

Isfel Co., Inc. v Moxie Apparel, LLC
2007 NY Slip Op 31499(U)
May 2, 2007
Supreme Court, New York County
Docket Number: 0100707/2007
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHÉ

PART 10

Justice

The ISFEL CO, INC,

INDEX NO.

100707/07

- v -

MOXIE APPAREL, LLC,

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION!

and PC scheduled for 6/7/07 @ 9:30 am
in Part 10

FILED

MAY 11 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: May 2, 2007

Check one: FINAL DISPOSITION

JJG
HON. JUDITH J. GISCHÉ c.

NON-FINAL DISPOSITION

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

-----X
The Isfel Co., Inc.

Plaintiff

-against-

Moxie Apparel, LLC, Rita Richardson and
Carol Banahan,

Defendants.

-----X

DECISION/ORDER

Index No.: 100707/07

Seq. No.: 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Number
OSC [§3211-preanswer] w/RR, CB affid, LF affirm, exhs	1
Pltff's opp w/SE affirm, JF and YF affids, exhs	2
Def's reply w/ RR, CB affids, exhs	3

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Upon the foregoing papers the court's decision is as follows:

This is an action by the former employer ("Isfel" or "plaintiff") of the individually named defendants ("Richardson" and "Banahan"). Richardson is the principal of Moxie Apparel, LLC ("Moxie"). Plaintiff contends that Richardson and Banahan misappropriated trade secrets or confidential information (1st cause of action), utilized the information to solicit plaintiff's customers (2nd cause of action), by doing so have wrongfully converted plaintiff's property (3rd cause of action), and also breached their fiduciary duty of loyalty as employees (4th cause of action).

The court has before it a motion by all the named defendants for any order dismissing the complaint for failure to state any cause of action (CPLR § 3211 [a][7]) or on the basis that there is documentary evidence disproving plaintiff's claims, as a matter of law (CPLR § 3211 [a][1]). Alternatively, defendants urge the court to convert this

preanswer motion to one for summary judgment, on notice, and to rule on a summary basis. CPLR § 3211 [c]; Gifts of the Orient v. Linden Country Club, 89 AD2d 508 (1st dept. 1982).

In a prior motion plaintiff sought a preliminary injunction against defendants, plaintiff withdrew that motion without prejudice, with the permission of the court. Order, Gische J., 2/1/07.

Defendants have not provided the court with any reason, let alone a compelling one, why it should rule on a summary basis, without issue being joined. Therefore that branch of their motion is denied. The defendants' motion is also denied because, for the reasons that follow, plaintiff has stated facts that would support a cause of action.

Background and facts considered

Although the underlying facts of this case are in sharp dispute, on a motion to dismiss the complaint is construed liberally. Moreover, 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]). Moreover, the court is free to consider the affidavits and other materials submitted by the plaintiff remedy any defects in the pleading. Leon v Martinez, 84 NY2d 83, 88 [1994]. Affidavits that dispute facts alleged in a complaint are generally not considered on a motion to dismiss. Zanett

Lombardier, Ltd v Maslow, supra. The following facts are common to all causes of action in the complaint and considered by the court:

Isfel is a designer and manufacturer of girls' apparel and the former employer of Richardson and Banahan. Richardson has created a company, Moxie, who is competing with Isfel for J.C. Penney's business. Isfel contends that the defendants stole, converted or otherwise misappropriated information that belongs to Isfel and that the defendants are using this misappropriated information to compete with Isfel. Plaintiff further contends the individual defendants were privy to, and misappropriated information that would not have been unavailable to them (or anyone else in the public), but for the fact that Richardson and Banahan were employees and entrusted with such valuable data. The information includes client lists, samples, marketing data, and financial information. Isfel contends that this information has been used by Richardson to set price points for apparel marketed to J.C. Penney and other clients, and that Moxie is now directly competing with Isfel for the exact same specialized apparel market and attendant clientele.

Joseph Feldman, the owner of Isfel has provided his supporting affidavit describing at least one situation involving Richardson's (alleged) use of Isfel's resources (a FED EX account). He contends there are other examples of defendants' use of company resources, including the computer and the INTERNET. Yaakov Feldman, the owner's son, and also an officer of plaintiff, avers that Richardson and Banahan sent and received packages while still employed with Isfel and that these packages were the means by which the private data, samples, boards, etc., were removed from the

premises.

In opposition, defendants offer their own affidavits. They also offer E-mails, receipts, and a charge account statement. Both defendants contend that they did not misappropriate or steal anything belonging to Isfel. Richardson denies she used Isfel resources to send packages and provides an American Express statement to show that she paid for a FED EX package herself. She also explains that anything Banahan did for her was on her own time (e.g. lunch time), and not on Isfel's time. Banahan echoes this argument and further states she was never warned about doing free lance work while employed at Isfel.

Richardson also states they she knew about Isfel's finances because it made no effort to hide the information from her and that its profit margin (20-30%) is not a "secret" either because it is common practice in the apparel industry.

Discussion

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 "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." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dept. 1997). Where the motion is premised upon the existence of documentary evidence, such evidence must definitively dispose of plaintiff's claims. Bronxville Knolls

Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995).

There is no documentary evidence that conclusively establishes the defendants' defenses, as a matter of law. Leon v. Martinez, 84 NY 2d 83 (1994). Defendants' have only set forth documents (credit card statement, etc.) that cast the events plaintiff relies upon in a different light, or present altogether different facts. Resolution of the facts and issues of credibility are for the trier of fact to decide at trial.

Looking at the complaint as a whole, and according plaintiff the benefit of every possible favorable inference, the facts as alleged fit within a cognizable legal theory, defeating defendants' motion to dismiss. Sokoloff v. Harriman Estates Dev Corp., 96 NY2d 409 (2001). Defendants' claim, that plaintiff has no evidence that they copied or misappropriated designs or anything else belonging to Isfel is a defense for them to prove either at trial, or through evidence in admissible form after issue has been joined. Falconwood Corp v. In-Touch Technologies, Ltd., 227 AD2d 215 (1st Dept 1996).

Plaintiffs have alleged facts that would support a claim for unfair competition, in the broadest sense. Whether the information plaintiff claims was misappropriated is indeed a "trade secret," or is the foundation for any unfair competition claim, remains to be decided. Ashland Management Inc. v. Janien, 82 N.Y.2d 395 (1993); Natural Organics, Inc. v. Nature's Way Products, 12 Misc.3d 1185 (a) (Sup Ct 2006) (*motion for summary judgment- unfair competition alleged, breach of employee's duties to employer*).

Defendant's argument that trade secrets cannot be converted because they are not "tangible personal property," is an inaccurate statement of the law. See: Thyoff v.

Nationwide Mut Ins Co., 8 NY3d 283 (2007); Sporn v. MCA Records, Inc., 58 NY2d 482 (1983); Schenectady Chemicals, Inc. v. Imitec, Inc., 151 A.D.2d 804 (3rd Dept 1989); Trustforte Corp. v. Eisen, 10 Misc3d 1064 (A) (Sup Ct 2005); Woodie v. Azteca Intern. Corp., 9 Misc.3d 1104(A) (Sup Ct 2005).

Other arguments by defendants, that plaintiff's business had been steadily declining even before Moxie was created, or that the named individual defendants owe no fiduciary duty their employer, are insufficient to warrant the dismissal of the complaint at this stage. An employee owes a fiduciary duty to his employer as a matter of law and is "prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties." Lamdin v. Broadway Surface Advertising Corp., 272 N.Y. 133, 138 (1936).

For all the foregoing reasons, defendants' motion to dismiss is denied and they are directed to serve their answer within 10 days of being served with a copy of this decision/order. **This matter is scheduled for a preliminary conference on June 7, 2007 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122.**

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 2, 2007

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NEW YORK
So Ordered
J.S.C.