

Cocomo Connections, Inc. v Luping Wang
2007 NY Slip Op 30850(U)
April 16, 2007
Supreme Court, New York County
Docket Number: 0113951/2006
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART _____

Index Number : 113951/2006
COCOMO CONNECTIONS, INC.
vs
WANG, LUPING
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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~~

FILED
APR 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 4/16/07 _____ *J.P.* J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
Cocomo Connections, Inc.
Plaintiff,

-against-

Luping Wang, Doris Young a/k/a
Doris Yong, Josephine Spears,
New York 1- #1 Productions, Inc. and
Litpiggy Accessories, Inc.
Defendants.

DECISION/ORDER

Index#133951/2006
Mot. Seq. #002

Present:
Hon. Judith J. Gische
J.S.C.

-----X
Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
Notice of Motion, Yong affd., Wang affd.	1
Notice of X-Motion, Rubin affd., McMahon affd., proposed amended complaint, exhs	2
MM affirm in reply, etc	3

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GISCHE, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Defendants have moved to dismiss the complaint against them. Plaintiffs have cross-moved to amend the complaint. The original complaint asserted four causes of action. The first cause of action was factual in nature without setting forth a specific cause of action; the second and third causes of action were for conversion and the fourth cause of action was for defamation. In the proposed amended complaint there are only two causes of action asserted. Neither is based on defamation or conversion.

No arguments are raised in opposition to defendants motion in chief that the facts alleged in the original complaint do not support any cause of action for conversion and/or

* 3]
defamation. Plaintiff's failure to address the arguments in support of dismissal and its own request to amend the complaint to exclude such causes of action is an implicit concession that no such causes of action exist. Thus the causes of action for conversion and defamation are dismissed.

The first cause of action in the original complaint and the two causes of action in the proposed amended complaint are largely factually based. Defendants argue that both of the causes of action in the proposed amended complaint suffer from the same defect as the first cause of action in the original complaint, *i.e.* they are vague and conclusory. Defendants argue that they should be dismissed on such basis. They also factually contest the allegations.

The gravamen of the first causes of action in both plaintiff's original complaint and the proposed amended complaint is that the individual plaintiffs were all at one time employees of plaintiff. It claims that while Yong was an employee of plaintiff she engaged in competitive business activities with plaintiff. Plaintiff claims that Spears assisted in this process. As to Wang, plaintiff claims that he used to work for plaintiff. After Wang left plaintiff's employment, he formed his own business, defendant New York 1 #1. Plaintiff alleges that New York 1 #1 did work for it and also, at the same time, competed with it, all while utilizing plaintiff's pricing structure and designs. The difference between the first causes of actions asserted in original complaint and the proposed amended complaint is only that the proposed amended complaint contains additional factual allegations.

The second cause of action in the proposed amended complaint claims after both Wong and Yong were no longer employed with plaintiff they opened a competing corporation, Litpiggy Accessories, Inc., which induced Chinese manufacturers, including

[* 4]

QD and JW to refuse to deliver goods ordered by plaintiff unless plaintiff completely paid its bills to such manufacturers. Plaintiff claims that as a result Litpiggy Accessories, Inc. was able to purchase and resell the goods plaintiff ordered from such manufactures.

Defendant contests many of the facts claimed by plaintiff. In construing the plaintiff's claims, however, the facts as alleged by plaintiff will be accepted as true, and afforded the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted by moving parties in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]). Where, as in this case, the parties submit affidavits and other evidentiary materials in support of their respective motions, the courts are free to consider the affidavits and documents submitted to remedy any defects in the pleading. Leon v Martinez, 84 NY2d 83, 88 [1994].¹ The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion to dismiss will fail. Guggenheimer v. Ginzberg 43 NY2d 268 (1977).

An employee owes an employer a duty of loyalty. A cause of action for breach of that duty will lie where an employee solicits the employers customers during the term of the employment relationship. A&L Scientific Corp. v. Latmore, 265 AD2d 355 (2nd dept.

¹In view of this legal standard, defendants arguments about the sufficiency of certain affidavits is irrelevant.

1999). Once the employment relationship ends, the parties' duties to one another change. A claim against a former employee will not lie solely for competing with his/her former employer. It will only lie if the competition is unfair because it is based upon use of the former employers trade secrets or other confidential or proprietary information. Laro Maintenance Corp. v. Culkin, 267 AD2d 431 (2nd dept 1999); Metal & Salvage Association, Inc. V. Siegel, 121 AD2d 200 (1st dept. 1986).

The court holds that the complaint (and proposed amended complaint) set forth allegations that assert a cause of action against Yong for breach of a fiduciary duty based upon claims that while she was an employee she engaged in competing activities with plaintiff. The court holds further that the complaint (and the proposed amended complaint) assert claims against Wang and New York 1 #1 based upon allegations that after Wang separated from plaintiff's employment he used using pricing and design information that he obtained only from plaintiff in running his own competitive business.

There is no reading of the facts that support any legal cause of action against Litpiggy Accessories, Inc. All of the allegations relate to activities that occurred after both Wang and Yong were no longer employed by plaintiff . None of the claims are based upon the use of any trade secrets, confidential information or anything of a like nature. Allegations of competition, alone, is not actionable.

There are no facts alleged that support any claim against Spears. The only allegations against Spears in both the original complaint and the proposed amended complaint are that she worked for plaintiff as a shipping clerk from 2001 through 2005 and that she aided and assisted New York 1 #1. There are also allegations that she told a

customer of plaintiff that Litpiggy Accessories, Inc. Obtained plaintiff's bills because it could not pay its bills. There is no cognizable cause of action against Spears. There are no facts indicating the nature of the "aid and assistance" given. The other facts alleged do not state a cause of action.

The cross-motion seeks to amend the complaint. Amendment should be freely granted absent prejudice or if the claim is patently improper. CPLR § 3025. At bar the first cause of action in the proposed amended complaint merely add additional facts to the first cause of action asserted in the original complaint. Thus amendment as to this cause of action will be allowed. The second cause of action in the proposed amendment complaint are based upon claims of competition by Litpiggy Accessories Inc. and/or the individual defendants acting through Litpiggy Accessories, Inc. Since this does not support any cognizable cause of action, the court will not permit any amendment of the complaint to include the second cause of action.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendants' motion to dismiss is granted to the extent that the second, third and fourth causes of action asserted in the complaint are dismissed as against all defendants; and it is further

ORDERED that defendants motion to dismiss is granted to the extent that the complaint is dismissed in its entirety as to defendants Josephine Spears and Litpiggy Accessories, Inc., and it is further

* 7]
ORDERED that plaintiff's cross-motion to amend the complaint is granted only to the extent that the first cause of action asserted in the proposed amended complaint shall be permitted; and it is further

ORDERED that plaintiff's cross-motion to amend the complaint is denied to the extent it seeks to assert a second cause of action; and it is further

ORDERED that plaintiff shall serve upon defendants counsel an amended complaint in accordance with this order within ten (10) days of the date of this order and that the remaining defendants shall interpose an answer within 20 days after service of such amended complaint; and it is further

ORDERED that the parties shall appear before this court for a preliminary conference on June 14, 2007 at 9:30 am , and it is further

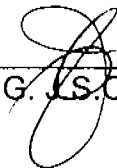
ORDERED that any requested relief not expressly granted herein is denied, and it is further

ORDERED that shall constitute the decision and order of the court.

Dated: New York, New York
April 16, 2007

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SO ORDERED:



J.G. J.S.C.