

Alevy v Uminer

2007 NY Slip Op 30355(U)

March 23, 2007

Supreme Court, New York County

Docket Number: 0601934

Judge: Helen E. Freedman

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

PRESENT: HELEN E. FREEDMAN

PART 39

Index Number : 601934/2006

ALEVY, STEVEN M.

vs

UMINER, ISAAC

Sequence Number : 001

DISMISS ACTION

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 ~~the~~ motion sequences 001 and 002
are consolidated for joint disposition and **IS DECIDED**

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 27 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 23, 2007

[Signature]
J.S.C.
HELEN E. FREEDMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

[* 1]

ORIGINAL IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
STEVEN ALEVY d/b/a BANKERS CAPITAL
REALTY ADVISORS,

Plaintiff,

-against-

ISAAC UMINER, DITMAS CAPITAL, INC.,
DITMAS CAPITAL REALTY, LLC, and
MELISSA ROSE,

Defendants.
-----X

Index No. 601934/06

FILED

MAR 27 2007

**COUNTY CLERK'S OFFICE
NEW YORK**

HELEN E. FREEDMAN, J:

Motion sequences 001 and 002 are consolidated for disposition.

In this action, plaintiff sues defendant Uminer for breach of a written and an oral contract, and sues defendants Uminer, Ditmas Capital, Inc. and Ditmas Capital Realty, LLC (collectively "Ditmas") for conversion and misappropriation of trade secrets, tortious interference with contract, tortious interference with prospective advantage, breach of fiduciary duty, and unfair competition. Plaintiff also interposes claims for misappropriation and tortious interference with prospective advantage against defendant Melissa Rose, and requests injunctive relief against all defendants.

The gravamen of the Complaint is that plaintiff hired and trained defendant Uminer in the mortgage brokerage business, elevated him to the status of virtual Chief Operating Officer of Bankers Capital Realty Advisors ("Bankers"), and that after twelve years Uminer started a competing business and appropriated plaintiff's trade secrets, customer lists and business. Defendant also allegedly took defendant Rose, whom he had hired to work at Bankers, with him. Among the allegations is the claim that Uminer started his own competing business while still working for Plaintiff.

In motion sequence 001 defendants Uminer and Ditmas, move to dismiss the within Complaint based on CPLR 3211(a)(7) and CPLR 3211 (a)(1), and in motion sequence 002, defendant Rose moves to dismiss the Complaint against her pursuant to CPLR 3211(a)(7). Based on the foregoing, the motion to dismiss is granted as to the third, four fifth, sixth and eighth causes of action as to all defendants and is otherwise denied as to defendants Uminer and Ditmas at this time with leave to seek summary judgment after discovery is complete.

Discussion

Claims against Uminer

In support of its claims for breach of a written contract and misappropriation Bankers (Alevy) furnishes an Agreement dated November 1, 1994 between Bankers and Uminer entitled INDEPENDENT CONTRACTOR AGREEMENT, the relevant portions of which are set forth below.

Paragraph C provides:

BANKERS has information including but not limited to customer lists , business marketing plans, business and technical know-how, confidential lender information and relationships and other proprietary information...which it desires to keep confidential and which it intends to share with Independent Contractor...subject to the express understanding that Independent Contractor will keep the foregoing confidential....”

Paragraph 6 provides

(b) Post-termination each party agrees to not disparage the other... Further, Independent Contractor shall not make any unfair use of his/her knowledge of BANKER’S proprietary contacts, prospects, customers, customer lists, trade secrets, inventions and/or any other Proprietary Information. Independent Contractor further agrees that for a period of two years after termination of this Agreement for any reason, he/she will

not act in the capacity as a mortgage banker/broker with regard to underlying Cooperative mortgages anywhere within the five boroughs of New York City.

The Agreement further provides for entitlement to injunctive relief and for liquidated damages of 1% for every loan that the Independent Contractor procures in violation of the terms of the Agreement. It also provides for attorneys fees and states clearly in paragraph 4(a) that:

“During the term of this Agreement Independent Contractor will not enter into any activity, employment, or business arrangement that conflicts with BANKERS’ interests or Independent Contractor’s performing services...hereunder.”

The Agreement also provides that Independent Contractor shall advise BANKERS in writing of any business opportunities it becomes aware of. within 24 hours and give BANKERS a right of first refusal.

Finally, it states in paragraph 13 that:

The parties acknowledge and agree that the relationship of the parties is that of an independent contract (sic) and not as an employer/employee. Accordingly, BANKERS will not be withholding any federal, state or city taxes, providing workers’ compensation coverage or any other benefits otherwise available to employees.

The Complaint alleges that in 2005, while working for Bankers, Uminer formed a mortgage brokerage business REFI in direct competition with Bankers and secretly diverted commissions to REFI. It also alleges that Uminer urged Bankers’ customers to transfer business to REFI or Ditmas, that he together with defendant Rose took customer lists and information about ongoing deals, that Rose and Uminer sabotaged Bankers’ back-up computer tapes which contained proprietary information and changed pass-words on the computer and e-mail to prevent plaintiffs from discovering Uminer’s plans to divert business to his new company, and that

Uminer failed to give the 30 days notice that he was leaving as provided for in the Agreement.

The first cause of action, the breach of contract claim, includes failure to give the thirty days notice provided for in the contract, and a claim that Uminer used proprietary information in his new business. It also cites the prohibition from entering into any business activity that conflicts with Bankers' business in 4(a) of the Agreement and claims that Uminer retained fees belonging to Bankers that he divulged proprietary information to his new company. The second cause of action, the breach of the oral agreement claim, concerns failure to hire or mentor new mortgage originators and conduct weekly meetings in return for which Uminer was to receive an increased commission. The third cause of action is for conversion and involves alleged taking of or diversion of deals by Uminer to his company and taking of fees due plaintiff. The fourth cause of action against all defendants is for conversion of proprietary information. The fifth and sixth causes of action are for tortious interference with prospective business advantage and contract respectively. The seventh cause of action is for breach of duty of loyalty and the eighth is for unfair competition, that is misappropriation of commercial advantage.

In support of their motion to dismiss defendants Uminer and Ditmas do not submit an affidavit of anyone with personal knowledge and just contest plaintiff's claims based on the language of the Agreement or the Complaint itself. Although defendant Rose indicates in her motion papers that she is submitting an affidavit, she has in fact not done so and relies on her counsel's affirmation.

In a motion to dismiss based on CPLR 3211(a)(7), the court must accept as true the "factual averments of the complaint" *Campaign for Fiscal Equity, Inc v. State of New York*, 86 N.Y.2d 307 (1995) and give the plaintiff all favorable inferences that can be drawn from the

pleadings. *Guggenheim v. Ginsburg*, 43 N.Y.2d 268 (1977). The criteria is not just whether a plaintiff has stated a cause of action, but whether in fact he has one. *Guggenheim v. Ginsburg*, 43 N.Y.2d 268 (1977); *Weiner v. Lazard Freres & Co.*, 241 A.D.2d 114, 672 N.Y.S.2d 8 (1st Dept. 1984).

The relevant portions of the Agreement that Alevy representing Bankers and Uminer signed on or about November 1, 1994, some twelve years before the commencement of this action, are cited above. In the Agreement Uminer agreed to preserve the confidentiality of plaintiff's proprietary information including customer lists, marketing information, and technical know-how and not to compete unfairly with plaintiff or use any information obtained by him to compete with plaintiff while employed by plaintiff. Plaintiff claims that Uminer established a mortgage brokerage business while still employed by plaintiff albeit as an "independent contractor", and that he used customer lists and proprietary information to do so. Plaintiff also claims that Uminer violated the two year restrictive covenant applicable to cooperative mortgages contained in the Agreement. Defendant Uminer contends that the two year restrictive covenant applies to cooperative mortgages only and that plaintiff has not alleged that defendant brokered cooperative mortgages. Uminer also contends that the proprietary information bar also applies to cooperative mortgages only. Moreover, he contends that plaintiff has failed in its complaint to set forth what constitutes proprietary secrets.

However, although defendants cite *Weiner v. Lazard Freres & Co.*, supra for the proposition that a plaintiff must specify what proprietary secrets were misappropriated, that case holds that where there is a factual issue raised, a court may not dismiss based on pleadings alone. While the case sets forth criteria for determining what constitutes proprietary or secret

information, it does not require that the pleadings so specify. Additionally, although plaintiff contends that the proprietary information is limited to cooperative mortgages alone, the Agreement does not so specify. It is only the reference to cooperative mortgages in the Agreement that is limited to the two year restrictive covenant. Thus, the first cause of action for breach of the written contract remains.

With respect to the claim for breach of an oral agreement, defendant contends that the written Agreement precludes any oral modification. However, the oral agreement that plaintiff claims was breached, appears to have been a subsequent unrelated agreement. That alleged agreement was to hire and train new employees. Thus, the G.O.L. § 15-301 provision barring oral modifications to agreements that contain merger clauses is not applicable. The alleged oral agreement does not change the written agreement. Rather it is a separate unrelated agreement. Additionally, the alleged partial performance of the oral agreement, the doubling of Uminer's commission, would take it out of the G.O. L. provision. *Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338 (1977). Thus, the second cause of action for breach of an oral contract remains.

With respect to the conversion claim, defendant argues that such a claim fails because plaintiff is merely seeking commissions that would become due but over which it never exercised dominion and control. In *Soviero v. Carroll Group International, Inc.*, 27 A.D.3d 276, a claim for conversion of commissions due was dismissed because plaintiff had been fired by the defendant firm before she could have exercised ownership or control of the funds that she alleged had been converted. Plaintiff cites several cases, *Bankers Trust Co. V. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384 (1st Dept. 1992) and *Bank of India v. Weg and Meyers, P.C.*, 257 A.D.2d 183 (1st Dept 1999), holding that where plaintiff had an immediate right to or a

secured interest in funds that were misappropriated, an action in conversion would lie. However, here the commissions appear to be referable to deals that had not been fully consummated when Uminer left plaintiff. Thus the third cause of action for conversion of funds is dismissed with leave to replead if appropriate.

As to the fourth cause of action for misappropriation of trade secrets or proprietary information, that claim appears to be duplicative of the breach of contract claim. Moreover, despite repeated allegations of misappropriation of trade secrets, plaintiff fails to detail what secrets were taken other than client lists, which presumably defendant knew about since he had run plaintiff's business for a number of years. See *Precision Concepts, Inc. V. Bonsanti*, 172 A.D.2d 737 (2d Dept. 1991). For these reasons, the fourth cause of action is dismissed. To the extent that plaintiff is able to identify specific secrets or proprietary information that it had secured, leave to replead may be granted.

With respect to the fifth and sixth causes of action for tortious interference with prospective advantage and tortious interference with contract, those claims are also dismissed. Tortious interference with prospective advantage requires a motive akin to malice, or at a minimum a showing of more than mere economic interest. *Shared Communications Services of ESR, Inc. v Goldman Sachs & Co.*, 23 AD 3d 162 (1st Dept. 2006). Plaintiff pleads nothing more than a generalized claim that defendant took deals away from plaintiff, but no specific deals are set forth. As to tortious interference with contract, it is necessary that a plaintiff allege that there is an existing valid contract between plaintiff and a third party, that the defendant knew about such a contract, and that defendant intentionally interfered with it. *Lama Holding Co. v. Smith Barney* 88 N.Y.2d 413 (1996). Here plaintiff only alleges that deals were taken away from it.

As to the seventh cause of action for breach of fiduciary duty, dismissal of that claim will be deferred pending discovery concerning the actual nature of the relationship between the parties. Plaintiff argues that as a de facto chief operating officer, defendant had a fiduciary duty to the corporation. While it is true that an officer of a corporation has a fiduciary duty to the entity, the contract establishing the relationship between parties here specifically stated that defendant was an independent contractor. For an independent contractor to have a fiduciary relationship to an employer, it must be shown that the relationship was akin to an employer-employee relationship. A breach of fiduciary duty occurs when an employee secretly forms a company for purposes of competing with the employer, solicits the employer's customers, and diverts business from the employer while still employed. *A & L Scientific Corp v. Latmore*, 265 A.D.2d 355 (2d. Dept. 1999). By not giving the required thirty day notice, there is some evidence that defendant may have breached a fiduciary duty even though the Agreement designated the relationship as that of an independent contractor.

Finally, plaintiff's cause of action for unfair competition is also subsumed in his breach of contract claim and is duplicative of that claim. Defendant was a duty not to compete with plaintiff for two years in the brokering of cooperative mortgages. However, he was not precluded from starting another business as long as he did not use specific proprietary information to do so. If he did any of the prohibited things, he breached the contract. Thus the unfair competition claim is dismissed.

Claims against Rose

The only claims interposed against defendant Rose are that she misappropriated trade secrets and that she tortiously interfered with contractual relationships and prospective economic

advantage. She had no explicit or implied contractual relationship with plaintiff. Since the misappropriation and tortious interference claims against Uminer have been dismissed, the claims against Rose must be dismissed for the same reasons.

Injunctive Relief

The ninth cause of action seeks injunctive relief. At this point, plaintiff has not demonstrated entitlement to injunctive relief, which would in any event be a remedy rather than a separate cause of action. However, the prayer for injunctive relief may remain albeit not as a separate cause of action.

For the reasons stated above, the claims against defendant Rose are dismissed in their entirety and the third, fourth, fifth, sixth and eighth causes of action are dismissed against the remaining defendants.

Thus, it is hereby

ORDERED that the third, fourth, fifth, sixth, and eighth causes of action are dismissed against all defendants; and it is further

ORDERED that all claims are dismissed against defendant Rose; and it is further

ORDERED that the other causes of action remain as against defendants UMINER, DITMAS CAPITAL, INC, DITMAS CAPITAL REALTY, INC.

The Clerk is directed to proceed accordingly.

Defendants Uminer et al. are directed to serve an answer on or before April 30, 2007 and remaining parties are directed to appear for a preliminary conference on May 15, 2007 in Room 208 at 9:30 a.m.

Dated: March 23, 2007

Enter:



Helen E. Freedman, J.S.C.

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