

**Ashland Management Incorporated v Altair
Investments NA, LLC**

2006 NY Slip Op 30532(U)

September 26, 2006

Supreme Court, New York County

Docket Number: 603554/05

Judge: Shirley Werner Kornreich

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

PRESENT: SHIRLEY WERNER KORNREICH
J.S.C.

PART 54

Justice

Index Number : 603554/2005

ASHLAND MANAGEMENT INC

vs

ALTAIR INVESTMENTS NA LLC

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 8 is motion to/for 8

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 1-a
2
4-8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in*

*accordance with the accompanying
Decision and Order.*

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

FILED
OCT 04 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/27/06

SHIRLEY WERNER KORNREICH
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: PART 54

-----X
ASHLAND MANAGEMENT INCORPORATED,

Plaintiff,

Index No. 603554/05

-against-

ALTAIR INVESTMENTS NA, LLC, NICHOLAS P.
JONES and MICHAEL OBUCHOWSKI,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

FILED
OCT 04 2006
NEW YORK
COUNTY CLERK'S OFFICE

Defendants move, pursuant to CPLR 3212, for an order granting them summary judgment and dismissing the complaint. Plaintiff Ashland Management Incorporated ("Ashland") cross-moves for an order reinstating the preliminary injunction issued by Justice Lowe on June 7, 2004 in *Ashland v Altair*, Sup Ct, NY County, Lowe J., Index No. 604072/03 ("Ashland I").

The preliminary injunction from Ashland I dissolved automatically on June 9, 2005, when Ashland I was voluntarily discontinued by written stipulation. The discontinuance contained an agreement that Ashland could recommence an action through an identical complaint if the parties did not resolve the matter within 120 days of the date of the stipulation. Pursuant to the stipulation, the preliminary injunction issued by Justice Lowe was replaced with a narrower and more precisely defined agreement, which was limited in scope to certain individuals set forth in an annexed list, until the earlier of (1) the expiration of the 120-day period, if Ashland had not by then commenced the new action; or (2) issuance of a judgment or order dismissing Ashland's claims, or determining that the listed names are not trade secrets or otherwise Ashland's confidential or proprietary information.

When the parties were unable to resolve the matter within 120 days of the stipulation, Ashland commenced the instant action. Thus, the parties are still operating under the terms of the restrictive agreement set forth in the stipulation.

Ashland is a company that provides investment advice and management to high net worth individuals and entities (such as pension funds) and places the clients' funds in what are termed "high cap" stocks. In the complaint, this action is described as one "for preliminary and permanent injunctive relief and damages resulting from the egregious breach of fiduciary duties and other wrongful actions of the individual defendants, who in combination with the corporate defendant, have stolen and diverted plaintiff's property and business." (Complaint, para. 1).

Defendant Nicholas Jones ("Jones") worked for Ashland for 17 years, without an employment contract, on an at-will basis, until he resigned as of August 15, 2003. Defendant Michael Obuchowski ("Obuchowski") worked for Ashland, without an employment contract, on an at-will basis, for approximately one and a half years, until he resigned as of August 19, 2003. At the time of their resignations, Jones was Ashland's managing director, a member of its investment committee and a portfolio manager. According to the complaint, Obuchowski was vice president for quantitative research. Jones and Obuchowski formed defendant Altair Investments NA, LLC ("Altair") (now known as Altanes Investments, LLC) under the laws of the State of Delaware on August 21, 2003, and it began operations as an investment management firm in October 2003.

Jones and Obuchowski state that, contrary to allegations in the complaint, they neither took nor memorized any client list of Ashland. Jones and Obuchowski explain that, in the course of their employment at Ashland, they communicated directly and frequently, and developed

personal relationships, with the principals of Ashland's accounts, and/or with other professionals who referred the accounts. Jones and Obuchowski maintain that they did not disclose their prospective resignations, or any plan to form another investment management firm, prior to leaving Ashland's employ. They assert that they never disparaged Ashland to a client nor did they exploit any of Ashland's resources in the formation of Altair.

Defendants state that, in October and November 2003, Altair sent promotional materials by Federal Express ("Fed Ex") to approximately 50 individuals, six of whom were then current or former Ashland clients, and 38 of whom were financial industry professionals who had referred clients to Ashland.

Jones and Obuchowski state that the recipients of the promotional materials were personally well known to one or both of them, and that their names were recalled by them through casual memory. They state that the recipients' telephone numbers and office addresses were either recalled by Jones and/or Obuchowski, or they were ascertained from publicly available sources, such as internet websites and telephone directories.

Jones and Obuchowski never entered into an agreement with Ashland that prohibited their formation of a competing business. Jones and Obuchowski each signed a Confidentiality Agreement that prohibited their use of "any information concerning a client of [Ashland] or the account of such client with [Ashland]" or any use of "confidential or proprietary information of [Ashland] or of any [c]lient" other than in connection with their employment at Ashland. The Confidentiality Agreements, which were drafted by Ashland's attorneys, do not contain any limitations on their duration or on their territorial scope.

Defendants assert that all seven of Ashland's causes of action are based on the idea that

the names of its clients, and of the financial professionals at the institutions that referred the clients, are its trade secrets. Defendants argue that the names are not trade secrets, and that, therefore, all seven causes of action fail as a matter of law.

Defendants state that Ashland concedes that the names of its clients are not trade secrets, but instead insists that the names of contact persons at the various large financial institutions that referred the clients are its trade secrets. Defendants maintain, however, that this argument is unavailing. Defendants further argue that the names of the recipients of Altair's mailing were recalled from Jones' casual memory, and that information casually recalled is never protected, even where it would otherwise constitute trade secrets.

Defendants further assert that the fifth cause of action, sounding in conversion, also fails as a matter of law because Ashland was not deprived of any property, and the sixth cause of action, alleging tortious interference with contract and with prospective economic relations, also presents no triable issue of material fact and should be dismissed.

Ashland cross-moves for an order reinstating the preliminary injunction issued by Justice Lowe on June 7, 2004 in Ashland I. Ashland states that defendants' papers in support of their instant summary judgment motion are a rehash of the papers they submitted in opposition to the motion for a preliminary injunction in Ashland I. Thus, Ashland argues that defendants' motion has already been ruled on and denied by this court in Ashland I.

Ashland states that it filed the complaint in Ashland I in January 2004, after it discovered that defendants had hacked into Ashland's computer system and sent promotional materials via Fed Ex to its clients. Judge Lowe, in granting the preliminary injunction in Ashland I, stated that Ashland "has demonstrated the likelihood of success on the merits with respect to its claims for

breach of fiduciary duty and breach of the Confidentiality Agreements. Defendants' use of plaintiff's trade secret - its contact list of individual brokers, custodians and consultants - was clearly in breach of their duty of loyalty." Ashland I, May 21, 2004, at 10.

Ashland argues that the instant summary judgment motion is not only non-meritorious, but that it is also barred by the collateral estoppel rule, because it has already been rejected by Justice Lowe's decision on the preliminary injunction motion in Ashland I.

Ashland argues that its list of clients cannot be readily ascertained from publicly available sources. These clients have specific investment needs and Ashland has identified and cultivated these clients over the years through the expenditure of considerable time and money. Ashland further states that it wants to show the court that defendants stole its client information, either by taking it out of Ashland's office and/or hacking into its Fed Ex account on the internet and using its shipping manager in Fed Ex to send solicitation materials to Ashland's clients. Ashland submits its Fed Ex statement from November 17, 2003, showing 40 of its clients to whom defendants mailed solicitation and other materials. Ashland explains that this is how it discovered that the defendants hacked into its Fed Ex client list for their own purposes. Ashland emphasizes that there are no publicly available lists or compilation of the names and addresses of the individuals who were Fed Exed packages. Ashland states that this was its proprietary and confidential information.

Ashland states that defendants' claim that the names and addresses to whom they sent promotional materials were in their casual memory or on publicly available websites is false. One example Ashland uses to dispute this is the Fed Ex package defendants sent to an individual at Glenmede Trust Company. Glenmede's website indicates its address is in Beachwood, OH,

while within Ashland's computer system, the town was listed as Shaker Heights, OH. Ashland states that, when defendants sent the package in October 2003 on Altair's behalf to Commede at Shaker Heights, they either had hacked into Ashland's Fed Ex account or had downloaded all of the addresses before they left, because the incorrect address is not publicly available on the website.

Ashland further states that defendants stole its performance data and misrepresented it as their own, in violation of SEC regulations, in their solicitation materials sent to Ashland's clients. Ashland states that what is at issue is defendants' misuse of Ashland's client lists, data and resources and the damages that resulted therefrom. Ashland asserts that defendants' abuses would have gone undiscovered had it not learned that Altair was using Ashland's Fed Ex account to send documents and information in its effort to solicit Ashland's clients.

Ashland further maintains that in the summer of 2003, prior to their departure, Jones and Obuchowski prepared and distributed to Ashland's clients a commentary on investment performance for the 2nd quarter of 2003 and their forecast for the 3rd quarter. The commentary was on Ashland's letterhead, and was distributed without the approval of Ashland's Investment Advisory Committee. According to Ashland, Jones and Obuchowski knew that distributing such commentary without the committee's approval was a breach of Ashland's policies. Ashland maintains that defendants' actions were designed to increase their visibility to Ashland's clients immediately prior to their resignation, so that they would be more likely to attract those clients once they joined Altair.

Ashland argues that, contrary to defendants' claims, it does not seek to turn a confidentiality agreement into a non-compete agreement. Ashland states that defendants are free

to compete with Ashland without any limitation as to time or geographic area, and are free to solicit insurance companies and investment banks. According to Ashland, however, defendants must not use confidential or proprietary information taken from Ashland in their competing business.

Ashland states that it has lost clients and millions of dollars as a result of defendants' wrongful misappropriation and use of its confidential information and resources. It argues that Jones' and Obuchowski's conduct in taking and using the confidential information on behalf of Altair goes beyond breach of their fiduciary duties and breaches the express terms of the Confidentiality Agreements, which provide for injunctive relief to restrain any actual or threatened breach.

Ashland maintains that defendants' wrongful conduct damaged its relationships with longstanding clients and caused irreparable injury to its business. Moreover, Ashland states that the relief it seeks does not aim to put defendants out of business. Rather, Ashland seeks an order directing defendants to return the confidential information and property they stole and enjoin them from using such confidential information and property to solicit its clients.

According to Ashland, if the defendants had disseminated information about their newly formed venture through the avenues of "mass mailing" or "cold calling," Ashland would not take action against them. Ashland states that defendants' wrongful acts involved directing their information deliberately and specifically to contact persons whom they knew to be working on fixed accounts, information which they gleaned only from the benefit of working at Ashland.

Defendants' summary judgment motion is granted in part, to the extent of dismissing the conversion and tortious interference claims, set forth as the fifth and sixth causes of action.

respectively. Ashland did not oppose that part of defendants' motion seeking to dismiss those claims. Defendants' motion is, however, otherwise denied.

There are issues of fact such that summary judgment is not appropriate at this time. Given that there was a confidentiality agreement in place, there is an issue of fact as to whether the list of individual contacts should be considered a trade secret. *See Ashland Mfg. v. Janien*, 82 N.Y.2d 395, 407 (1993) (holding that whether trade secret is secret is generally question of fact).

Furthermore, there are issues relating to Jones' and Obuchowski's conduct in compiling the list of individuals to whom they sent the promotional materials, as well as their allegedly inappropriate use of Ashland's Fed Ex account. *See Leo Silfen, Inc. v Cream*, 29 N.Y.2d 387, 391-92 (1972) (finding that, if there had been "a physical taking or studied copying" of plaintiff's customer list, court might enjoin solicitation as breach of trust, and that, in case of other "wrongful or fraudulent tactics" while in plaintiff's employ, court might award damages for and enjoin similar conduct as unfair competition).

Thus, because there are material issues of fact, summary judgment is denied as to the remaining causes of action, sounding in breach of fiduciary duty, breach of the Confidentiality Agreements, and unfair competition, and seeking both damages and injunctive relief.

As to the cross motion, Ashland argues that defendants' motion is barred by collateral estoppel, which "precludes a party from relitigating 'an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point.'" *Kaufman v Eli Lilly and Co.*, 65 N.Y.2d 449, 455 (1985), quoting *Gilberg v Barbieri*, 53 N.Y.2d 285, 291 (1981). Ashland's argument on this point is unavailing, however, because "it is settled law that the determination on a preliminary injunction lacks preclusive effect." *BFP 245 Park*

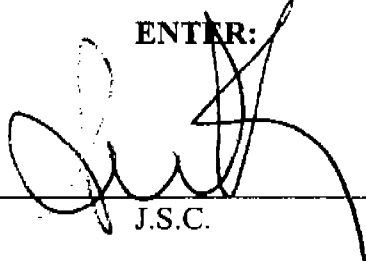
Co., LLC v GMAC Commercial Mtge. Corp., 12 A.D.3d 330, 332 (1st Dept. 2004).

Furthermore, Ashland has not shown that it is entitled to the broader preliminary injunction it seeks, and the cross motion, therefore, is denied. In the stipulation, the parties agreed to the narrower restrictive terms regarding a list of specific individuals, and the stipulation itself states that, in the event of a commencement of a new action, Ashland could seek another preliminary injunction, on those narrower grounds the parties had agreed to. Instead, Ashland here seeks to reimpose the broader injunction. Given that Ashland has not shown reason why a broader injunction is necessary, the defendants continue to comply with the terms agreed to in the stipulation, and more than a year has now passed since the broader injunction was in place, Ashland is not entitled to the broader injunction. Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted in part, to the extent that the fifth and sixth causes of action of the complaint are dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion is denied.

Date: September 26, 2006

ENTER:


J.S.C.

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