

Fusebox, Inc. v Shin

2007 NY Slip Op 34091(U)

December 13, 2007

Supreme Court, New York County

Docket Number: 0603951/2006

Judge: Richard B. Lowe

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

PRESENT.

HON. RICHARD B. LOWE, III

PART Se

Index Number : 603951/2006

FUSEBOX

vs

SHIN, HANA

Sequence Number : 003

DISMISS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

8/10/07

C

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 18 2007
NEW YORK COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE, III

Dated: 12/13/07

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
FUSEBOX, INC.

Plaintiff,

Index No. 603951/06

- against -

HANNA SHIN, STEVEN NEWMAN,
JAMES D. JACKSON, PARADIGM MARKETING,
JOHN DOE Nos. 1-5 and JANE DOE Nos. 1-5,

Defendants.
-----X

FILED
DEC 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE III, J.:

Defendants Hanna Shin, James D. Jackson, and Paradigm Marketing (collectively, the "Paradigm defendants"), move, pursuant to CPLR 3211(a)(7), to dismiss the first, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, and twelfth causes of action against them in the Complaint.

BACKGROUND

Plaintiff, Fusebox, Inc. ("Fusebox"), is a professional services internet firm that develops multi-channel marketing, creative, and technology solutions for businesses. The individual defendants are current or former Fusebox employees. Shin is Fusebox's former Vice President of Marketing, responsible for business development, client relations, proposals, management of work product and billing, and project management with employees. Defendant Steven Newman ("Newman") is Fusebox's Creative Director with responsibility for design, project management of creative staff, and creative work production. Jackson is Fusebox's former Flash Director, working with the company for less than two months, and responsible for programming creative product as a final deliverable in Flash format, and programming other creative products.

Paradigm is a business entity formed by Shin, Newman, and Jackson. Defendants John Doe Nos. 1-5 and Jane Doe Nos. 1-5 are unidentified persons who worked with the named codefendants.

Fusebox commenced this action seeking to recover damages for the alleged wrongful conduct of defendants. Fusebox essentially claims that defendants diverted clients, projects, and payments away from it; misappropriated its proprietary information; and directly competed with its business. Fusebox further claims that defendants' wrongful conduct makes them liable for damages for breach of contract, breach of fiduciary duty, breach of duty of loyalty, tortious interference with contract, tortious interference with business relationship, unjust enrichment, conversion, misappropriation of trade secrets, and unfair competition.

The Complaint alleges that Shin, Newman, and Jackson entered into written agreements apprising them of their duties and obligations as Fusebox employees. Specifically, Fusebox claims that the written offers of employment extended to these defendants, coupled with Fusebox's written Employment Policies received by defendants upon their engagement, sufficiently set forth their duties and obligations so as to establish binding and enforceable written employment agreements between them and Fusebox. The Complaint also asserts that Fusebox's written Employment Policies prohibit employees from undertaking outside work without prior consent from Fusebox management; prohibit employees from engaging in commercial endeavors in conflict with Fusebox's business interests; apprise employees that all documents, notes, files, records, oral information, computer files, or similar materials are confidential and may not be removed from Fusebox's premises or disclosed to any unauthorized person; and apprise Fusebox employees that they may not copy or disperse any copyrighted material, trade secrets, or proprietary financial information. Fusebox alleges, *inter alia*, that

defendants violated these policies by operating Paradigm, a direct competitor, and diverting clients, projects, and payments away from Fusebox for the benefit of Paradigm.

In particular, Fusebox asserts that its roster of clients includes Viacom International, Inc. (“Viacom”) and several of its properties, including MTV, Nickelodeon, and Spike TV/38th Floor Productions (“Spike TV”). Fusebox further claims that between 2004 and 2006, defendants, *inter alia*, diverted Viacom contracts, projects and payments away from Fusebox for the benefit of Paradigm.

Fusebox cites numerous examples of defendants’ alleged wrongful conduct. In particular, Fusebox claims that defendants (1) diverted work on the “MTV World” project through Paradigm and submitted Paradigm contracts and invoices totaling \$17,195 for work performed by Fusebox employees on that project; (2) submitted Paradigm invoices totaling \$15,000 for Fusebox’s work on the contract for the Spike TV “Pros vs. Joes Email Campaign” project; (3) issued a Paradigm invoice in the amount of \$9,040 for Fusebox’s work on the contract for the Spike TV “AutoRite Evite” project; (4) issued a Paradigm invoice in an unspecified amount for Fusebox’s work on the contract for the Spike TV “AutoRox Email Campaign” project; (5) issued a Paradigm invoice in the amount of \$9,000 for Fusebox’s work on the contract for the Spike TV “AutoRox Online Campaign” project; (6) submitted a Paradigm invoice in the amount of \$7,000 for Fusebox’s work on the Spike TV “Bullrun Email Campaign” project; (7) submitted Paradigm invoices totaling \$43,500 for Fusebox’s work on the Spike TV “Video Game Award Banner” project; (8) submitted a Paradigm invoice in the amount of \$13,500 and diverted payments owed to Fusebox for work performed on the Spike TV “Scream Awards” project; (9) issued a Paradigm invoice for Fusebox’s work on the contract for the Spike TV “Thumbsdown Smackdown” project; (10) submitted a Paradigm invoice in the amount of \$6,000 and received

payment for hair styling and make up performed by Warren Tricomi Salon for a Spike TV video shoot; (11) billed Spike TV through Paradigm (a) \$3,000 for Fusebox's work on the Spike TV "KOV Online Campaign" project; (b) \$6,500 for Fusebox's creative services on the "Slammin' Saturdays Email Campaign" project; (c) \$25,000 for Fusebox's creative services and programming on the "CSI 5 Webisodes" project; (d) \$1,000 for Fusebox's preliminary work on the "Ultimate Fighter Fusespot" project; (e) \$5,500 for Fusebox's preliminary work and creative services on the "V-Girl Casting Call" project; (f) \$3,000 for Fusebox's work on the "Viva Baseball Online Banner" project; (g) \$11,780 for Fusebox's Website Production work; (h) \$5,000 for Fusebox's HTML production on the "2005 Video Games Awards" project; (i) \$1,000 for Fusebox's promotional work on the "2005 Pros v Joes Online" project; (j) \$1,300 for Fusebox's promotional and splash page work on the "King of Vegas" project; (k) \$6,500 for Fusebox's flash promotion work on the "2005 Video Game Awards 'Vote' Email Campaign" project; (l) \$9,200 for Fusebox's work on the "2005 Video Games Award 'Tune-in' Online Campaign" project; (m) \$13,950 for Fusebox's video editing work on the "2005 Video Games Awards" project; (n) \$5,250 for Fusebox's creative services and for email list rental for the "Schick Email Campaign" project; (o) \$16,000 through Paradigm for Fusebox's work on the "Total Nonstop Action Online Banner Campaign" project; and (p) \$3,000 for Fusebox's work on two banner ads and back-up gifts; (12) billed ESPN through Paradigm (a) ESPN \$16,350 through Paradigm for Fusebox's work on the "ESPN.Com Trade Campaign" project; (b) \$4,885 for Fusebox's work on the "AdAge.Com Online Campaign" project; (c) \$11,750 for Fusebox's creative services and HTML, evite, and email work on the "ESPN US Open" project; and (d) \$10,000 for Fusebox's 3-D animation work on the "ESPN Upfront/Nascar" Project; (13) billed MTV (a) \$3,500 for Fusebox's creative services on the "BETJ MTVN.Com Flash

Movie/Banner” project; and (b) \$3,500 for Fusebox’s creative services on the “BET Gospel MTVN.Com Flash Movie/Banner” project; and (14) billed Fusebox and received more than \$30,000 in payments for purported client expenses. Fusebox also claims that Shin received payments for unapproved, duplicate or phony expenses totaling \$1,279.35 in 2004, \$35,806.05 in 2005, and \$50,000 in 2006.

The first cause of action alleges that Shin breached her employment agreement with Fusebox by, *inter alia*, undertaking outside work without prior consent from management, undertaking work in conflict with Fusebox’s business interest, and using Fusebox’s confidential or proprietary information. The second and third causes of action make similar allegations against Newman and Jackson, respectively. The fourth cause of action alleges that defendants breached their fiduciary duty to Fusebox by using Fusebox’s resources, employees, and proprietary information to organize a competitor and divert business. The fifth cause of action alleges, *inter alia*, that defendants breached their duty of loyalty by using Fusebox’s confidential or proprietary information to operate a competing business. The sixth, seventh, and eighth causes of action allege that defendants tortiously interfered with its General Services Agreement with Spike TV, ESPN Agreement, and other Viacom client agreements, respectively. The ninth cause of action alleges that defendants tortiously interfered with Fusebox’s established business relationships by diverting its client and business, misappropriating its confidential and proprietary information, and misrepresenting Paradigm as a division of Fusebox. The tenth cause of action alleges a claim for unjust enrichment against defendants. The eleventh cause of action alleges a claim for conversion. The twelfth cause of action alleges a claim for misappropriation of trade secrets against defendants, and the thirteenth cause of action alleges a claim for unjust enrichment against defendants.

The Paradigm defendants now move to dismiss the first, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, and twelfth causes of action in the Complaint for failure to state a cause of action.

DISCUSSION

On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]). When extrinsic evidence is introduced attacking the complaint, however, the truthfulness of the pleaded allegations is not assumed, and the inquiry is as to whether the pleader has a cause of action or defense, not whether he has properly stated one (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]).

As stated, the first and third causes of action allege claims for breach of contract against Shin and Jackson, respectively. In order to state a cause of action for breach of contract, the plaintiff must allege the existence of a valid agreement between the parties, performance by the plaintiff, failure of performance by the defendant, and damages (*Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

Here, Fusebox argues, in essence, that contracts of employment have been established through the written offers of employment extended to Shin and Jackson and the written Employment Policies received by them upon their engagement. Fusebox further alleges that

defendants breached their contractual obligations by undertaking outside work in conflict with its business interests, and using its confidential and proprietary information.

In order to determine whether valid employment agreements existed between Fusebox and defendants, the Court must look to the objective manifestations of the intent of the parties to be bound by an agreement as gathered by their expressed words and deeds (*see Brown Bros. Elec. Contr., Inc. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]). The written offers of employment extended to Shin and Jackson expressly state that “terms of this offer letter ... do not and are not intended to create either an express and/or implied contract of employment with Fusebox” (Not of Mot, Exh B). Similarly, the memoranda acknowledging receipt of Fusebox’s Employment Policies, which each Fusebox employee is required to sign, states that “nothing contained in the Employment Policies may be construed as creating a promise of future benefits or a binding contract with Fusebox for benefits or for any other purpose, except those as specifically outlined in my signed contract” (*id.*, Exh C). Even construed in the light most favorable to plaintiff, the language of the abovementioned documents demonstrates the intent of the parties not to be bound by an agreement. In the absence of factual allegations to establish the existence of any agreement between the parties, the first and third causes of action alleging claims for breach of contract against Sin and Jackson, respectively, must fail. Thus, the branch of the motion that seeks to dismiss the first and third causes of action in the Complaint is granted.

The fourth cause of action alleges that defendants breached their fiduciary duty by using Fusebox’s resources, employees, files, confidential and proprietary information to organize a competitor and divert business away from it. In order to state a cause of action for breach of fiduciary duty, the pleading must allege the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant’s misconduct (*Kurtzman v*

Bergstol, 40 AD3d 588, 590 (2d Dept 2007)). Furthermore, the circumstances constituting the alleged misconduct must be stated in detail (CPLR 3016[b]).

The Complaint sufficiently sets forth specific allegations that Shin wrongfully diverted clients, projects, and payments away from Fusebox so as to state a viable claim for breach of fiduciary duty against her. Furthermore, although defendants make much of the fact that Fusebox employed Jackson for only two months and most of the projects identified in the Complaint were alleged to have been performed before or after his tenure, the Complaint specifically alleges that Jackson was an active participant in the wrongdoing during his employment with Fusebox. In particular, the Complaint alleges that Jackson and other Fusebox employees created, designed, developed, and stored the Spike TV Video Games Awards Banner project on Fusebox's server; that Shin requested an invoice from Jackson for \$10,000 for the work on the Video Games Awards project; that the invoice included Jackson's name, address, and social security number; and that defendants used the Jackson invoice to support the Paradigm invoices issued to Spike TV for the Video Games Awards project.

However, in the absence of factual allegations to establish the existence of a fiduciary relationship between Fusebox and Paradigm, the cause of action for breach of fiduciary duty against Paradigm must be dismissed. Thus, the branch of the motion that seeks to dismiss the claim for breach of fiduciary duty is granted as to Paradigm and denied as to Shin and Jackson.

Similarly, the branch of the motion that seeks to dismiss the cause of action for breach of the duty of loyalty must be granted as to Paradigm and denied as to Shin and Jackson. "An employee has a duty of undivided loyalty to his employer" (*Southmark/Envicon Capital Corp. v United Airlines, Inc.*, 132 Misc 2d 586, 588 [1986]). It is well established that an employee "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 Adv. Corp.*, 272 NY 133, 138 [1936]). Moreover, while it is lawful for an employee to organize a competing business while employed, the employee must not use the employer’s time, facilities, or proprietary secrets to build the competing business (*Maritime Fish Prods. Inc. v World Wide Fish Prods., Inc.*, 100 AD2d 81, 88 [1st Dept 1984]). Here, the factual allegations against Shin and Jackson are sufficient to survive a motion to dismiss the cause of action for breach of the duty of loyalty to Fusebox, their former employer. However, the Complaint fails to allege any facts to establish that Paradigm owed any duty of loyalty to Fusebox, its competitor.

The sixth, seventh, and eighth causes of action allege that defendants tortiously interfered with Fusebox’s contracts with Spike TV, ESPN, and other Viacom clients, respectively. A claim for tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant’s knowledge of that contract; (3) the defendant’s intentional procuring of the breach; and (4) damages (*Foster v Churchill*, 87 NY2d 744, 749-750 [1996]). Here, the Complaint sets forth specific allegations that Fusebox had valid contracts with Spike TV, ESPN, and other Viacom properties, that the Paradigm defendants had specific knowledge of said contracts, and that defendants intentionally procured the breach of these agreements, *inter alia*, by diverting clients, projects, and payments away from Fusebox, resulting in damages. Thus, the branch of the motion that seeks to dismiss the sixth, seventh, and eighth causes of action in the Complaint must be denied.

As to the claim of tortious interference with business relations, which requires a showing that defendants intentionally and through wrongful acts prevented a third party from extending a contractual relationship to plaintiff, the Complaint sets forth sufficient allegations that the

Paradigm defendants intentionally used wrongful means to interfere with Fusebox's dealings with Spike TV, ESPN, and MTV on prospective projects. Thus, the request to dismiss the ninth cause of action is also denied.

The eleventh cause of action alleges a claim against the Paradigm defendants for conversion. Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights (*Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288-289 [2007]). Here, the Complaint alleges in detail that the Paradigm defendants exercised ownership over certain confidential and proprietary materials belonging to Fusebox, including software, files, documents, graphics, and sensitive financial information, to the exclusion of Fusebox's rights. Thus, the branch of the motion that seeks to dismiss the eleventh cause of action is also denied.

Likewise, the Complaint sufficiently alleges that the Paradigm defendants wrongfully appropriated confidential and proprietary information, including computer files, client information, project bids, client invoices, so as to survive a motion to dismiss the cause of action for misappropriation of trade secrets (*see Ashland Mgt, Inc. v Janien*, 82 NY2d 395, 407 [1993]). Thus, the branch of the motion that seeks to dismiss the twelfth cause of action must be denied.

Some time after filing the instant motion, by letter dated August 9, 2007, the Paradigm defendants sought to stay this action, pursuant to CPLR 2201, pending the resolution of a criminal proceeding against Shin. Defendants essentially assert that Shin pleaded guilty to grand larceny based on the alleged wrongful conduct that is the subject of this action; that she is liable for damages in excess of \$369,000; and that it is likely that she will be ordered by the criminal court to make restitution to Fusebox in the amount of \$369,000. Defendants further assert that Shin is scheduled to be sentenced in January 2008.

CPLR 2201 directs that unless otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just. However, a stay pending determination of another action should not be granted unless the other action presents complete identity of parties, causes of action, and relief sought (*Matter of Squire [Donner]*, 161 AD2d 405, 406 [1st Dept 1990]). As the criminal proceeding does not satisfy these prerequisites, grounds for a stay are not present.

Accordingly, it is

ORDERED that the motion is granted to the extent of dismissing the first and third causes of action against the Paradigm defendants, as well as the fourth and fifth causes of action as against Paradigm, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that the request for a stay is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of this order with notice of entry.

Dated: December 13, 2007

ENTER:

HON. JUDGE D. LOWE, III

FILED
DEC. 18 2007
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