

Open Media LLC v Bunker

2008 NY Slip Op 32511(U)

September 12, 2008

Supreme Court, New York County

Docket Number: 0600638/2007

Judge: Charles E. Ramos

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

Charles Edward Ramos

53

PRESENT: _____
Justice

PART _____

Index Number : 600638/2007

INDEX NO. _____

OPEN MEDIA LLC

MOTION DATE _____

vs

BUNKER, MICHAEL

MOTION SEQ. NO. _____

Sequence Number : 004

MOTION CAL. NO. _____

DISMISS

motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Motion is decided in accordance with
accompanying Memorandum Decision.

FILED

SEP 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/12/08

[Signature]
HON. CHARLES E. RAMOS .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:COMMERCIAL DIVISION
-----X
OPEN MEDIA LLC and TEAM NY LLC,

Plaintiffs,

-against-

MICHAEL BUNKER, FACTORY IMAGING,
DEPICTURE CORPORATION and STEVEN ULLMAN,
Defendants.
-----X

Index No. 600638/07

FILED
SEP 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Charles Edward Ramos, J.S.C.:

The defendants Factory Imaging, Depicture Corporation ("Depicture") and Steven Ullman move pursuant to CPLR 3211(a)(1) and (7) to dismiss the third, sixth, eighth, and ninth causes of action of the second amended complaint of the plaintiffs Open Media LLC and Team NY LLC (collectively "Open Media"). Open Media cross-moves for partial summary judgment seeking a declaration that there was a sale of a business and that the non-compete provision is enforceable. In the alternative, if the Court determines that the non-compete provision is unenforceable, Open Media seeks a declaration that the non-compete provision is unenforceable as to all of its members and not just Michael Bunker.

This action arises out of an alleged asset purchase agreement between Open Media and non-parties NY Print NY LLC ("Print NY") and Original Card Company, Inc. ("OCC"). The asset purchase agreement was allegedly memorialized in Open Media's operating agreement.

On March 10, 2006, the final operating agreement¹ for Open Media (the "Agreement") was executed by the defendant Bunker, Team NY LLC ("TNY") and non-parties Luke Saban and Anthony Parmalee.

The complaint alleges that pursuant to Section 13.1 of the Agreement, Bunker was to cause OCC to transfer all of its assets to Open Media as OCC's initial capital contribution. Print NY was obligated to do the same and did so, but Bunker failed to reciprocate. The Agreement also contained a non-compete provision in Section 3.7 prohibiting any of the executing parties from competing in a similar industry.

In February 2007, Bunker allegedly ceased his involvement in Open Media and started the co-defendant Factory Imaging, which is associated with the other the co-defendant, Depicture Corporation. By the end of 2007, Open Media alleges that Bunker solicited clients and employees from Open Media to leave and join him in his competing venture, and is sharing Open Media's confidential information with Factory Imaging and Depicture. Open Media and TNY then commenced this action against the defendants.

During oral argument on December 20, 2007, the Court converted the motion to dismiss the sixth cause of action to a motion for summary judgment finding that there was a threshold issue as to whether the language of Agreement effectuated a sale

¹ The first Open Media Operating Agreement was executed on or about December 12, 2005.

of OCC to Open Media.

Depicture argues that the Agreement is merely an operating agreement for Open Media. Notwithstanding Open Media's claims that the transaction was an asset purchase agreement, neither OCC nor Open Media executed the Agreement. Furthermore, the Agreement lacks a material term of an asset purchase agreement, namely, the purchase price.

Open Media contends that the Agreement is both the operating agreement for Open Media, and the asset purchase agreement selling the Print NY and OCC businesses to Open Media in exchange for a membership interest. Open Media further contends that Depicture knew of the Agreement, but nonetheless induced Bunker to breach his duties and obligations to Open Media.

The language of Section 13.1, entitled "Acquisition of Assets" states: "The Members will cause to be invested into [Open Media] as its start-up capital sufficient value so as to enable [Open Media] to purchase the assets of [Print NY] and [OCC] and the Members shall cause such entities to transfer to [Open Media] the following...²"

The Agreement clearly states that the members will invest enough start-up capital to enable Open Media to purchase the assets of Print NY and OCC. The only obligation created by the provision is to sufficiently fund Open Media so that it may

² The Agreement lists: equipment, furniture and fixtures, customer lists, real property leases, product lines and intellectual property, trademarks, know-how, etc., work in process, general intangibles, and excluding financial assets, account balances and accounts receivables.

purchase the assets of OCC and Print NY at some future date.

In order to sustain a cause of action for tortious interference with contract, Open Media must demonstrate: (1) the existence of a valid contract between the Open Media and Bunker, (2) Depicture's knowledge of the Agreement, (3) Depicture's intentional procurement of OCC's breach of the Agreement without justification, (4) actual breach of the Agreement, and (5) the resulting damage. (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]).

Open Media contend that Depicture had knowledge of the Agreement, as evidenced by a letter, dated September 26, 2006, from Depicture to Open Media discussing a proposed purchase of Depicture by Open Media. Nonetheless, it would be difficult for one to conclude from a reading of the Agreement that it effectuates a sale of the OCC business to Open Media. Neither Print NY nor OCC are signatories to the Agreement and cannot be bound by the Agreement. Furthermore, there is no evidence demonstrating the sale or transfer of assets between Open Media and OCC.

Therefore, in the absence of a valid asset purchase agreement, defendants should be awarded summary judgment on the sixth cause of action for tortious interference with contract.

An essential element of Open Media's third cause of action for aiding and abetting breach of fiduciary duty is the defendant's knowing inducement of the plaintiff's breach. Consequently, Open Media's third cause of action must fail in the

absence of an allegation of actual knowledge. (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]).

Open Media's eighth cause of action for tortious interference with advantageous business relations fails as well. To establish such a claim, it must be first established that Depicture's interference with its business relations was accomplished by "wrongful means" or that it acted for the sole purpose of harming Open Media. (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 300 [1st Dept 1999]).

Open Media's conclusory allegations of tortious conduct, when coupled with the absence of any evidence of malicious conduct, are clearly insufficient to sustain the cause of action. (*Bank Leumi Trust Co. v Samalot/Edge Assocs.*, 202 AD2d 282, 283-284 [1st Dept 1994]).

Open Media's ninth cause of action for unfair competition fails to allege the bad faith misappropriation with any specificity and is also dismissed.

Unless an employee is "unique" or "extraordinary" the enforcement of a non-compete provision in an employee/employer context is limited to "the extent necessary to prevent the employee's use or disclosure of his former employer's trades secrets, processes or formulae" (*Purchasing Associates, Inc. v Weitz*, 13 NY2d 267, 271-2 [1963]).

There are no allegations advancing the notion that Bunker is an extraordinary or unique employee and it has not been sufficiently established that Bunker is disclosing trade secrets.

The non-compete provision in Section 13.1 of the Agreement could be enforceable in the sale of a business context but the non-compete provision is unenforceable as against all members, as there was no sale ever consummated and the provision is over broad in the employer/employee context.

Accordingly, it is

ORDERED that defendants Factory Imaging, Depicture Corporation and Steven Ullman's motions for summary judgment on the sixth cause of action and to dismiss the third, eighth and ninth causes of action are granted and the complaint is severed and dismissed as against Factory Imaging, Depicture Corporation and Steven Ullman; and is further

ORDERED that plaintiffs Open Media LLC and Team NY LLC cross-motion for partial summary judgment is granted in part; and it is further,

ORDERED that it is adjudged and declared that the non-compete provision is unenforceable as against all members of Open Media LLC.

This constitutes the decision and order of this court.

Dated: September 12, 2008



J.S.C.

HON. CHARLES E. RAMOS

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