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

PRESENT: HON. EILEEN BRANSTEN PART 3

Justice

Index Number : 601077/2007

EDELMAN, ASHER B.

VS.

STARWOOD CAPITAL GROUP, LLC

SEQUENCE NUMBER : # 003

DISMISS

INDEX NO. 601077-07

MOTION DATE 4/18/08

MOTION SEQ. NO. #003

MOTION CAL. NO. _____

read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause Affidavits — Exhibits	1,2
Answering Affidavits Exhibits	3,4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

FILED

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 6-27-08

HON. EILEEN BRANSTEN 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: PART THREE

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ASHER B. EDELMAN; A.B. EDELMAN MANAGEMENT Co., Inc.; ASHER B. EDELMAN & ASSOCIATES, LLC; MUSEUM PARTNERS, L.P.; MUSEE PARTNERS, L.P.; EDELMAN VALUE PARTNERS, L.P.; and EDELMAN VALUE FUND, LTD.

Plaintiffs,

Index No.: 601077/07
Motion Date: 4/15/08
Motion Sequence Nos.: 003 & 004

-against-

STARWOOD CAPITAL GROUP, LLC; STARWOOD RESORTS AND HOTELS WORLDWIDE, INC.; and STAR GT ACQUISITION,

Defendants.

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PRESENT: EILEEN BRANSTEN, J:

Motion Sequence Nos. 003 and 004 are consolidated for disposition.

Defendants Starwood Capital Group, LLC ("Starwood Capital"), Starwood Resorts and Hotels Worldwide, Inc. ("Starwood Hotels"); and Star GT Acquisition ("Star GT") (collectively "Defendants") move for dismissal pursuant to CPLR 3211(a)(7). Plaintiffs Asher B. Edelman ("Mr. Edelman"); A.B. Edelman Management Co., Inc.; Asher B.

Edelman & Associates, LLC; Museum Partners, L.P.; Musee Partners, L.P.; Edelman Value Partners, L.P.; and Edelman Value Fund, LTD (collectively "Plaintiffs") oppose the motion.

BACKGROUND

Mr. Edelman is an investor and financier, with a specialization in the identification and acquisition of public companies whose value is not accurately reflected by their share price. In 1997, he concluded that non-party Societe du Louvre ("SDL"), a French company whose shares are traded on the Paris Stock Exchange, possessed underlying assets of 14 luxury hotels in Europe that were more valuable than the stock price reflected. The Tattinger Family owned the majority of SDL's stock.

Mr. Edelman desired to acquire SDL in its entirety and alleges that he undertook an extensive research project at a great personal expense to collect data on the company and its assets. This research assisted him in formulating a plan on how to make SDL a more profitable company. In 1999, he retained non-party ODDO et Cie ("ODDO"), a French company, to locate a business partner in the hotel industry and arrange financing for the planned tender offer. They executed a contract in September 1999 that contained a confidentiality provision, wherein ODDO promised not to disclose Mr. Edelman's research and plans for SDL.

ODDO solicited Starwood Hotels, a corporation organized under Maryland law with its principal place of business in White Plains, New York, as Mr. Edelman's potential

partner. Mr. Edelman alleges that Starwood Hotels promised ODDO that it would maintain the confidentiality of his research and plans that it reviewed in deliberating whether to partner with him. Starwood Hotels eventually decided not to partner with Mr. Edelman. After encountering a series of difficulties in obtaining control of SDL, Mr. Edelman abandoned his pursuit.

In 2005, Mr. Edelman learned that the Tattinger Family decided to sell all of their corporate holdings in SDL for the publicly-disclosed price of 1.4 billion euros. Starwood Capital, a Delaware-organized company with its principal place of business in Greenwich, Connecticut, purchased the assets. It used Star GT as the vehicle to make the purchase.

Starwood Capital published a plan for the disposition of SDL's assets, which Mr. Edelman alleges is in fact his. He further alleges a series of connections between Starwood Hotels and Starwood Capital, and infers that the former gave the latter the plan in violation of its purported promise to keep the information confidential.

In March 2007, Plaintiffs commenced this action for unfair competition, improper use of proprietary information, tortious interference with economic advantage, unjust enrichment, and conversion. On October 2, 2007, the Court (Moskowitz, J.) dismissed it without prejudice, and gave Plaintiffs the opportunity to replead within 30 days.

Plaintiffs filed their amended complaint in November 2007, asserting claims for unfair competition, improper use of proprietary information, and unjust enrichment. In Motion

Sequence No. 003, Starwood Capital and Starwood GT move for its dismissal pursuant to CPLR 3211(a)(7). Starwood Hotels moves for the same in Motion Sequence No. 004.

DISCUSSION

"A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. . ." (CPLR 3211[a][7]). In a motion to dismiss, the court takes the facts as alleged in the complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see AG Capital Funding Partners, LP v. State Street Bank and Trust Co,* 5 N.Y.3d 582 [2005]). "The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Ackerman v. 204 East 40th Owners Corp.,* 189 A.D.2d 665 [1st Dept. 1993]).

First Cause of Action: Unfair Competition

Plaintiff's cause of action for unfair competition is rooted in their allegation that the Defendants used Mr. Edelman's confidential plan to increase SDL's value. New York law recognizes seven bases for a claim of unfair competition, one of which is misappropriation (*see* 2 N.Y. PJI3d 3:58). To state such a claim, a plaintiff must demonstrate that it had

compiled information used in its business that provided an opportunity to obtain a competitive advantage and that a competitor misappropriated it (*see Ashland Management Inc. v. Janien,* 82 N.Y.2d 395 [1993]).

Plaintiffs allege that the plan to increase SDL's value was the result of Mr. Edelman's "unique expertise in the recognition of undervalued companies" and that it was "based upon non-public information which [he] developed at a substantial expense" (Frey Aff, Ex. 3, Amended Complaint, ¶ 126-127). They sufficiently plead that this plan was devised for their pecuniary gain in 1999. But it is the competitive element of the claim that warrants its dismissal.

Plaintiffs plead that "[Mr.] Edelman eventually dropped his plan to take over SDL" (*Id.,* ¶ 95), "defendants exploited the strategic information from plaintiffs' plan and used it for their own purpose..."(*Id.,* ¶ 134), and that they "obtained an unfair commercial advantage at plaintiffs' expense" (*Id.,* ¶ 135). While Plaintiffs indeed allege that Defendants siphoned Mr. Edelman's ideas, nowhere do they plead the requisite competitive relationship between them. Unfair competition "requires competition in the marketplace. . ." (*Capitol Records, Inc v. Naxos of America Inc.,* 4 N.Y.3d 540 [2005]). By their own admission, Mr. Edelman abandoned his initiative to gain control of SDL before Starwood Capital launched its quest in 2005. None of the Defendants could have unfairly competed with Mr. Edelman because

he was no longer planning to take over SDL. Plaintiffs therefore do not plead a cognizable claim for unfair competition, and the motion to dismiss it is granted.

Second Cause of Action: Improper Use of Proprietary Information

To state a claim for the improper use of proprietary information, Plaintiffs must first and foremost allege that the information is a secret (*see Ashland Management,* 82 N.Y.2d 395, *supra*). New York courts will consider a number of factors in determining this: 1) the extent in which the information is publicly known; 2) the plaintiff's attempts to keep it confidential; 3) its value; 4) the plaintiff's efforts to develop the information; and 5) the ease or difficulty in duplicating it (*see Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114 [1st Dept. 1998]).

Here, Plaintiffs allege that

"The information accumulated. . . used to formulate [Mr. Edelman's] plan. . .was not publicly available [and included]

• An analysis of the shareholder structure. . .

• A description of each hotel chain owned by the Tattingers including a breakdown in the number of rooms. . . [and] revenue per room. . .

• A quarterly analysis of revenues for each hotel. . .

• Comprehensive analysis for other hotel chains in Europe. . .

• Economic survey of the world-wide hotel market. . .

• [Mr.]Edelman's strategic plan [which was specifically] premised on the sale of the champagne company back to the Tattinger family. . .

• Use of the Crillon name to create a new luxury hotel division. . .

• Removal of the Tattinger family from the 275 positions [they] held. . .

(Frey Aff, Ex. 3, Amended Complaint, ¶ 70).

Moreover, they allege that "[a] true and accurate accounting of the actual size of [the assets] was not publicly available" (*id.*, ¶ 67); "[Mr.] Edelman never revealed. . . the research he had performed. . ." (*id.*, ¶ 68); "[Mr.] Edelman's strategic plan for the takeover was a product of thirty-five years of experience; and that "without [his] extensive and unique experience . . . there could be no strategic plan" (*id.*, ¶ 79).

The alleged proprietary information can be divided into two categories: Mr. Edelman's research and the plan that he devised premised on it. To be sure, the data that contained details on the various hotels and the European hospitality industry is within the public domain and can easily be found. But the analysis that Mr. Edelman conducted and the strategic plan that he prepared are not *per se* within that ambit. The question for this Court to resolve is whether Plaintiffs cognizably allege that Mr. Edelman made sufficient attempts to keep this plan confidential and that it was it was used by Defendants.

Plaintiffs plead that "through ODDO. . . Starwood Hotels orally assured [Mr.] Edelman. . .that such confidentiality will be maintained" (Frey Aff, Ex. 3, Amended Complaint, ¶ 88). They acknowledge that Mr. Edelman did not have any confidentiality agreement with either Starwood Capital or Star GT (*Id.*, ¶ 98). Finally, they plead that Starwood Capital, with Star GT's aid, are the defendants who allegedly used Mr. Edelman's plan (*Id.*, ¶¶ 101-107).

While Plaintiffs sufficiently pled that Mr. Edelman made reasonable attempts to maintain the plan's confidentiality with Starwood Hotels, nowhere do they allege that it actually used his plan. The allegations that there are "links" between Starwood Capital and Starwood Hotels do not sufficiently plead that the two were so intertwined that one's decisions and actions could be imputed on the other (*Id.*, ¶¶ 108-113). With respect to Starwood Capital and Star GT, there is no pleading whatsoever that Mr. Edelman made any attempt to ensure that they kept his plan non-disclosed. In fact, the complaint is bereft of any indication that Mr. Edelman knew these two entities when he devised his plan and attempted to take over SDL in 1999. Plaintiffs fail to satisfy the liberal pleading requirements, and this claim is therefore dismissed.

Third Cause of Action: Unjust Enrichment

"To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant [obtained] the benefit without adequately compensating plaintiff therefor" (*Nakamura v. Fuji,* 253 A.D. 2d 387 [1st. Dept. 1998].) "While. . .a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, . . . a claim does not lie [when the relationship] is simply too attenuated" (*Sperry v. Compton Corp.,* 8 N.Y.3d 204 [2007].)

Here, Plaintiffs plead that "Defendants reviewed the proprietary information. . .by giving plaintiffs their assurances that the information would be used solely for the purpose of evaluating their interest in joining plaintiffs in the takeover " (Frey Aff, Ex. 3, Amended Complaint, ¶ 146); "By using the proprietary information and strategic plan. . . defendants were unjustly enriched at plaintiff's expense" (*Id.,* ¶ 153); "Plaintiffs therefore demand that [D]efendants disgorge the profits and rewards obtained by them at [P]laintiffs' expense. . ." (*Id.,* ¶ 153). These allegations do not state a cognizable claim for unjust enrichment.

Plaintiffs broadly plead that all Defendants reviewed the plan for the purposes of potentially partnering with Mr. Edelman, but it was Starwood Hotels to whom ODDO revealed the plan to in 1999 (*Id.,* ¶¶ 87-90). Starwood Hotels was not the entity who sought to purchase SDL in 2005. The complaint fails to state a claim that Starwood Hotels used and

therefore benefitted from Mr. Edelman's plan. Moreover, Plaintiffs fail to allege - in fact they admit - that they had no relationship with Starwood Capital or Star GT. Without such an assertion, the unjust enrichment claim against them cannot proceed. The motion to dismiss is granted.

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint is granted with prejudice. This constitutes the Decision and Order of the Court.

Dated: New York, New York
June 27,2008

Enter:

Hon. Eileen Bransten

HON. EILEEN BRANSTEN