

**Sierra Fashions, Inc. v Y-Brands, Inc.**

2008 NY Slip Op 33592(U)

January 10, 2008

Supreme Court, New York County

Docket Number: 100167/07

Judge: Barbara R. Kapnick

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

PRESENT: KAPNICK  
Justice

PART 12

SIERRA FASHIONS INC

- v -

Y-BRANDS INC

INDEX NO. 100167/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 2  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this 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**  
JAN 14 2008  
NEW YORK  
COUNTY CLERKS OFFICE

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

Dated: 1/10/08

  
**BARBARA R. KAPNICK** S.C.  
J.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
SIERRA FASHIONS, INC.,

Plaintiff,

- against -

DECISION/ORDER  
Index No. 100167/07  
Motion Seq. No. 002

Y-BRANDS, INC., independently and  
transacting as YMLA and/or Y-CHROME,  
DAVID G. BERKMAN, and JEFFREY WU a/k/a  
CHIEN MIN WU;

Defendants.

-----X  
BARBARA R. KAPNICK, J.:

In this action, plaintiff Sierra Fashions, Inc. ("Sierra") seeks to recover compensatory and punitive damages against two of its former employees, defendants David G. Berkman ("Berkman") and Jeffrey Wu a/k/a Chien Min Wu ("Wu"), and their new employer, defendant Y-Brands, Inc., independently and transacting business as YMLA and/or Y-Chrome ("Y-Brands").

Plaintiff claims that Berkman and Wu, while working for Sierra, took steps at Sierra's expense to create a sales and design plan that they would take to Y-Brands, Sierra's purported competitor.

Defendants now move for an order pursuant to CPLR § 3211(a)(7) dismissing the Amended Complaint on the grounds that it fails to state a cause of action, and requiring plaintiff to pay the costs

and disbursements of this action and motion, including reasonable attorneys' fees.

In the first cause of action, plaintiff alleges that defendant Berkman, in violation of his alleged representations, terminated his employment with Sierra. In the second cause of action, plaintiff alleges that defendant Wu, in violation of his alleged representations, terminated his employment with Sierra.

Defendants argue that the first and second causes of action must be dismissed on the ground that both defendants Berkman and Wu were at-will employees.

Plaintiff argues in opposition that defendants Berkman and Wu had fiduciary duties to Sierra while employed there, and that their leaving Sierra within a week of each other, and immediately joining a direct competitor of Sierra's raises a question as to their breach of these fiduciary obligations. Plaintiff also argues that it took steps to its detriment, including securing licenses, and expended substantial sums of money, as a result of discussions with defendants Berkman and Wu.

However, it is well settled that an employment-at-will may be terminated "at any time" by either party. Meyercord v. Curry, 38

A.D.3d 315, 316 (1st Dep't 2007). See also, Lui v. Chinese-American Planning Council, Inc., 300 A.D.2d 80 (1st Dep't 2002).

Therefore, those portions of defendants' motion seeking to dismiss plaintiff's first and second causes of action are granted.

In the third cause of action, plaintiff alleges that defendant Berkman has taken a "Sales Plan" he formulated with Sierra, or a copy thereof, and has been using said plan or portions thereof for his own benefit while employed by his new employer, defendant Y-Brands, without Sierra's authority.

Defendant argues that the third cause of action actually sounds in misappropriation of a trade secret, yet the Amended Complaint fails to allege that information allegedly taken was not ascertainable outside of Sierra's business and/or that said information was maintained in secret.<sup>1</sup>

[A] trade secret is generally defined as formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know or use it (Restatement of Torts § 757 comment b [1939]). An essential requisite to legal protection against compilation of information is the element of secrecy.

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<sup>1</sup> In addition, defendant Berkman denies that a formal "Sales Plan" was, in fact, developed during the course of his employment at Sierra.

Secrecy is used in the Restatement in two related senses: (1) as substantial exclusivity of knowledge of the formula, process, device or compilation of information ("Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret" [id.]); and (2) as the employment of precautionary measures to preserve such exclusive knowledge by limiting legitimate access by others ("Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information" [id.]).

Delta Filter Corp. v. Morin, 108 A.D.2d 991, 992 (3rd Dep't 1985).

See also, New York Spool Corp. v. Industrial Paper Tube, Inc., 160 A.D.2d 194 (1st Dep't 1990).

There is no allegation in the Amended Complaint that the "Sales Plan" contained any confidential information, nor is there any allegation as to what precautionary measures were taken by Sierra to protect the confidential information.<sup>2</sup>

Therefore, that portion of defendants' motion seeking to dismiss the third cause of action for failure to state a cause of action must be granted.

In the fourth cause of action, plaintiff alleges that defendant Wu has taken a "Designed Line" he formulated with Sierra,

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<sup>2</sup> In fact, plaintiff's counsel concedes in his Affirmation in Opposition that "at no point has Sierra claimed the confidential nature of material in the possession of defendants Berkman and Wu."

or a copy thereof, and has been using said line or portions thereof for his own benefit while employed by his new employer, defendant Y-Brands, without Sierra's authority.

Defendants argue that the fourth cause of action likewise sounds in misappropriation of a trade secret. However, plaintiff has not and cannot allege that the "Designed Line" was maintained as a trade secret since said line of clothing was sold to the general public and was thus a matter of public knowledge.

Thus, that portion of defendants' motion seeking to dismiss the fourth cause of action is also granted.

In the fifth cause of action, plaintiff alleges that defendant Wu requested samples from persons/manufacturers who have access to the Designed Line, fraudulently claimed that said samples belonged to him, and demanded that the samples be sent to him and bear the name and/or mark of his new employer. Plaintiff further alleges that Wu obtained said samples bearing Y-Brands' name and/or mark.

Defendants argue that the fifth cause of action which sounds in fraud fails to set forth the necessary elements.

In order to state a cause of action for fraud, a plaintiff must allege a misrepresentation or material

omission of fact which was false and known to be false by the defendant and made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance of the plaintiff on the misrepresentation or material omission, and injury (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

Morgenthau & Latham v. Bank of New York Co., 305 A.D.2d 74, 80 (1st Dep't 2003), lv. to app. denied, 100 N.Y.2d 512 (2003).

Although the Amended Complaint sets forth allegations of purported misrepresentations made to third persons, there is no allegation that defendants made a misrepresentation to Sierra, nor is there any allegation that Sierra detrimentally relied on said representation.

Therefore, this branch of defendants' motion is granted to the extent of dismissing plaintiff's fifth cause of action with leave to replead with the requisite specificity.

In the sixth cause of action, plaintiff alleges that defendant Y-Brands, directly or through its employees and/or agents has received samples that belong to Sierra, has retained and displayed said samples to potential customers, and taken orders based upon said samples. Plaintiff claims that Y-Brands has thus been unjustly enriched.

Defendants argue that the sixth cause of action must be dismissed because the samples in question were "shopping samples" which Wu claims he purchased in Europe, at Y-Brands' expense, while he was employed by Y-Brands. Defendants further contend that no consideration was paid by Sierra for any of these samples.

Plaintiff, on the other hand, contends that defendant Wu traveled to various manufacturers at its expense while he was still employed by Sierra to assist in the design of Sierra's final product line, and that the manufacturers produced the samples in question based upon the various items shown to them by Wu. Plaintiff further claims that within one week of leaving his employment with Sierra, Wu contacted all the manufacturers and demanded that his new employer's brand be placed on the same samples.

This Court thus finds that there are outstanding issues of fact with respect to the sixth cause of action. That portion of defendants' motion seeking to dismiss said cause of action is, therefore, denied.

In the seventh cause of action, plaintiff alleges that defendants Berkman and Wu conspired with willful intent and scienter to prepare the Sales Plan, the Designed Line and the

samples at the expense of Sierra during, prior to and after their employment with Sierra.

It is well settled that "New York does not recognize civil conspiracy to commit a tort as an independent cause of action (citations omitted)." Pappas v. Passias, 271 A.D.2d 420, 421 (2nd Dep't 2000). See also, Steier v. Schreiber, 25 A.D.3d 519 (1st Dep't 2006).

That portion of defendants' motion seeking to dismiss the seventh cause of action is, therefore, granted.

Accordingly, plaintiff's first, second, third, fourth and seventh causes of action are dismissed with prejudice and without costs or disbursements.

Plaintiff's fifth cause of action is dismissed with leave to replead within 30 days of service of a copy of this order with notice of entry, and plaintiff's sixth cause of action is severed and continued.

Defendants shall serve an Answer or otherwise move with respect to the Second Amended Complaint within 20 days of service thereof.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on March 26, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: January 10, 2008

  
\_\_\_\_\_  
Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**

**FILED**  
JAN 14 2008  
NEW YORK  
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