

Nastel Tech., Inc. v Shetty

2007 NY Slip Op 33961(U)

December 5, 2007

Supreme Court, Suffolk County

Docket Number: 0026557/2006

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

NASTEL TECHNOLOGIES, INC.

Plaintiff

-against-

KIRSH SHETTY,

Respondents

MOTION DATE: 6-15-07, 7-16-07
SUBMITTED: 6-20-07, 8-1-07
MOTION NO.: 001 - RRC
002 - Mot D

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Upon the following papers numbered 1 to 21 read on this Motion to Dismiss the Complaint; Notice of Motion and supporting papers 1- 9; Answering Affidavits and supporting papers 10-19; Replying Affidavits and supporting papers 20-21; and upon the following papers numbered 1 to 18 read on this Order to Show Cause for a Preliminary Injunction; Order to Show Cause and supporting papers 1; Answering Affidavits and supporting papers 2- 10; and Replying Affidavits and supporting papers 11- 18; it is,

ORDERED that the motion dated June 25, 2007 by defendant, Kirsh Shetty (“Shetty”) seeking dismissal of the Fifth, Seventh and Eighth causes of action in the Verified Complaint dated May 23, 2007 is denied. It is further;

ORDERED that the motion dated June 25, 2007 seeking dismissal of the First and Second causes of action is granted. It is further;

ORDERED that the Order to Show Cause dated June 15, 2007 seeking a preliminary injunction is hereby referred to a conference on January 9, 2008 at 11:00 a.m.

In his motion to dismiss, Shetty claims that the First, Second, Fifth, Seventh and Eighth causes of action fail to state a claim upon which relief may be granted and that certain of these causes of action are moot as a result of a so-ordered Stipulation between the parties dated May 30, 2007 (the “Stipulation”)

Respondent Shetty is a 36.5% shareholder in Nastel Technologies, Inc. (“Nastel”),

an entity incorporated on or about November 9, 1994, under the laws of the State of Delaware. The remaining shareholders of Nastel include David Mavashev, who owns 57.5% of the outstanding stock and Albert Mavashev, who owns 5% of the outstanding stock. Although the verified complaint contains eight causes of action, Shetty seeks to dismiss only five of them. Therefore, only those causes of action affected by the motion will be discussed herein.

Nastel claims in the First cause of action that Shetty, converted certain corporate assets including a laptop computer and a separate hard drive, along with all of the electronic information contained on them. In addition, Nastel claims conversion of hard copies of corporate documents and contends that Shetty has refused to return any of these items despite Nastel's demand to do so. Nastel alleges that it will be irreparably harmed unless Shetty is compelled to return Nastel's assets and seeks both compensatory and punitive damages. Nastel in its Second cause of action seeks the return of the same Nastel property, and alleges that Shetty has taken these corporate assets willfully, maliciously and with the intention of harming Nastel. However Nastel seeks injunctive relief by way of an order compelling Shetty to return the laptop, return all Nastel-owned information including but not limited to documents, emails, computer files and other data on the laptop at the time of Shetty's termination and to return the hard disk drive which allegedly belongs to Nastel.

Nastel's Fifth cause of action alleges defamation and business slander by Shetty. It is alleged that on or about May 3, 2007 Shetty initiated a telephone call with a Vice President of a bank with which Nastel has a line of credit. It is claimed that during this telephone call Shetty suggested that Nastel is no longer a good credit risk. Shetty allegedly misrepresented to the bank that Nastel has no controller, that the financial prospects of Nastel had declined and that the future of the company was in serious jeopardy. Nastel alleges that Shetty made these statements to induce the bank to take actions that harm Nastel and that he knew these statements were false when made. It is claimed that as a result of this conversation, the bank suspended Nastel's right to draw on its line of credit.

The Seventh cause of action claims unfair competition pursuant to GBL 360-1 and common law alleging that Shetty incorporated an entity called "Nastel Corporation" to deliberately confuse and deceive potential customers to transfer their "loyalties" from Nastel to Nastel Corporation. Nastel claims that it will suffer irreparable harm if Shetty is not ordered to cease and desist using the Nastel name.

The Eighth and final cause of action claims unauthorized disclosure of confidential information. Prior to the events that led to this litigation, Nastel settled an action with ASG. Pursuant to the terms of that settlement, the terms of the agreement were to remain confidential. It is Nastel's position that Shetty, without authority, disclosed the terms of this agreement to Dee Gulati. Mr. Gulati is a technology and investment expert who served as an expert witness for Nastel in the ASG litigation. As a result of this alleged unauthorized disclosure, Nastel claims it is now exposed to claims for breach of confidentiality. In addition, this cause of action alleges that by use of the previously discussed laptop, Shetty continued to access confidential information of Nastel. It is alleged that Shetty has formed a new company and is using Nastel's confidential information.

In his motion to dismiss these causes of action, Shetty claims that the within action was commenced as a retaliatory lawsuit in response to his filing an action, against Nastel and its remaining principals¹. He contends that no conversion ever took place and that the first cause of action is not sufficiently plead and the second cause of action seeking return of Nastel Property, is moot in light of the Stipulation. Shetty contends that aside from the laptop, (which Nastel agreed to let him keep), the hard drive and the hard copies of the documents belonging to Nastel, have already been turned over to Nastel's counsel. Shetty further argues that the fifth cause of action lacks the requisite specificity required for defamation and business slander, and the seventh cause of action lacks the specificity required for unfair competition. Finally, Shetty argues that the eighth cause of action for unauthorized disclosure of confidential information is refuted by an affidavit of Dee Gulati claiming that no confidential information was disclosed to him by Shetty. He further argues that since he is no longer in possession of Nastel property, he is not using nor disclosing any confidential information and this cause of action is moot.

It is well settled that, on a motion to dismiss pursuant to **CPLR 3211(a)(7)**, the Court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see, Leon v Martinez*, 84 NY2d 83; **Guggenheimer v Ginzburg**, 43 NY2d 268; **Rovello v Orofino Realty Co.**, 40 NY2d 633). However, under CPLR 3211 (a)(1), dismissal is warranted if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (*see, Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326; *Leon v Martinez, supra* at 88). Furthermore, an action is subject to dismissal if said action is barred by the applicable statute of limitations. (*see, A. Morrison Trucking v. Bonfiglio*, 13 Misc 3d 1211A). Additionally, the Court must look to the individual causes of action and determine if they are sufficiently plead to survive a motion to dismiss (*see, EBC Inc. v Goldman, Sachs & Co.* 5 NY3d 11).

In reading the complaint in a light most favorably to the plaintiff, the Court finds that causes of action five, seven and eight are sufficiently plead to survive this motion to dismiss. The fifth cause of action seeks to recover damages for defamation and business slander. In an action for libel or slander, the particular words complained of shall be set forth in the complaint but their application to the plaintiff may be stated generally, (*see, CPLR 3016*). As the plaintiff quite correctly points out in its opposition, paragraph 55 sets forth the conversation alleged to have taken place between Shetty and the Vice President of the bank with which Nastel does business. The plaintiff has satisfied its burden as to this cause of action. The seventh cause of action likewise is adequately plead to survive this motion. Nastel has not provided any information other than his denial of this cause of action, which would refute the allegations of unfair competition. Nastel alleges the Shetty has created another company under the name Nastel Corp. An unfair competition claim may result from representations or conduct that deceive the public into believing that the business name, reputation or good will of one person is that of another, (*see, Ruder & Finn v Seaboard Surety Company* 52 NY2d 663). Although in the case now before the court,

1. This action is related to a pending litigation before this court under Index #26557/06 captioned Shetty v. Nastel Technologies Inc. et al.

Shetty denies creating a new company under this name, Shetty argues that he originally created the name Nastel and plaintiff's claim to the name is "suspect", (*see*, Affidavit in opposition of Shetty at ¶ 16). Whether or not Shetty continues to retain the right to use the name Nastel, will be determined after the parties have conducted discovery on all remaining issues in this complaint. The court denies Shetty's motion to dismiss the seventh cause of action.

Nastel's claim for unauthorized disclosure of confidential information is clearly set forth in the verified complaint. The information Nastel claims to have been disclosed is stated, the individual to whom it was allegedly disclosed is identified and the potential harm to Nastel is indicated. Although, as previously indicated, Shetty in his opposition has submitted an affidavit by Dee Gulati which purports to refute this allegation, consideration of this affidavit in the within motion is premature. The Court is aware that discovery has not yet proceeded in this action and all parties will be given the opportunity to support their respective positions, at the appropriate time. In evaluating this allegation in the context of this motion to dismiss, the court finds that the Eighth cause of action is plead with the requisite particularity and dismissal of this cause of action is denied.

Shetty's motion as it pertains to causes of action one and two are granted. Both these causes of action allege conversion of computer equipment and extensive electronic and paper business records of Nastel and seeks their return along with damages. The record before the court indicates that Shetty has turned over the laptop and hard drive to a forensic computer technician pursuant to the Stipulation. In addition, Nastel in its opposition, acknowledges that the laptop and hard drive were turned over, and that Shetty delivered three boxes of documents to Nastel.² Based on this record, the court finds dismissal of the first and second causes of action is warranted. However, if the plaintiff identifies additional property of Nastel which it believes Shetty is in possession of, the Court grants leave to replead causes of action one and two.

Pending before this court is also an Order to Show Cause signed by Justice Emerson on May 31, 2007 seeking a preliminary injunction. This Order contained a request for a temporary restraining order which was resolved by the Stipulation. However, to the extent that issues remain regarding the issuance preliminary injunction against Shetty, they are referred to a conference which shall be held on January 9, 2008 at 11:00 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

DATED: December 5, 2007

HON. ELIZABETH HAZLITT EMERSON

J. S.C.

² The court notes that although the laptop was turned over, Shetty claims that after it was "wiped clean" of Nastel's files, he was permitted to retain ownership of the laptop. In addition, the files that were turned over to Nastel were copied, the Court is aware that Shetty's attorney is in possession of copies of the documents.