

**American Business Training v American
Management Association**

2006 NY Slip Op 30365(U)

February 2, 2006

Supreme Court, New York County

Docket Number: 0603909/2002

Judge: Charles E. Ramos

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

Charles Edward Ramos

53

PRESENT: _____

PART _____

0603909/2002

AMERICAN BUSINESS TRAINING
vs
AMERICAN MANAGEMENT

SEQ 6

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

... 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
accompanying memorandum decision and order.

FILED

FEB 14 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/2/06

CHARLES E. RAMOS
J.S.C.
J.B.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK:COMMERCIAL DIVISION
 -----X
 AMERICAN BUSINESS TRAINING,

Plaintiff,

Index No. 603909/02

-against-

AMERICAN MANAGEMENT ASSOCIATION,

Defendants.
 -----X

Charles Edward Ramos, J.S.C.:

In motion 07, plaintiff American Business Training Inc. ("ABT") moves pursuant to CPLR 2221 to renew and reargue its motion to strike defendant's answer. In motion 06, defendant American Management Association ("AMA") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint.

ABT alleges that AMA stole its five day mini-MBA program and its marketing slogans. ABT's program was first offered to the public in 1994.

In an April 11, 2005 decision, this Court denied plaintiff's motion to strike defendant's answer. Plaintiff's motion to renew and reargue is likewise denied. Plaintiff merely repeats its original motion. Plaintiff fails to show that this Court overlooked or misapprehended any relevant facts or misapplied any controlling principles of law. *Foley v Roche*, 68 AD2d 558 (1st Dept 1979).

In addition, plaintiff fails to raise any new facts. Rather, plaintiff relies on facts which were already before this Court on the original motion. The three depositions of current or former AMA employees which occurred after the motion to strike

was submitted in November 2004 are irrelevant. The thrust of plaintiff's objection is that defendant did not identify who created AMA's brochure. Specifically, plaintiff points to the depositions of AMA's Geiger and Newton who testified that they could not personally identify who worked on the brochure. From this, plaintiff concludes that AMA never undertook an effort to identify who wrote the brochure. Other evidence established that only three employees worked on AMA brochures. Indeed, defendant, in its July 13, 2004 discovery response, identified Karl DeSala and Gerri Equinda as having worked on the brochure. Further, during her deposition on July 21, 2004, Diane Laurenzo identified Fred Huber as a marketing strategist who directed development of the brochure. This is just one of many unsupported accusations in plaintiff's papers.¹

Plaintiff's objection to Fexas's deposition is equally unfounded. Plaintiff requested certain financial information. This information was not kept in the ordinary course of AMA's business so Fexas created a new report, using data in AMA's computer system, which was delivered to plaintiff. Now plaintiff accuses Fexas of "manufacturing" documents. Presumably, had defendant failed to produce this information, plaintiff would have complained about that. Plaintiff cannot have it both ways

Finally, this Court will not repeat its refusal to infer that defendant destroyed documents when there is no evidence that

¹Plaintiff's papers are a maelstrom of unsupported accusations, typos and misspellings.

such documents ever existed. The purpose of renewal or reargument is not to serve as a vehicle to permit the unsuccessful party to advance arguments different from those tendered on the original application or to repeat the initial unsuccessful arguments. *Id.*; see also, *Pro Brokerage, Inc. v Home Insur. Co.*, 99 AD2d 971 (1st Dept), appeal dismissed without opinion, 64 NY2d 646 (1984). Disagreeing with this Court's conclusion does not demonstrate that this Court misunderstood the facts or misapplied the law.

The background of the action is set forth in this Court's April 11, 2005 decision and shall not be repeated here except as is necessary to this decision. The unsigned amended complaint,² dated February 15, 2004, lists seven causes of action: (1) fraud; (2) misappropriation of plaintiff's idea; (3) breach of joint venture agreement; (4) unjust enrichment; (5) breach of implied in fact contract; (6) breach of quasi or implied in law contract; (7) conversion. Defendant seeks to dismiss all of the claims.

²Another example of plaintiff's carelessness is the complaint itself. The amended complaint states that it is verified, however, a verified complaint was not submitted with the motion nor found in the Court's file. Indeed, it is not signed at all. The original complaint is another example of plaintiff's sloppy and unprofessional submission. The October 22, 2002 verification attached to the complaint is signed by John D. Rapoport plaintiff's attorney because "the **defendant** does not reside in the County in which I have offices." Mr. Rapoport states in he signed the verification in White Plains. However, the beige-back lists two offices for Mr. Rapoport: 342 Madison Avenue, N.Y., N.Y. and another in White Plains. The Amended complaint states that Segal is a resident of New York County. Records kept by the NY Secretary of State report that ABT is located in New York County as well. Accordingly, there is no authority for plaintiff's attorney to verify the amended complaint, if he had in fact ever signed it. CPLR 3020(d)(3).

All of plaintiff's causes of action, whether based on contract or property, involve misappropriation of an idea. Novelty to the buyer is essential to establish "the attributes of ownership necessary for a property-based claim and the value of the consideration - the disclosure - necessary for contract based claims." *Apfel* at 478. Therefore, the legal standard which applies here is "[a] showing of novelty, at least as to the buyer." *Apfel v Prudential-Bache Securities, Inc.*, 81 NY2d 470, 478 (1993).

In *Apfel*, after signing a confidentiality agreement, defendant reviewed plaintiffs' system of issuing municipal bonds through a system that eliminated paper certificates and the parties entered into a contract for use. *Id.* at 474. For at least a year, defendant was the only one using the idea and paid plaintiff for two years. *Id.* at 476. However, defendant stopped paying under the use contract taking the position that since the idea was not novel, because it had been in the public domain at the time of the contract, there was no consideration for the use contract. The court held "[h]aving obtained full disclosure of the system, used it in advance of competitors, and received the associated benefit of precluding disclosure to others, defendant can hardly claim now the idea had no value to its municipal securities business."

By contrast in this case, plaintiff alleges no subsequent contract for use. Rather, this case resembles the Downey line of cases where the seller agrees to disclose the idea to the buyer

with payment based on use.

Such transactions pose two problems for the courts. On the one hand, how can sellers prove that the buyer obtained the idea from them, and nowhere else, and that the buyer's use of it thus constitutes misappropriation of property? Unlike tangible property, an idea lacks title and boundaries and cannot be rendered exclusive by the acts of the one who first thinks it. On the other hand, there is no equity in enforcing a seemingly valid contract when, in fact, it turns out upon disclosure that the buyer already possessed the idea. In such instances, the disclosure, though freely bargained for, is manifestly without value.

Apfel, supra, at 477. In *Downey v General Foods Corp.*, 31 NY2d 56 (1972), the case was dismissed because the idea, for an advertising campaign which was similar to one subsequently used by General Foods, was neither novel nor original, and defendant possessed the idea before plaintiff's disclosure so there could be no value to defendant, nor consideration for a subsequent use agreement. Whether an idea is novel is initially an issue of law. *Paul v Haley*, 183 AD2d 44 (2d Dept 1992); *Oasis Music, Inc. v 900 USA, Inc.*, 161 Misc 2d 627, 631 (Sup Ct, NY County 1994).

Here, ABT cannot establish either novelty or novelty to AMA. "Improvement of standard technique or quality, the judicious use of existing means, or the mixture of known ingredients in somewhat different proportions -- all the variations on a basic theme -- partake more of the nature of elaboration and renovation than of innovation." *Educational Sales Programs, Inc. v Dreyfus Corp.*, 65 Misc. 2d 412, 416 (Sup Ct, NY County 1970).

Rather, this case resembles *Soule v Bon Ami Co.*, 201 AD 794 (2d Dept 1922), *affirmed*, 235 NY 609, *remitter denied* 236 NY

555 (1923), where plaintiff agreed to disclose to Bon Ami a way of increasing profits. Upon disclosure defendant learned plaintiff's "secret" which was to increase prices. *Id.* At 795. Plaintiff's action was dismissed because its idea lacked novelty. *Id.* at 797. "An agreement premised on the disclosure of a secret is a blind deal. When the purveyor of that secret exacts a promise of confidentiality, he knows what he is dealing with, but the recipient is in the dark. The enforceability of such a threshold agreement -- a promise in exchange for a revelation -- turns on the value of the disclosure." *Educational Sales Programs, Inc, supra.*

Here, plaintiff's program consisted of management, finance accounting and marketing, clearly not original. Indeed, it is undisputed that AMA offered a 20 day course for 40 years, The Management Course, which had identical content. James W. Weller affidavit dated Feb. 23, 2005 ¶20. Likewise, the system of delivery was not unique: lectures to participants. Shortening the class to days instead of years is also not unique. It is also undisputed that many other organizations, e.g. TEC (in 1992) and Hawksmere (in 1989) and universities offered similar courses. Weller ¶¶10 and 12. The mere length of plaintiff's course does not render it unique. Moreover, plaintiff's counsel's statement that university courses are "clearly distinguishable" does not make it so. In 1997, three years before plaintiff disclosed its program to defendant, AMA had developed an accelerated three-day MBA program for client Watson Wyatt's managerial employees.

Weller ¶¶15 and 17. Without a novel idea or novelty to AMA, all of plaintiff's property based claims or contract based claims must be dismissed.

Novelty is required for implied in fact and implied in law contracts. *Paul v Haley*, 183 AD2d 44 (2d Dept 1991), appeal denied, 81 NY2d 707 (1993). Therefore, plaintiff's fifth and sixth causes of action are dismissed. Likewise, plaintiff's redundant claim for unjust enrichment must be dismissed. *Educational Sales Programs Inc.*, 65 Misc 2d 416.

Without novelty, there is nothing to misappropriate or convert. *Oasis, supra; Paul v Haley, supra; Ed Graham Productions, Inc. v National Broadcasting Co.*, 75 Misc 2d 334, 337 (Sup Ct, NY County 1973). Therefore, the second and seventh causes of action are dismissed.

Plaintiff contends that as a result of two conversations with AMA employees and her sending a copy of an advertising brochure to defendant, a binding joint venture resulted. However, Segal admitted that on November 27, 2000, he was told that defendant was not interested in doing business with plaintiff.

A joint venture represents more than a simple contractual relationship. *Zeising v Kelly*, 152 F Supp 2d 335, 347 (SDNY 2001). Under New York law the factors considered in determining whether the parties have agreed to form a joint venture are: "(1) sharing of profits; (2) sharing of losses; (3) ownership of partnership assets; (4) joint management and control; (5) joint

liability to creditors; (6) intention of the parties; (7) compensation; (8) contribution of capital; and (9) loans to the organization." *Brodsky v Stadlen*, 138 AD2d 662, 663 (2d Dept. 1988). Plaintiff relies on Ms. Segal's "understanding that I made clear to him [Ed Selig] I was interested in a joint venture. And upon using the material and the idea of the concept, we would be in partnership." Ms. Segal's understanding does not constitute an agreement among the parties; her understanding is simply not enough to make a joint venture. Even if there was a question of fact as to whether there was an oral joint venture agreement, as plaintiff alleges, lack of novelty is fatal to plaintiff's claim. *Bram v Dannon Milk Products, Inc.*, 33 AD2d 1010 (1st Dept 1970). As to the other eight factors, there appears to have been no discussion and certainly no meeting of the minds. "The absence of any one of these elements is fatal." *Zeising*, supra. Therefore, the third cause of action is dismissed.

Finally, plaintiff's fraud claim is dismissed. Plaintiff asserts that when Selig stated that AMA was not interested in her course, he lied. As proof of the fraud, ABT points to AMA's offering the course within weeks after Ms. Segal mailed her brochure to defendant.

To prove fraud, plaintiff must establish that defendant made a "representation of a material existing fact, falsity, scienter, deception and injury." *Channel Master Corp. v Aluminum Ltd. Sales Corp.*, 4 NY2d 403, 407 (1958); *New York Univ. v Continental Ins.*

Co., 87 NY2d 308, 318 (1995).

Contrary to plaintiff's objection, there is no issue of credibility here. There is no evidence that the statements were false when made. Rather, there is an alternate explanation to how defendant was able to produce an identical course within weeks of receiving plaintiff's brochure. Nor is there any evidence of detrimental reliance. Since the idea was not novel to defendant; AMA was already working on offering an identical course. Again, this Court must reject plaintiff's conclusory claim. Therefore, the first cause of action is dismissed.


Accordingly, it is

ORDERED, that plaintiff's motion to renew and reargue is denied; and it is further

ORDERED, that defendant's motion for summary judgment is granted and the action is dismissed; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.

Dated: February 2, 2006

FILED
FEB 14 2006
COUNTY CLERK'S OFFICE
NEW YORK

CHARLES E. RAMOS
J.S.C.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.