CFAA because it does recognize a private cause of action.

CFAA, 18 U.S.C. § 1030(a)(4) imposes liability on whoever:

knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5000 in any 1-year period.

In order to succeed on a claim under CFAA, the plaintiff must properly allege "loss" and "damage" as the CFAA defines them. CFAA § 1030(g) provides that only a plaintiff who "suffers damage or loss by reason of a violation of this section may maintain a civil action." "Damage" means "any impairment to the integrity or availability of data, a program, a system, or information," § 1030(e)(8), and "loss" means "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or

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information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages because of interruption of service,” § 1030(e)(11).

The proposed amended complaint alleges that Alarmex lost potential profits from its Wal-Mart account because Pianin wrongfully accessed e-mail accounts to uncover pricing and production information and also deleted some of Vogt’s e-mails. However, in order to recover under CFAA, Alarmex must allege some damage to the computer system and allege losses related to remedying the computer or losses incurred because of an interruption in computer service. *See Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F.Supp.2d 468 (S.D.N.Y. 2004). Throughout the enactment of CFAA and its subsequent amendments, “loss” has “consistently meant a cost of investigating or remedying damage to a computer, or a cost incurred because the computer's service was interrupted.” *Id.* at 475. *See also Civic Center Motors, Ltd. v. Mason Street Import Cars, Ltd.*, 387 F.Supp.2d 378, 381 (S.D.N.Y. 2005)(finding that “losses” are “compensable only when they result from damage to, or the inoperability of, the accessed computer system”). Thus, the losses alleged here including lost profits from prospective Wal-Mart orders are certainly not recoverable under CFAA. Additionally, Pianin did not use Alarmex computers, but rather he used his own company issued laptop computer, which is currently in his counsel’s possession.

The August 18 order dismissed Alarmex’s claims for unfair competition and tortious interference with a business relationship, in part because Alarmex failed to allege that Pianin competed with Alarmex and that Pianin interfered with a specific business relationship, respectively. Alarmex seeks to amend the complaint to allege that Pianin’s new company Worldwide competed Alarmex, and that he interfered with Alarmex’s relationship with Wal-Mart. However, these new allegations do not correct all of the deficiencies of the original complaint because the proposed

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amended complaint still fails to allege all of the necessary elements of the claims for unfair competition and tortious interference with a business relationship.

Pianin is not subject to a restrictive covenant not to compete with Alarmex, and thus Alarmex must show that Pianin misappropriated trade secrets in order to support its unfair competition claim. *See Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114 (1st Dept. 1998). Trade secrets consist of any formula, pattern, device or compilation of information that is used in one's business, and which gives him or her an opportunity to obtain an advantage over competitors who do not know or use it, *Id.* citing *Restatement Torts*, § 357.

Here, Alarmex alleges that Pianin gained knowledge related to Alarmex's t-shirt pricing information, production costs, and production problems and communicated that information to Wal-Mart, so that Wal-Mart would cease placing orders with Alarmex and instead place orders with Worldwide. None of the information allegedly stolen constitutes trade secrets. *See Marietta Corp. v. Fairhurst*, 301 A.D.2d 734 (3rd Dept. 2003)(finding pricing data and market strategies not trade secrets). Additionally, the fact that Alarmex experienced production quality problems is not a trade secret, and Alarmex does not dispute that it experienced some production problems, although it characterizes the problems as minor.

Alarmex's proposed amended complaint also fails to correct all of the deficiencies of the original pleading related to the tortious interference with a business relationship claim. Alarmex does not allege that Wal-Mart breached an existing contract with Alarmex, but rather Wal-Mart informed Alarmex that it did not intend to place future orders with Alarmex or, if it did, it would place smaller orders. Although Alarmex has specified a business relationship with which Pianin allegedly interfered, the proposed amended complaint does not sufficiently allege that Pianin acted

by “wrongful means” or that his sole purpose was to harm the plaintiff, or that Pianin’s interference caused the alleged damage to Alarmex’s business relationship. See *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d 614 (1996). “Wrongful means” includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions, and some degree of economic pressure, but more than simple persuasion is required. *Id.* See also *Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294, 684 N.Y.S.2d 235 (1st Dept. 1999). A showing of wrongful means is necessary in order to balance “society’s interest in respect for the integrity of contractual relationships, on the one hand, on the other, the right to freedom of action on the part of the party interfering and society’s concern that competition not be unduly hampered.” *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d 614 (1996), citing *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183 at 190 (1980).

Here, Alarmex had no more than an expectancy that Wal-Mart would continue to place large volume orders with it and Wal-Mart informed Alarmex that it may place some smaller orders with it in the future. Not only is Pianin’s conduct not necessarily the cause of Wal-Mart’s decision, but Pianin’s conduct is not sufficiently “wrongful” in order to be culpable for tortious interference with a prospective contract. Accessing Alarmex’s e-mail by using Lotus Notes software installed on his company issued laptop does not constitute the type of physically violent or fraudulent behavior that supports a claim for tortious interference with prospective business relations. Once Pianin gleaned knowledge about Alarmex, either by accessing Vogt’s corporate e-mails or by recalling knowledge he gained as president of the company, he allegedly persuaded Wal-Mart to take orders from his new company Worldwide Solutions LLC. Persuasion, even if directed at interference, is not enough to establish wrongful means. *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d

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614 at 624 (1996).

The proposed amended complaint seeks to add a new defendant, Kim, and alleges that Kim aided and abetted Pianin's unfair competition and breached his duty of good faith and loyalty "by intentionally causing harm to the Company's relationships with its customers and other business partners including Wal-Mart, so that the business could be transferred to Pianin's new venture, where it would be sourced by Kim." Because the Alarmex does not state a cause of action for the underlying claims against Pianin, the proposed amended complaint does not state a cause of action against Kim for aiding and abetting Pianin. Additionally, Kim did not breach a duty of loyalty because he did not convey proprietary information to Pianin, and he did not use Alarmex's time and resources to compete with Alarmex. *See Headquarters Buick-Nissan, Inc. v. Oldsmobile*, 149 A.D.2d 302 (1st Dept. 1989).

Alarmex's alternative motion to renew its opposition to the motion to dismiss the original complaint should be denied. CPLR 2221(e)(2) provides that a motion to renew:

shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.

Alarmex has not sufficiently alleged new facts to support its claims, and the new facts it has alleged do not change the result of the August 18, 2005 order dismissing the original complaint.

Pianin argues that Alarmex's motion is frivolous and thus sanctions are warranted under New York Code Rules and Regulations § 130-1.1(a). Although Alarmex's motion is meritless, the pleadings have alleged some new facts and are not frivolous on their face. Thus, the cross motion for sanctions is denied.

Accordingly, it is

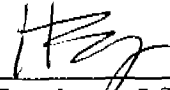
ORDERED motion for leave to amend is denied, and it is further

ORDERED that alternative motion for renewal of opposition of the motion to dismiss original complaint is denied, and it is further

ORDERED that cross motion for sanctions is denied.

DATED: March 20, 2006

ENTER:



Helen E. Freedman, J.S.C.

FILED
MAR 23 2006
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