

**Louis Capital Markets, L.P. v REFCO Group Ltd.,
LLC**

2008 NY Slip Op 30131(U)

January 2, 2008

Supreme Court, New York County

Docket Number: 0601028/2004

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
Charles Edward Ramos 53

PART _____

Index Number : 601028/2004
LOUIS CAPITAL MARKETS
vs
REFCO GROUP LTD
Sequence Number : 009
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read _____ s 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):

**IS DISPOSED OF
IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM DECISION.**

FILED
JAN 16 2008
NEW YORK
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Dated: 1/2/08



HON. CHARLES E. RAMOS J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
LOUIS CAPITAL MARKETS, L.P., Successor to
LOUIS CAPITAL MARKETS, L.L.P.,

Plaintiff,

Index No.
601028/04

-against-

REFCO GROUP LTD., LLC, REFCO SECURITIES, LLC,
REFCO SECURITIES PARIS S.A., ALAIN FELLOUS,
MICHAEL BENISTY, HENRI CONDRON, BENJAMIN CHOUCANE,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

In motion 9, defendants REFCO Securities Paris, SA ("REFCO Paris") and Michael Benisty move pursuant to CPLR 3212 for summary judgment dismissing the remaining two causes of action. The motion is granted and the case is dismissed.

This is an alleged corporate espionage case. Three causes of action remain following the court's prior decisions, with which the court assumes familiarity. The first cause of action is against Mr. Benisty for tortious interference with at-will employment relationships between plaintiff Louis Capital Markets ("LCM") and its former at-will employees Benjamin Chouchane and Henri Condron. The third cause of action is against Mr. Benisty and REFCO Paris for unfair competition with LCM based on REFCO Paris's alleged conspiracy to infiltrate LCM with Mr. Benisty and steal trade secrets and key staff. The sixth cause of action against Mr. Benisty is for breach of fiduciary duty based on his alleged involvement in the corporate espionage.

For a motion for summary judgement, the court must accept as true the opposing party's evidence and any evidence of the movant

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that favors the opposing party, here plaintiff. *Weiss v Garfield*, 21 AD2d 156, 158 (3d Dept 1964). A plaintiff opposing a motion for summary judgment must

"come forward and lay bare his proofs of evidentiary facts showing that there is a bona fide issue requiring trial...[it] cannot defeat this motion by general conclusory allegations which contain no specific factual references."

Hanson v Ontario Mild Producers Co-Op., Inc., 58 Misc 2d 138, 139 (Sup Ct, Oswego County, 1968). As discussed below, plaintiff's evidence is woefully insufficient and plaintiff has utterly failed to offer any facts to establish its claims. "Suspicion, surmise and accusation are not enough to defeat a motion for summary judgment." *Pappalardo v Meisel*, 112 AD2d 277, 278 (2d Dept 1985).

The first cause of action against Mr. Benisty for tortious interference arising from Benisty's recruitment of LCM employees Chouchane and Condron is dismissed. For tortious interference with economic relations involving an at-will employee, plaintiff must prove that defendants used wrongful means to recruit the at-will employee. *Carvel Corp. v Noonan*, 3 NY3d 182, 190 (2004). Wrongful conduct can be criminal conduct or an independent tort, such as breach of fiduciary duty. Hiring at-will employees is not sufficient to sustain an allegation of tortious interference. *Lockheed Martin Corp. v Atlas Commerce Inc.*, 283 AD2d 801, 803 (3d Dept 2001). However,

"To successfully oppose a motion for summary judgment on a cause of action for tortious interference with prospective business relations, plaintiffs must establish that defendants engaged in the use of wrongful or unlawful means to secure a competitive advantage over plaintiffs, or that

defendants acted for the sole purpose of inflicting intentional harm on plaintiffs."

NBT Bancorp Inc. v Fleet/Norstar Financial Group Inc., 215 AD2d 990 (3d Dept 1995), affirmed, 87 NY2d 614 (1996). Wrongful means is defined as "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not include persuasion alone." *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 (1980).

Plaintiff alleges Mr. Benisty breached his fiduciary duty to LCM by recruiting to REFCO New York four other LCM employees including Chouchane and Condron when LCM had only 12 employees. Recruitment of LCM employees was but one element of defendants' alleged scheme set up an identical competing business at REFCO New York. In 2002 when Mr. Benisty came to work for LCM, REFCO New York had no presence to sell equities to institutional accounts. Benhamou 100:8-19. According to Laurent Imbert, LCM's co-managing partner, throughout 2002, REFCO Paris allegedly tried to acquire LCM and when that plan failed, two or three months before Mr. Benisty was fired in December 2002, Mr. Alain Fellous of REFCO Paris stopped visiting LCM. Imbert 164:2-165:5. Mr. Imbert concludes that Fellous visited REFCO New York during those months setting up the competing operation. *Id.* Plaintiff's whole case rests on this scheme, yet the only basis in fact for the scheme is that Fellous stopped visiting LCM. This is not enough.

As proof of defendants' sinister intent, Mr. Imbert

testified that during a 10 or 15 minute conversation during which Mr. Benisty was confronted about his plan to compete with LCM and fired, Mr. Benisty said he was going to destroy LCM. Imbert: 206 to 209. Accepting for the purpose of this motion that Mr. Benisty threatened to ruin LCM, it is simply not enough to establish the scheme of which raiding employees is but one part.

Personal reasons do not constitute a motive to harm. See *Headquarters Buick-Nissan, Inc. v Michael Oldsmobile*, 149 AD2d 302, 305 (1st Dept 1989). Chouchane and Condron had other perfectly reasonable financial incentives for joining REFCO.

Mr. Chouchane was hired by LCM as Mr. Benisty's assistant in July 2002¹ for \$35,000 which was not increased during his brief tenure. Chouchane 11:19-12:25; 36:25-37:3. Chouchane was an employee-at-will and did not have customers of his own. Chouchane 31:34. In November 2002, Mr. Benisty told Chouchane he was leaving LCM and offered Chouchane the opportunity to join him. Chouchane 31:21-32:8. Chouchane followed Mr. Benisty to REFCO where he was paid \$60,000. Chouchane 36:2-3; 100:21-24. REFCO also gave Chouchane the opportunity to develop his own client base. Id.

Mr. Condron was hired by LCM in March 2002 as an "office clerk" also as an employee-at-will. Condron 20:14-21:3. He was paid \$35,000 with no increase during his term. Condron 23:21-24:2. Chouchane approached Condron after Chouchane had left LCM.

¹ Since Benisty came to LCM prior to LCM hiring Chouchane, Benisty could not have been sent to poach him from LCM.

Condrón 39:20-40:6. In December 2002, Condrón interviewed with Mr. Benisty and accepted a job at REFCO. Condrón 40:7-41:8. He began working in January 2003 and was paid more than he was paid at LCM. Condrón 41:23-42:2.

Plaintiff fails to offer any evidence of wrongful means. Employees, including employees-at-will, are always free to leave their employment, especially for better terms. *Triangle Film corp. v Aircraft Pictures Corp.*, 250 F 981, 982 (2d Cir. 1918). Notifying your work colleagues of your imminent departure is not forbidden. *Headquarters Buick-Nissan Inc. v Michael Oldsmobile*, 149 AD2d 302, 305 (1st Dept 1989). Here, Chouchane immediately joined Mr. Benisty at REFCO. That LCM consisted of 12 employees and that five employees (Benisty, Condrón, Chouchane, Mellul and Pagani) left over a three month period (December 2002 to February 2003) is not sufficient to prove raiding. *See id.* *See also*, *Anchor Alloys, Inc. v Non-Ferrous Processing Corp.*, 39 AD2d 504, 507-08 (2d Dept 1972), appeal denied 32 NY2d 612 (1973) (10% of workforce including plant foreman was not raiding); *CBS Corp. v Dumsday*, 268 AD2d 350 (1st Dept 2000). REFCO offered these employees better opportunities including more money. *See Anchor Alloys, Inc. v Non-Ferrous Processing Corp.*, 39 AD2d 504, 507-08 (2d Dept 1972). LCM admits that neither Chouchane nor Condrón are key employees. Rather, LCM contends that since it has less than 15 employees, every employee is key. LCM's small workforce does not protect it from competition. *Lazar, Inc. v Kesselring*, 823 NYS2d 834, 839 (Sup Ct, Monroe County 2005). Therefore,

LCM's first cause of action for tortious interference is dismissed.

The third cause of action against Mr. Benisty and REFCO Paris for unfair competition is dismissed. For a claim of unfair competition, plaintiff must prove misappropriation or exploitation of confidential information belonging to the former employer in abuse of the relationship of trust. *Comprehensive Community Dev. Corp. v Lehach*, 223 AD2d 399 (1st Dept 1996). Although the employee's obligations of good faith to the employer end upon termination, the employee's obligations with regard to trade secrets differ depending on whether the alleged disclosure was pre or post termination. *Am. Broadcasting v Wolf*, 52 NY2d 394, 404 (1981). During employment, employees are forbidden from disclosing information even if that information does not meet the requirements for trade secret protection, while post-termination a former employee may use skills and experience gained during employment because of the "powerful" public policy consideration militating against sanctioning the loss of a man's livelihood. *Columbia Ribbon & Carbon Mfg. Co v A-1-A Corp.*, 42 NY2d 496, 499 (1977). Both pre and post termination, an employee is barred from using the employer's confidential information or trade secrets. *Advance Biofactures Corp. v Greenberg*, 103 AD2d 834, 836 (2d Dept 1984).

Here, plaintiff alleges that Mr. Benisty stole LCM's "long/short pair trading model" and/or "risk management procedures." LCM also implies that its knowledge of French

culture is a trade secret. A trade secret is a formula, pattern, device or compilation of information which gives the possessor of the information an advantage over a competitor who does not possess the information. *Ashland Management Inc. v Janien*, 82 NY2d 395, 407 (1993). According to the Restatement, the factors that should be considered in determining trade secret status include:

the extent to which the information is known outside of the business;

the extent to which it is known by employees and others involved in the business;

the extent of measures taken by the business to guard the secrecy of the information;

the value of the information to the business and its competitors;

the amount of effort or money expended by the business in developing the information;

the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement First, Torts §757 Comment (b).

LCM has failed to establish that it had a trade secret.

Plaintiffs's knowledge of French culture is not unique.

Plaintiff offers only conclusory testimony by LCM's principals

Michael Benhamou and Laurent Imbert that LCM had trade secrets.

See e.g. Imbert 26:15 -28:16. Imbert testified that LCM

"as soon as 2000 we started to hire graduate students from the best engineering schools in Paris . . . to create a model of trading in order to use as marketing tools for our customers. This model has been so effective that ever since every semester the head of the graduate program is asking whether we want to hire two, four trainees in order to keep upgrading our system. So that was the second part, our trading model was so well recognized that we managed to open

up to 400 additional trading customers. Then customers were paying us either through the ideas that we were proposing them or any type of ideas, but obviously they wanted to pay us for the quality of our ideas. ... our sales force was not as big as some of the institutions. So in order to be able to trade with 400 customers we had to do two things -number one, create a product which was very unique, which I just talked about. Number two, being able to propose turnkey solutions to European brokers who were not members of the U.S. markets and were utilizing our clearing, a technical terms, piggybacking our clearing agreement in order to be able to trade in the U.S., which is exactly what we did with REFCO."

Imbert 16:1-18:11. See also Benhamou: 19:13-21:4; 25:2-26:7. By LCM's own admission, REFCO Paris was not using LCM's secret model, but its clearing facility.

The Court also finds Mr. Imbert's reasoning flawed. That a school's placement office repeatedly contacts an employer about jobs for its recent graduates is not evidence that the model allegedly created by prior students using feedback from French customers is a trade secret. Benhamou 25:2-26:7.

Also, flawed is Mr. Imbert's conclusion that 400 new clients came to LCM because of its secret model. Alternatively, these European customers may have come to LCM for its equity trading facility as REFCO Paris had. There is simply no proof offered to establish the existence of a trade secret.

LCM's statements about creating the secret trading model without more is insufficient. Rather, some evidence of time, cost, and effort are necessary to show that the model is not public. *Hecht Foods, Inc. v Sherman*, 43 AD2d 850 (2d Dept 1974).

Alternatively, an employer could show that its trade secret is not readily accessible and that the competitor developed an

identical product soon after hiring the wayward employee. Mr. Benhamou testified in response to a request for facts supporting LCM's contention that Benisty or Condron used the same long/short program:

"Because they were able to show ideas to our customer at the same time we did. There was more than this. We had a system in the office to execute certain types of orders that were hard to execute, for example risk arbitrage, so we had internal system that could execute these orders and that was the job of Henri Condron at Louis Capital. So we knew that the Excel spreadsheet that were developed internally to execute order was transferred, because they could execute order very easily the day after."

Benhamou 59:11-22. Later Mr. Benhamou testified that there was no proof that the Excel file was stolen. Benhamou 60:3-6. Rather, Benhamou concludes that Benisty or one of the other former LCM employees must have had this very complicated formula contained in an EXCEL spreadsheet in his head. *Id.* LCM's principals also testified that Mr. Benisty at REFCO New York did precisely the same work that he did at LCM. Imbert 28:12-16. Benhamou 58:9-13. Both acknowledge that their information was based on conversations with LCM's customers, (Benhamou 58:9-59:6) yet not one customer affidavit was supplied in opposition to the motion for summary judgment nor does LCM offer a customer as a witness at trial. That is simply not enough for LCM to prove its claim for unfair competition. *Lombardi v First Nat. Bank of Hancock*, 23 AD2d 713 (3d Dept 1965) (summary judgment was properly granted where only evidence in opposition to judgment was incompetent and it was clear that no additional evidence could be adduced at trial).

Moreover, there is no evidence that LCM's "trade secrets" were not possessed by every other broker dealer on the street. Benhamou 27:13-15. Indeed, according to Benhamou and Imbert, LCM did nothing to protect these alleged trade secrets. Benhamou 60:7-13, 74:8-13, 80:9-11; Imbert 137:7-24, 140:9-10. This failure is fatal to LCM's request here for trade secret protection. *J&L Am. Enters., Ltd v DSA Direct, LLC*, 10 Misc 3d 1076A, (Sup Ct, NY County, 2006); *Ice Sculpture Designs Inc. v Icebreakers*, 14 Misc 3d 1227A, (Sup Ct., Nassau County, 2007). Therefore, plaintiff's third cause of action against defendants for unfair competition is dismissed.

LCM's sixth cause of action against Benisty for breach of fiduciary duty is dismissed. An employee has a duty of good faith and loyalty to his employer. *Duane Jones Co. v Burke*, 306 NY 172, 187-88 (1953). This duty applies during the term of employment and bars the employee from (1) competing with the employer; (2) acting on behalf of third parties whose interests conflict with those of the employer; and (3) using or disclosing the employer's confidential or trade secrets.² NY employment Law (2d ed) §4.02[1][a]. The duty continues after termination but only to the extent that the former employee may not use the employer's trade secrets or confidential information which was addressed above with respect to the third cause of action. Accordingly, the only remaining issue is whether Mr. Benisty was

² This third duty is addressed with respect the third cause of action.

competing with LCM during the course of his employment by LCM or whether he was simultaneously working for REFCO while employed by LCM.

Mr. Benisty was allegedly sent by REFCO Paris as a corporate spy to infiltrate LCM, learn its business strategies, befriend LCM's key employees, and leave to create a direct competitor at REFCO New York, taking secrets and employees with him. LCM's proof is that Mr. Benisty worked at REFCO Paris, worked at LCM for nine months, left to work for REFCO New York which created a new department in direct competition with LCM and one LCM employee left with Mr. Benisty while three other LCM employees followed Mr. Benisty later to REFCO.

Mr. Benisty was an employee-at-will who did nothing more than resign to compete with his former employer. Employment by a competitor after termination is not corporate espionage or proof of prior espionage. See e.g., *Duane Jones Co. v Burke*, 306 NY 172, 187-88 (1953). Rather, absent a contrary agreement, an employee is free to compete with his former employer and to use the knowledge and skills he gained while employed by the predecessor employer. *Reed Roberts Assocs. Inc. v Strauman*, 40 NY2d 303 (1976).

As proof of the espionage scheme, LCM points to Mr. Benisty's regular contact with Mr. Fellous of REFCO Paris while Mr. Benisty was working at LCM. Mr. Benisty's employment at LCM was contingent on his bringing the REFCO Paris business of \$4.5 million with him to LCM. Benhamou 51:23-52:24. Mr. Benisty was

required to be in regular contact with Fellous to fulfill his duties to LCM. Without more, these phone calls do not establish that Benisty was serving two masters.

LCM makes much of the fact that Mr. Benisty testified at his deposition that "I was not close to Alan Fellous." Benisty 133:22-135:13. First, LCM completely mischaracterizes Mr. Benisty's statement regarding proximity not relationship. The question he was answering was whether Fellous had a boss. He answered "I can't answer this question. I was not close to Alan Fellous. He was not on the [trading] floor." Nonetheless, even if the court accepts LCM's butchered version of Benisty's statement, it leads to the question how then did these two men who were not close cook up this very intricate scheme of espionage. Implicit in LCM's accusation is that in addition to conducting \$4.5 million in business on the phone, Benisty and Fellous were simultaneously spying. The Court rejects plaintiff's invitation to surmise, imply or guess. Rather, to defeat defendant's motion, plaintiff must establish the existence of a material fact to create a triable issue. *Shaw v Time-Life Records*, 38 NY2d 201 (1975). Plaintiff offers nothing to support its contention of corporate espionage. Plaintiff's "proof" is insufficient to establish that Mr. Benisty breached his fiduciary duty by infiltrating LCM on REFCO Paris's behalf.

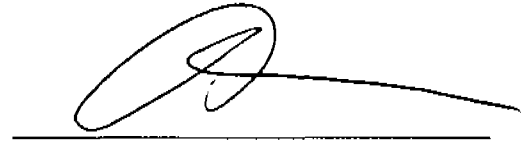
Accordingly, it is

ORDERED, that defendants' motion for summary judgment is granted and the action is dismissed in its entirety with costs

and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: January 2, 2008



J.S.C.

HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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