

**Westport Hardness & Gaging Corp. v All Precision
Needs Ltd.**

2007 NY Slip Op 32324(U)

July 20, 2007

Supreme Court, New York County

Docket Number: 0601574/2007

Judge: Judith J. Gische

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

PART 10

Index Number : 601574/2007

WESTPORT HARDNESS

vs

ALL PRECISION NEEDS LTD.

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 20, 2007

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

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

Supreme Court of the State of New York
County of New York: Part 10

Westport Hardness and Gaging
Corporation,

Plaintiff,

Decision/Order

-against-

Index#601574/07

All Precision Needs Ltd.,
Richard Steinbauer aka Rick Mannix,
and Ray Lamitola,

Defendants.

Mot. Seq. #003

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

| | |
|---|---|
| PAPERS | |
| Summons, Verified Complaint..... | 1 |
| Notice of Motion, RL affd., exhibits..... | 2 |
| RS affd..... | 3 |

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JUL 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

Gische, J.:

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

Defendants All Precision Needs, Ltd., and its principal Ray Lamitola (collectively "APN") move, pre answer, to dismiss this action brought against them for failure to state a cause of action. CPLR § 3211. Plaintiff, Westport Hardness and Gaging Corporation ("Westport") have opposed this motion by submitting a Memorandum of Law only, to which APN has replied.

In considering this motion based on the alleged failure to state a cause of action, the complaint is construed in favor of the plaintiff and it is entitled to the benefit of every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). The inquiry is not whether plaintiff can establish the claim asserted, but rather whether the complaint supports any cognizable claim against the defendant. Guggenheimer v. Ginzburg, *supra*.

APN has submitted the affidavits of both Richard Steinbauer and Ray Lamitola in support of its motion to dismiss. While affidavits are used freely to preserve an inartfully pleaded but potentially meritorious claim, they are seldom relied upon for support to dismiss a pleading unless they conclusively establish that plaintiff has no cause of action. Rovello v. Orofino Realty Co., 40 NY2d 633 (1976). With these principles in mind, the court addresses the particular causes of action asserted.

The first cause of action is for a preliminary and permanent injunction against all defendants based upon breach of contract. The second cause of action is for an accounting against all defendants. The third cause of action is for specific performance against Steinbauer only. The fourth cause of action is for tortious interference with contractual relations against APN. The fifth cause of action is for tortious interference with business relations against all defendants. The sixth and last cause of action is for conversion against all defendants.

The underlying facts alleged are that Steinbauer was an employee of Westport and he signed an agreement which not only restricted his use and disclosure of proprietary and confidential information owned by Westport but also contained a non-compete clause. Westport alleges that Steinbauer left its employ and was thereafter employed by APN. Westport alleges that Steinbauer, through APN, is violating the employment agreement by directly competing with it in violation of the restrictive covenant and using its proprietary information to do business with Westport's customers.

It is beyond dispute that the only contract that existed was between Westport and Steinbauer. Thus, Westport concedes that there can be no breach of contract action brought against APN. Although the first cause of action is for a permanent injunction, it is based upon a claim for breach of contract. The relief is styled against all defendants,

despite Westport's argument in opposition that this cause of action applies only to Steinbauer. Injunctive relief, however, is an equitable remedy available to address a cognizable wrong where there is no adequate remedy at law. Harris v. Doe, 204 NYS2d 712 (NY Co. Sup. Ct. 1960); Spatt v. Feinberg, 183 NYS2s 659 (NY Co. Sup. Ct. 1959). As more fully set forth below, because Westport's claims for tortious interference with contract and tortious interference with business survive this motion, and Westport has otherwise alleged no adequate remedy at law, the claims for preliminary and permanent injunctive relief against APN survives dismissal, albeit not based upon any claim of breach of contract.

The second cause of action is for an accounting. An accounting is an equitable remedy, the essential elements of which are an allegation of a fiduciary relationship and a charge of wrongdoing against the party having that duty. Hamilton v. Patrolman's Benevolent Association of City of New York, 88 NYS2d 683 (Sup. Ct. Queens Co. 1949); Bezuska v. LaModels, Inc. 2006 WL 770526 (*nor*). Here there is no allegation that Westport and APN have a fiduciary relationship. Moreover, the complaint reveals that what Westport really wants is information relevant to calculating its damages on the other causes of action. This information is available through discovery, but does not form the basis for a separate cause of action for an accounting from APN. The second cause of action is, therefore, dismissed.

The third cause of action is for specific performance of a contract and it is asserted against defendant Steinbauer only. Thus, the motion to dismiss such claim as against APN is denied as academic.

The fourth cause of action is for tortious interference with contractual relations. In order to establish a validly stated cause of action for tortious interference with contract a

plaintiff must allege the existence of a valid contract between plaintiff and a third party, the defendant's intentional and unjustified procurement of the third party's breach of contract and resulting damages. JM Ball Chrysler LLC v. Marong Chrysler-Plymouth, Inc., 19 AD3d 1094 (4th dept. 2005). Here the contract that Westport claims APN interfered with is the one it has with co-defendant Steinbauer. Allegations supporting this claim have been alleged in the complaint. Although APN relies on Steinbauer's affidavit stating that he did not breach the contract, this is inherently a factual issue that is not reviewable at the pre-answer stage of the proceedings. Moreover, arguments that the contract's non-compete clause (at issue in this action) is not enforceable because it is not reasonable as to time and geography, are rejected. The reasonableness of the restrictions must be examined in the factual context in which such agreements are made and such agreements are routinely upheld. BBDO Seidman v. Hirshberg, 93 NY2d 382 (1999); Gelder Medical Group v. Webber, 41 NY2d 680 (1977); North Shore Hematology/Oncology v. Zevros, 278 AD2d 210 (2nd dept 2000); Zelner v. Conrad, 183 AD2d 250 (2nd dept 1992). Consequently, there is no basis for dismissal of the fourth cause of action at this juncture.

The fifth cause of action is for tortious interference with business. Tortious interference with business relations is a distinct and separate claim from tortious interference with contract. Carvel Corp. v. Noonan, 3 NY3d 359 (2004). It applies to those situations where a third party would have entered into, or extended a contractual relationship with, plaintiff but for the wrongful and intentional acts of the defendant. Where, as here, the alleged interferer is a business competitor, then, unless wrongful means are employed, an interference that is intended to advance the competing interest of the interferer is not actionable. In Carvel Corp v. Noonan, *supra*, the Court of Appeals held that in order to constitute "wrongful means" the conduct by the competitor must: [1] amount to a crime or

[2] constitute an independent tort or [3] be for the sole purpose of inflicting intentional harm on plaintiffs. See also: Stapelton Studios LLC v. City of New York, ___ AD3d ___, 810 NYS2d 657 (1st dept. 2006). Here, the independent tort on which this particular tort is premised is the intentional tortious interference with Steinbrauer's contract. There is no allegation of a crime and there is no claim that the purpose of APN's conduct was solely for the purpose of inflicting harm on Westport. Thus the wrongful means in this case must constitute an independent tort. Since Westport has plead a valid cause of action for the independent tort, this claim survives dismissal as well.

The sixth cause of action is for conversion. Conversion is the wrongful interference with the property of another. Republic of Haiti v. Duvalier, 211 AD2d 379 (1st dept. 1995). In order to assert conversion a plaintiff must demonstrate not only an ownership interest in the property alleged to be converted (State v. Seventh Regiment Fund, Inc. 98 NY2d 249 [2002]) but also that the unauthorized possession was to the exclusion of the rights of plaintiff. AMF Inc. V. Algo Distributors, Ltd., 48 Ad2d 352 (2nd dept. 1875). Where, as here, the property claimed converted in a customer list or other proprietary information that still remains in the possession of plaintiff, even though it is also alleged to be in the possession of defendant, it will not form the basis for the tort of conversion. Hair Say, Ltd. V. Salon Opus, Inc., 6 Misc. 3d 1041 (A), 800 NYS2d 347 (table)(NY Sup Ct. Nass. Co. 2007). The motion to dismiss the sixth cause of action is therefore granted.

CONCLUSION

In accordance herewith it is hereby:

ORDERED that the motion to dismiss made by defendants All Precision Needs, Ltd and Ray Lamitola is granted only to the extent that the second and sixth causes of action are hereby dismissed as to such defendants, and it is further

ORDERED that the motion to dismiss made by defendants All Precision Needs, Ltd and Ray Lamitola is denied as academic as to the third cause of action, and it is further

ORDERED that the motion to dismiss made by defendants All Precision Needs, Ltd and Ray Lamitola is denied as to all remaining causes of action, and it is further

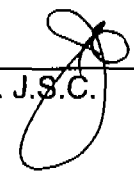
ORDERED that defendants All Precision Needs, Ltd and Ray Lamitola shall serve an file an answer as to the remaining cause of action asserted against them no later than 20 days after the date of this decision, and it is further

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

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

Dated: New York, New York
July 20, 2007

SO ORDERED:



J.G. J.S.C.

FILED
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