

**Institutional Drug Supply Corp. v Christopher Niall,
LLC**

2008 NY Slip Op 30809(U)

March 7, 2008

Supreme Court, Nassau County

Docket Number: 0756-06/

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

**INSTITUTIONAL DRUG SUPPLY CORP. and
REMINGTON OFFICE & SCHOOL SUPPLY CORP.,**

Plaintiffs,

**INDEX NO.: 010756/2006
MOTION DATE: 01/18/2008
MOTION SEQUENCE: 007**

-against-

**CHRISTOPHER NIALL, LLC, CHRISTOPHER
BARRETT, DESERIE KALLELIS-DIMAGGIO,
ANGELA LAMBERTI a/k/a LYNN LAMBERTI,
GALE THERESA TOLEDO, LISA GIORDANO,
NURYS DELAROSA and APRIL B. BIENER,**

Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit, Facts and Background dated 10/18/07 & Exhibits Annexed.....	1
Summons & Verified Complaint.....	2
Affirmation in Opposition of Andrew M. Jacobs, Esq.	3
Answer to Reply of Christopher Barrett & Exhibits Annexed.....	4

This motion by defendant, Christopher Barrett, for an order pursuant to CPLR 3212 granting summary judgment is determined as follows.

As a threshold procedural matter, there are seven other defendants, in addition to Christopher Barrett. Six are individually named former employees of plaintiff. Defendants are all appearing pro se with the exception of the corporate defendant Christopher Niall LLC which is not represented by counsel, and is in default. Insofar as the moving defendant is not a lawyer, this motion is brought solely on his own behalf.

Plaintiffs commenced this action seeking injunctive relief, (in the first and second causes of action) and damages from six defendants who left plaintiffs' employ and went to work for Christopher Niall LLC. Plaintiffs are in the business of selling catalogue goods to institutions over the telephone. The women employees provided sales services for plaintiffs, and after they left, for Christopher Niall LLC. Christopher Niall LLC opened in 2005, then closed in 2007. Plaintiffs have continuously been in business since 1963.

Defendant Barrett was alleged to be a principal of Christopher Niall LLC. Complaint ¶ 16. It is alleged that he met with plaintiffs' former employees, induced them to leave, come to work for Christopher Niall doing the same work, and to bring with them plaintiffs' proprietary information to use in competition against plaintiffs. Complaint ¶ 17.

Three causes of action are plead in the complaint. The first is labeled unfair competition and misappropriation of trade secrets. Plaintiffs claim that the information they entrusted to their employees was secret, has great value, was created after great expenditures of money and labor, and cannot be duplicated. Complaint ¶¶ 22, 24, 25 and 26.

The second cause of action is labeled misappropriation of plaintiffs' property and confidential information. Plaintiffs claim that the "Former Employees" stood in a confidential relationship to plaintiff by virtue of their employment, Complaint ¶ 32, that the confidential information entrusted to them was developed using the skill and labor of plaintiffs' employees, and despite their knowledge that it was confidential, they misappropriated it and used it to misplace plaintiffs as a provider of catalogue goods. Complaint ¶¶ 34, 36 and 37.

The final cause of action is labeled unfair competition and wrongful conversion of trade secrets. Plaintiffs claim that they own trade secrets and confidential information, Complaint ¶ 41, they kept it secret and confidential, Complaint ¶ 42, and defendants AA and BB [sic] use the confidential information to solicit customers of plaintiff. Complaint ¶ 44.

The complaint is unartfully drafted as the three causes of action are not distinguished by reference to any of the recognized business torts in this State. They are repetitious. Notwithstanding, the complaint can be understood to complain of unfair competition and the taking, retention and use of plaintiffs' trade secrets. Plaintiffs define their trade secrets as being the "database of customer information including but not limited to the names and addresses, individual contact information, payment information and kinds of products each customer buys."

Complaint ¶ 5. They allege that the former employees physically took records with them on the last day of their employment. Further, that they contact plaintiffs' customers and tell them reasons why they should buy from the new employer, Christopher Niall. And, that one of the employees sold products for Christopher Niall while employed by plaintiffs.

The claims against Christopher Barrett are not easily identified. There was no important information entrusted to him by plaintiffs. The complaint does not identify any duty he owed to plaintiffs. It is not alleged that he personally solicited customers who had formerly bought from plaintiffs.

It is alleged he induced the former employees to take possession of plaintiff's "trade secrets," qua customer lists. Paragraph 17 alone in the complaint addresses his conduct. It states that he solicited plaintiffs' former employees, at plaintiffs' offices, to work for Christopher Niall and he induced the co-defendants to bring the customers information with them. Specifically, that he "solicit[ed] the Former Employees to work for Christopher Niall LLC to compete unlawfully with the plaintiffs"

The allegation, seemingly, is that defendant Barrett was involved in unlawful or unfair business competition.

As the first cause of action is drafted, defendant Barrett, who is neither a salesman for plaintiff nor defendant, is not charged with having misappropriated plaintiffs' property and confidential information. He has shown, through his affidavit, and it is not denied by plaintiff, that it was the former employees, if anyone, who took paper information. He has not been charged with aiding and abetting, or conspiracy, leaving aside for purposes of this motion whether the information that the former employees allegedly took constitutes trade secrets, and therefore constitutes a tort. See, H. Meer Dental Supply v Francesco Comisso, 269 A.D.2d 662, 663 (3d Dept 2000) (holding that customer lists are generally not considered confidential information); NCN Company, Inc. v Cavanagh, 215 A.D.2d 737 (2d Dept 1995).

Defendant Barrett has also shown through his first hand knowledge that for the short while that Christopher Niall was in business it sold essentially different products than had the defendants while employed by plaintiffs. He avers that one defendant did make sales for Christopher Niall, for which she was paid a commission, but it was a product not sold by plaintiff.

The first cause of action which deals with the taking of property and confidential information, notwithstanding its label of "unfair competition" does not factually implicate defendant Barrett as his conduct is described in the complaint. He has sustained his prima facie burden that he is entitled to judgment as a matter of law (*see, Zuckerman v City of New York*, 49 N.Y.2d 557, 562), as there are no facts alleged in the complaint to be tried to implicate him in the first cause of action.

The same reasoning applies to the second cause of action. Defendant Barrett was not an employee and, thus, did not stand in a confidential relationship to plaintiff. He did not have access to the confidential information plaintiffs allege their customer list to be contain. It was only accessible through other people. According to defendant Barrett he was not the owner of Christopher Niall LLC, and the evidence supports his contention. Seemingly, he was an agent of the corporation, and is not liable for damages in his own behalf. It bears mentioning that honest competition is not answerable in damages, and that employees may leave a trying employer and take with them the skills they have learned on the job. NCN Company, Inc., 215 A.D.2d at 737. It would, therefore, appear that the second cause of action is not plead on facts involving Barrett and there are no facts necessary of trial as to him.

It has been shown that defendant Barrett was not the creator, owner or principal of Christopher Niall, but that it was one Adele Pinto. Checks were made out by her and the corporate income tax is filed by her. In the motion subjudice defendant Barrett states that he did not go to plaintiffs' corporate offices to meet with the IDS employees. There is ample evidence in the record that the defendant employees wanted to find new positions in the line of work which they knew. Seemingly, the company's proposed relocation would bring an end to their employment, or would require them to commute.

Movant does not deny that he spoke with the defendant employees to recruit them for Christopher Niall. Christopher Niall was formed in 2005 and had operated as a vendor of catalogue merchandise over the telephone for a year before hiring the defendants. It voluntarily closed in 2007, which rather than relieving plaintiffs, enraged them.

The proof shows that a small percentage of the customers of Christopher Niall and of plaintiffs are the same, but that the products sold are different, with the exception of lanyards and some clothing.

Plaintiff claims exceptional damages from the loss of its sales force. To reiterate, the motion sub judice is Barrett's, not the other defendants'. The defendants cannot be lumped together even though the complaint is careless in this regard. Barrett, the only defendant who was not a former employee, is chargeable for any losses resulting from the departure of the of IDS sales staff only if Niall's competition was unfair. It is widely accepted that competition in the market place is valued and the details of how it is effected must be scrutinized before a line can be drawn saying that it is not right. The Court of Appeals in Carvel Corp v Noonan, 3 N.Y.3d 182 (2004) in a case involving tortuous interference with contract stated " competition, by definition, interferes with someone else's economic relations. ... [A]s long as the defendant is motivated by legitimate economic self-interest, it should not matter if the parties are or not competitors in the same marketplace." Id at 191. For this reason only the circumstances of defendants' employment must be examined before this motion is finally determined. In short, did plaintiffs' have a property right in the totality of information about the customers who bought from them which was wrongfully used by Barrett?

It is old law that "absent a covenant not to compete ... an employee is free to compete with his or her former employer unless trade secrets are involved or fraudulent methods employed and 'that remembered information as to specific needs and business habits of particular customers is not confidential' (*Anchor Alloys v Non-Ferrous Processing Corp.*, 39 AD2d 504, 507 mot for lv to app den 32 NY2d 612; see also *Reed, Roberts Assoc v Strauman*, 40 NY2s 303; *Greenwich Mills Co. v Barrie House Coffee*, 991 AD2d 398, 402; Mandel, *The Preparation of Commercial Agreements* [1978 ed], p 178; Ann., 28 ALR3d 7). Knowledge of the intricacies of a business operation does not necessarily constitute a trade secret and absent any wrongdoing it cannot be said that a former employee 'should be prohibited from utilizing his knowledge and talents in this area' (*Reed, Roberts Assoc., v Struaman*, supra, p309). Nor will trade secret protection attach to customer lists where such customers are readily ascertainable from sources outside the former employer's business. *Reed, Roberts Assoc., v Struaman*, supra; *Leo Silfen, Inc v Cream*, 29NY2d 387, 392; Ann., 28 ALR3d 7)." Catalogue Service of Westchester v Henry, 107 AD2d 783,784 (2d Dept 1985); see also NCN Company, Inc. v Cavanagh, 215 A.D.2d 737 (2d Dept 1995) ("in the absence of a restrictive covenant not to compete, 'an employee is free to compete with his or her former employer unless trade secrets are involved or fraudulent methods

are employed”’).

Unfair competition is a broader concern about business affairs, than that between an employer and former employees. “There is no complete list of the activities which constitute unfair competition. The general principle ... evolved from all the cases is that commercial unfairness will be restrained when it appears that there has been a misappropriation for the commercial advantage of one person, of a benefit or property right belonging to another.” Dior v Milton, 9 Misc.2d 425, 431 (Sup. Ct., N.Y. Cty. 1956). Each case turns on its facts rather than technical pleading requirements. Id.

There is authority that a “physical taking or studied copying of the employer’s client information may result in a court enjoining solicitation based not on a trade secret violation but as an egregious breach of trust and confidence (see *Silfen Inc. V Cream*) 29 N.Y.2d 387, 391-392 [1972]).” Battenkill Veterinary Equine PC v Cangelosi, 1 A.D.3d 856,859 (3d Dept 2003). Thus, misappropriation of property rights of a telephone order business is an element of unfair competition.” Dior, 9 Misc2d at 425. The concern is with methods which are deceitful, contrary to accepted business ethics, and harm to the public. Electrolux v ValWorth, 6 N.Y.2d 556 (1959).

Defendant Barrett states that he did not go the plaintiffs’ business offices. He solicited one of plaintiffs’ employees to work for Christopher Niall. He paid her commissions for selling items for Niall which plaintiffs did not sell while she was employed by plaintiffs. Other of plaintiffs’ employees communicated with him relative to a job in the same neighborhood at higher wages. He offered them jobs which they accepted. He did not tell them to bring physical information with them because they didn’t need it. The employees’ work for Nialls was to sell products that were different from the products they sold for plaintiffs with the exception of lanyards and some clothing. He states that the defendant former employees know by heart the names, telephone numbers and preferences of customers with whom they dealt at IDS. In addition, defendant Barrett has never seen any original non-compete agreements which were supposedly signed by the other defendants. Nor has he seen a schedule of plaintiffs’ customers since this action began. Finally, at the commencement of this action the proceeds of sales of the defendant corporation were frozen and the business closed. It remains closed.

Movant has made out a prima facie case for summary judgment. His statements show that

he was acting in economic self interest, without interference or thought to plaintiffs' business. Whether the other defendants took it upon themselves to remove information is an other question. As is the issue of whether the information is entitled to protection as a trade secret. There is no conduct in the foregoing paragraph which can be called unfair competition in any of its forms.

Accordingly, the burden falls upon plaintiffs to show the existence of a viable issue establishing that Christopher Barrett individually or as an agent of Christopher Niall LLC engaged in unfair competition in the business of telephone sales of catalogue merchandise. In order to raise issues of fact sufficient to defeat a motion for summary judgment where movant has presented prima facie evidence in support of its entitlement to such relief, it is incumbent upon the party, here plaintiffs who oppose summary judgment to raise triable issues of fact based upon more than mere conclusory or unsupported assertions. See Sun Yau Ko v Lincoln Savings Bank, 99 A.D.2d 943, *aff'd*, 62 N.Y.2d p38 (1984) (citing to Zuckerman v City of New York, 49 N.Y.2d 557 (1980)).

In opposition plaintiffs have not submitted any argument or proof or evidence by a person with knowledge. This is despite several oral examinations. There is only an affirmation by counsel who has no knowledge and cannot attest to the facts. The cases are legion in holding that and attorney's affirmation has no probative value. Bradt v John Hancock, 98 A.D.2d 886 (3d Dept 1983). Accordingly, the motion is granted, and it is

ORDERED that defendant, Christopher Barrett, is granted summary judgment and the complaint is dismissed against him.

Dated: March 7, 2008


ENTERED

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 NASSAU COUNTY
 COUNTY CLERKS OFFICE