Shmueli v Corcoran Group
2006 NY Slip Op 30664(U)
April 11, 2006
Supreme Court, New York County
Docket Number: 104824/2003
Judge: Herman Cahn
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SCANNED ON 4/19/2006

[* 1]

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

HERMAN CAHN

PRESENT:

PART 49

Index Number : 104824/2003

SHMUELI, SARIT

VS

CORCORAN GROUP

Sequence Number : 006

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE 11/7/05

MOTION SEQ. NO. 006

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 19 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . .

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

Dated: 4/11/06

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 49

----------X

SARIT SHMUELI, :

Index No. 104824/03

Plaintiff, :

- against - :

THE CORCORAN GROUP and TRESA HALL, :

Defendants. :

----------X

Herman Cahn, J.

This is an action for damages arising out of defendant Corcoran Group's termination of its business relationship with plaintiff. Defendants are alleged to have wrongfully taken from plaintiff various lists that she allegedly maintained on defendants' computer after the termination.

Defendants move (seq. no. 006) for reargument of their motion for summary judgment dismissing the second amended complaint, which was substantially denied by decision and order dated July 25, 2005 (the "Decision"), CPLR 2221.[1]

The facts are fully set forth in the Decision. Familiarity therewith is presumed.

The amended complaint seeks $3,000,000.00 in damages, asserting causes of action for conversion (first cause of action), intentional infliction of emotional distress (second), breach of bailment (third), misappropriation of proprietary information (fourth), and interference with prospective business relations (fifth). The Decision only granted defendants' motion to

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[1] By order dated February 7, 2006, the Appellate Division granted a stay "of trial" pending determination of defendants' appeal from the Decision. This court reads that order as not staying the within determination of this motion.

dismiss, as to the last cause of action. Defendants now move for reargument in connection with the court's dismissal of the causes of action for conversion and misappropriation of proprietary information.

A motion for reargument is designed to afford a party an opportunity to show that the court overlooked relevant facts or misapprehended pertinent law in its determination of a prior motion (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). "Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*id.*, at 567).

Defendants' counsel contends that the court's analysis of their claim for misappropriation of proprietary information overlooked deposition testimony by plaintiff that the computer data that is the subject of this action was publicly available, and that she furnished a copy thereof to defendants (Affirm. of John Pribish, Esq., dated August 15, 2005 [the "Pribish Aff."] ¶ 15). He also states that "Plaintiff failed to offer any evidence that Corcoran misappropriated her purported trade secrets" (*id.*). That is incorrect.

The Decision expressly took note of defendants' foregoing arguments, and disposed of them. As for the assertion that plaintiff's real estate investor data may have been publicly available, the Decision held that sufficient grounds exist to have it classified as propriety, due to its nature as a business compilation. The Decision stated:

> Defendants maintain that the lists, containing names, addresses, and telephone numbers of prior and prospective real estate purchasers are not afforded legal protection, as "trade secrets." They further assert that plaintiff did nothing to maintain the secrecy of the lists.
>
> Business information is entitled to trade secret protection if it consists of "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 407 [1993] [*quoting* Restatement [Second]

of Torts § 757, comment *b*]; *see also, id.*, for additional relevant factors).

> Plaintiff, whose assertions are given every favorable inference in opposition to a motion for summary judgment (*Myers, supra; Martin, supra*), asserts that she expended considerable time, effort, and cost in compiling her client/investor lists. Where, as alleged here, customer lists require extraordinary effort to compile, such lists may, in a proper case, be afforded trade secret protection (*Leo Silfen, Inc. v Cream*, 29 NY2d 387 392 [1972]).

(Decision at 11.)

As for the assertion that plaintiff did not maintain secrecy, the Decision noted:

> The parties are in conflict as to whether plaintiff maintained the secrecy of the lists. Plaintiff asserts that she did, with the understanding that she alone possessed the password for her computer (Complaint ¶ 36; Viuker Aff. ¶ 26; Shmueli Aff. ¶¶ 37, 39, 42, 51, 54). Defendants assert that she did not, citing excerpts from her deposition testimony describing the crowded nature of Corcoran's offices, thereby suggesting that secrecy was impossible (Def. Mem. at 2-3; Rowe Aff. Ex. B [Shmueli Depo. Tr.] at 110-13).[] Efforts to maintain secrecy are relevant to trade secret analysis; however, issues of fact involving such efforts are matters for trial (*Ashland Mgt. Inc., supra*). The parties' conflicting accounts give rise to such an issue of fact.

(Decision at 11-12 [footnote omitted].)

The Decision (at 12 n 7) further noted that "[d]efendants' reliance on plaintiff's deposition testimony appears to ignore her attestation that despite the close office quarters, all personnel within Corcoran's offices harbored, and practiced, a commonly understood, mutual, expectation of privacy (*see*, Rowe Aff. Ex. B [Shmueli Depo. Tr.] at 111; *accord*, Shmueli Aff. ¶52)."

In addition, defendants mischaracterize plaintiff's deposition testimony. Plaintiff did not simply state that she turned over her investor list to Corcoran. Rather, she testified that she maintained her original list, providing the office staff a copy for the limited and express purpose of enabling personnel to do mailings on her exclusive behalf (*see*, Pribish Aff. ¶ 10).

Thus, the denial of summary judgment in the face of issues of fact, and in light of

the Decision's reasoning, did not overlook or misapprehend any material legal or factual point. Reargument is denied as to the non-dismissal of the claim for misappropriation of proprietary information (fourth cause of action).

Defendants' counsel again argues that the claimed theft of plaintiff's computer files does not constitute a conversion. He does so by re-invoking the plaintiff's aforesaid deposition testimony (Pribish Aff. ¶ 22). As explained, that testimony does not demonstrate defendants' entitlement to summary judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Moreover, notwithstanding its recognition that "plaintiff's computerized client/investor list is convertible property," the Decision (at 7) acknowledged that "plaintiff's burden to prove the existence of all elements necessary to sustain a claim for conversion" remains for trial.

Consequently, reargument is denied as to the court's non-dismissal of the conversion claim (first cause of action).

Accordingly, it is

ORDERED that defendants' motion for reargument is denied.

FILED
APR 19 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 11, 2006

ENTER:

J. S. C.