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NO. 265/02

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 6-18-07
Submission Date: 8-10-07
Motion Sequence No.: 007/MOT D

BEVERAGE MARKETING USA, INC. and HORNELL BREWING CO., INC.,

Plaintiffs,

- against -

SOUTH BEACH BEVERAGE COMPANY, INC. and JOHN BELLO,

Defendants.

COUNSEL FOR PLAINTIFFS
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COUNSEL FOR DEFENDANTS
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ORDER

The following papers were read on Defendant's motion to reargue the portions of this Courts' order of April 11, 2007 which denied Defendants' prior motion for summary judgment:

Notice of Motion dated June 1, 2007;
Affirmation of Sanford M. Goldman, Esq. dated June 1, 2007;
Defendant's Memorandum of Law;
Plaintiff's Memorandum of Law;
Defendant's Reply Memorandum of Law.

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Defendants, South Beach Beverage Company, Inc. ("South Beach") and John Bello ("Bello") move for an order pursuant to CPLR 2221(d) granting leave to reargue so much of this Court's order dated April 11, 2007 as denied summary judgment with respect to misappropriation of certain alleged trade secrets, breach of fiduciary duty and unfair competition.

The factual details of this action for misappropriation of trade secrets and breach of fiduciary duty are outlined in this Court's order dated April 11, 2007 and will not be repeated here, except as necessary.

In its prior order, this Court granted Defendants' motion for summary judgment with respect to several of Plaintiff, Beverage Marketing USA, Inc's ("Beverage Marketing") misappropriation of trade secret claims, but found factual issues concerning unfair competition, cost information, distribution plans and strategies, marketing techniques and strategy/business plan. Dismissed were trade secret claims concerning flavor formulations, tunnel pasteurization, a hot-fill process, specialized consumer preference knowledge, customer lists, glass packaging and labeling technology, supplier/co-packer information, production methods and order handling and billing processes. The latter were found to be neither confidential nor secret.

Initially, Beverage Marketing's claim for unfair competition was previously dismissed. Its application to replead was denied by order dated April 7, 2004. That order was not appealed by Beverage Marketing. Thus, no cause of action for unfair

competition is pending (see, *Beverage Marketing USA v. South Beach Beverage Co.*, 20 A.D. 3d 439, 440 [2nd Dept. 2005] [". . . arguments on behalf of the Defendant Beverage Marketing, USA, Inc., [have] not been considered as no notice of appeal was filed by that Defendant"]). Accordingly, the cause of action for unfair competition should not have been sustained.

Turning to the merits of reargument regarding misappropriation of trade secrets and breach of fiduciary duty, a motion for reargument is addressed to the sound discretion of the court, and may be granted "upon a showing that the court overlooked or misapprehended the relevant facts or misapplied [a] controlling principle of law." McGill v. Goldman, 261 A.D. 2d 593, 594 (2nd Dept. 1999). Reargument "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." *Id.* Here, Defendants have persuaded the Court that it overlooked and/or misapprehended material facts and law.

With respect to the claim for breach of fiduciary duty, the deposition testimony of Stephen Graeme of Wild Flavors, Inc. failed to raise a factual issue as to whether Bello was planning to start his own business while still employed by Beverage Marketing.

In support of Defendants' motion to dismiss, Bello provided unequivocal and uncontroverted testimony that he decided to go into the beverage business for himself

in 1995; only after Plaintiff fired him from a six figure position. For purposes of summary judgment, Bello made a *prima facie* showing of entitlement to judgment as a matter of law. Alvarez v Prospect Hosp., 68 N.Y. 2d 320 (1986). As a result, Beverage Marketing was required to come forward with proof in admissible form establishing the existence of a triable issue. Davenport v. County of Nassau, 279 A.D. 2d 497 (2nd Dept. 2001).

In the underlying motion, Plaintiff offered Graeme's testimony concerning a conversation in which Bello spoke of a plan to start his own beverage company. Graeme testified that the conversation took place either in 1994 *or* 1995, stating "It may have been early in the year of '94 or early in the year of '95 . . . " (Graeme transcript, pp.12-13. Graeme's admittedly unclear memory and resultant equivocal testimony is insufficient to raise an issue of fact concerning the timing of this conversation, as speculation would be required for resolution of the discrepancy. See Shelden v. Hample Equipment Co., 89 A.D. 2d 766 (3rd Dept. 1982) (Equivocal testimony by plaintiff's witness "does not create a question of fact"; it "establishes" that plaintiff "failed to satisfy her required burden of proof"), *affd.*, 59 N.Y. 2d 618 (1983); and Bachurski v. Polish and Slavic Federal Credit Union, 33 A.D. 3d 739, 740 (2nd Dept. 2006) ("In opposition, the plaintiffs failed to raise a triable issue of fact, setting forth only equivocal deposition testimony").

With respect to trade secrets and Plaintiff's 1995 business plan, this Court found that the plan was confidential and "at least one page in the South Beach Business Plan was copied in both form and format" directly from the AriZona business plan.[1] While the Court was correct, those pages were not original to Beverage Marketing. Rather they originated in public documents published by a company with a name similar to that of Plaintiff; Beverage Marketing Corporation. Beverage Marketing Corporation is an independent publisher of beverage industry data and is unrelated to Plaintiff. A public document is clearly not a trade secret or proprietary to Plaintiff.

Defendants argue that even if the AriZona's business plan is entitled to trade secret protection, any similarities are the product of Bello's casual memory, which is not actionable. The Court disagrees. There is no "broad rule dictating that anything an employee remembers casually is not a trade secret." B.U.S.A. Corp. v. Ecogloves, 2006 WL 3302841, *4 (S.D.N.Y. 2006). Moreover the "casual memory" exception to trade secret protection has been applied only in the context of secret customer lists and customer information, and not generally to other trade secrets. See, *e.g.*, Leo Silfen, Inc. v. Cream, 29 N.Y. 2d 387 (1972); Falco v. Parry, 6 A.D. 3d 1138 (4th Dept. 2004); Zurich Depository Corp. v. Gilenson, 121 A.D. 2d 443 (2nd Dept. 1986); and Arnold K. Davis & Co., v. Ludemann, 160 A.D. 2d 614 (1st Dept. 1990).

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[1]AriZona is the name under which Beverage Marketing sells its soft drinks,

The Court finds that South Beach's business plan was not appropriated from AriZona. South Beach's business plan contains approximately 85 pages of detailed analysis of the new age market and its readiness for a new entrant. South Beach's business plan contains research findings, a ten point business plan, a detailed distribution plan and plan for merchandising support, plus development time lines, financial information, executive profiles, designs and market facts. Little resembles Arizona's simple 28 page business and marketing plan except for those items taken from industry publications.

While South Beach's plan reveals its hope to challenge AriZona, an industry leader in the premium ready to drink tea market, it also states an intention to "trump" other "new age beverage leaders" by introducing a more distinctive package and by doing the unconventional to build a "fun brand". The targets outlined in South Beach's plan are the industry leaders, AriZona and Snapple, as would be expected. Although South Beach may have copied AriZona's distinctive bottle shape, an acknowledged factor in its market success, the bottle shape is not secret. Secrecy of design is lost when a product is placed in the open market (Hudson Hotels Corp. v Choice Hotels International, 995 F2d 1173, 1177 [2nd Cir. 1992], *abrogated on other grds. by*, Nadel v. Play-by-Play Toys & Novelties, 208 F3d 368 [2nd Cir. 2000]), and the "readily discernible physical features" of a product in the public marketplace are not secret. A.

H. Emery Co. v. Marcan Prods. Corp., 389 F.2d 11, 15 (2nd Cir.), *cert. den.* 393 U.S. 835 (1968).

South Beach's plan also adopts a geographic identity strategy, which is not novel or secret, and outlines its reasons for associating itself with Miami and its image. The plan also identifies some strategic errors made by AriZona and states its intention to avoid making the same mistakes.

In its prior order, this Court overlooked the fact that AriZona had not established that its marketing errors were secret. Thus, it failed in its burden of proof. Moreover, AriZona's loss of market share is documented in industry publications which track the new age beverage business. The causes of public market loss, identified as business errors including price increases, lack of marketing support, quality problems and rumors of sale, are, by their nature, perceptible to the industry. Beverage Marketing's perceived insufficient manpower for a national market, the only other error sought to be avoided and identified in South Beach's business plan, has not been shown to be a secret. The size of a company relative to its geographic market is not a self-evident secret. It was Plaintiff's burden to show that it was.

Plaintiff has failed to show that its business errors were secret. Even assuming, *arguendo* for purposes of this motion, that business "errors" could be protected as a trade secret. Any conclusion that former employee, Bello, and his new company would be condemned to repeat rather than avoid the same mistakes must be rejected. Sound

business practice avoids the known mistakes of competitors, particularly when, as here, repeating such errors could also be claimed as proof of appropriation.

Further considering marketing plans, strategies and mistakes, Beverage Marketing has failed to establish that the information used by Bello was anything other than information publicly available. For example, a website offered by Defendants on reargument, *FundingUniverse.com*. outlines the history of AriZona Beverages, its marketing strategies, its advertising and wholesaler errors, its targeting of neighborhood stores, its market share as its fortunes grew and the success of its bottle shape and some flavor formulas. Indeed, John Ferolito and Don Vultaggio co-founders of Beverage Marketing, are widely quoted in the article explaining their marketing strategies. Moreover, the Court takes notice that "guerilla marketing", which bypasses big media advertising, and targets marketing efforts at the point of sale level, is not peculiar or original to AriZona. Thus, it cannot be deemed secret.

Plaintiff's cost information was also available from other sources. Although the Court found that nothing in the record established that "anyone outside of Beverage Marketing knew its various costs for the components of its beverages, the costs incurred to bottle and label its products, its distribution costs and/or advertising and promotional costs", this factual finding, standing alone, is insufficient to establish a trade secret. Costs are not subject to trade secret protection when the evidence establishes that the Plaintiff's suppliers are not exclusive, inasmuch as they also supply

the Plaintiff's competitors. See, Cosmos Forms, Ltd. v. American Computer Forms, 193 A.D. 2d 577, 579 (2nd Dept. 1993)

In addition, Defendants' expert, J. Ross Colbert ("Colbert"), asserted that people outside of Beverage Marketing knew the cost of its operations and that the information is available from the Plaintiff's suppliers *Id.* Having met its burden of proof to show that Plaintiff's costs were not secret, it was not part of Defendants' burden of proof to actually secure the information from AriZona's suppliers. Accordingly, the motion papers do not provide evidentiary support for the Plaintiff's claim that its cost information was confidential. Marietta Corp. v. Fairhurst, 301 A.D. 2d 734, 738 (3rd Dept. 2003).

The authorities relied upon by Plaintiff is inapposite. It is only in those cases where companies compete or bid for a single contract that pricing information can be deemed confidential. In such cases, the confidential information concerning pricing can be used to submit a lower bid than the plaintiff and thus compete unfairly. See, e.g., Support Sys. Assocs. v. Tavolacci, 135 A.D. 2d 704 (2nd Dept. 1987). Here, there is no bid competition to be the sole supplier of ready-to-drink teas. The new age beverage business is open to many competitors, and success by one does not preclude success by another. See, Laidlaw, Inc. v. Student Transportation of America, 20 F.Supp.2d 727, 759 (D.N.J. 1998); Inflight Newspapers, Inc. v. Magazines In-Flight, *LLC*, 990 F.Supp. 119, 126 (E.D.N.Y. 1997); and Panther Systems II, Ltd. v.

Panther Computer Systems, 783 F.Supp. 53, 69 (E.D.N.Y. 1991). See also, B.U.S.A. Corp. v. Ecogloves, *supra*.

To establish that costs are confidential, Plaintiff relies upon Support Sys. Assoc. v. Tavolacci, *supra*, which concerned a contractor supplying automatic test equipment and engineering test programs for the B-1 Bomber manufactured by Rockwell International for the United States Department of Defense. There, costs were subject to an additional critical factor; to wit: Department of Defense procurement regulations required confidentiality concerning military contract bids. *Id.* at 705-6. Such circumstances are distinguishable from this case, where cost information, which is not applicable to exclusive contractors or subject to government regulations, and is known and shared by suppliers, is not confidential or entitled to trade secret protection. Additionally, even if Plaintiff's pricing information was confidential, its "conclusory allegations" that Bello "used" his knowledge of Plaintiff's pricing "to undermine" its business "is insufficient to defeat the motion for summary judgment." Cosmos Forms, Ltd. v. American Computer Forms, *supra* at 579.

With respect to the remaining alleged trade secrets, Plaintiff failed to meet its burden of proof to show that they were secret and that they were used by Bello and South Beach. Plaintiff attempts to show "specified" trade secrets regarding distribution plans and strategies, which are either not specific enough to be considered confidential or they are broadcast in publications available to anyone with an internet connection.

Plaintiff makes vague references to "strengths", "management commitment", "marketing skill" and "capacity", which references do nothing to support Plaintiff's burden of proof regarding secret "distribution plans and strategies".

With respect to weaknesses, product mix, product experience in beverage categories and product sales, these items are also discussed in the *FundingUniverse.com* internet site which contains extensive quotes from Beverage Marketings co-founders John Ferolito and Don Vultaggio who discuss the very items Vultaggio here claims are confidential. Further, AriZona's sales are also detailed in industry publications. Accordingly, the alleged secrets are not secret and not protected.

Finally, the Court also rejects Plaintiff's contention that the complaint may not be dismissed so long as Bello was exposed to trade secrets, even without proof that he appropriated or used such secrets. The "inevitable disclosure" theory relied upon by Plaintiff is employed only in the context of an application for a preliminary injunction. See, e.g., Marietta Corp. v. Fairhurst, *supra*. Its application in New York is restricted and limited to applications for a preliminary injunction, where access to trade secrets is sufficient for purposes of establishing a likelihood of success on the merits without an actual showing of appropriation. *Compare,* DoubleClick v. Henderson, 1997 WL 731413 (Sup. Ct. N.Y. Co.1997) with Silipos, Inc. v. Bickel, 206 WL 2265055, *5 (S.D.N.Y.).

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Accordingly, it is,

ORDERED, that Defendants' motion to reargue this Court's order of April 11, 2007 is **granted**; and it is further,

ORDERED, that, upon reargument, Defendants' motion for summary judgment is **granted** in its entirety. The complaint is hereby dismissed.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
October 10, 2007

Hon. LEONARD B. AUSTIN, J.S.C.

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ENTERED

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