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

PRESENT: [redacted] Justice

PART 55

Index Number : 113772/2008

NOISE MARKETING LLC

VS.

GREAT WORKS AMERICA, INC.,

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 113772-08

MOTION DATE 1/16/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum decision and order annexed hereto.

N.P. -- preliminary conference is scheduled for June 22, 2009 at 12 noon. Adhere to this courtesy copy in chambers

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

Dated: 4/28/09

[redacted] J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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NOISE MARKETING LLC,

Index No. 113772/08

Plaintiff,

DECISION and ORDER

-against-

GREAT WORKS AMERICA, INC., ZOE TURNBULL and KRISTA FREIBAUM,

Defendants.

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Solomon, J.:

In this action, plaintiff Noise Marketing LLC (Noise) seeks damages from all defendants for the alleged improper use of confidential and proprietary information by defendants Zoe Turnbull (Turnbull) and Krista Freibaum (Freibaum) in violation of their employment agreements with it. The six-count amended complaint asserts causes of action for breach of contract, breach of fiduciary duty and the duty of good faith and fair dealing, tortious interference with prospective contract and business relationships, aiding and abetting breach of fiduciary duty, and quantum meruit and unjust enrichment. Defendants now move to dismiss the complaint based upon documentary evidence and for failure to state a cause of action.

Facts

Noise is a company specializing in marketing, advertising and public relations campaigns for corporations.

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Noise alleges that, pursuant to employment agreements dated May 26, 2006 and February 15, 2008, both of which are submitted, Turnbull was employed as its Senior Director of Public Relations. In this position, Turnbull worked with Noise's high-level clients, including those that subcontracted work to Noise, and obtained access to the confidential and proprietary information of Noise and its clients. Freibaum allegedly joined Noise in February 2007 as a Public Relations Associate, pursuant to an employment agreement, and she signed a second employment agreement, dated February 2, 2008, which Noise submits. Freibaum worked under Turnbull, giving her access to much of the same sensitive and proprietary information as was available to Turnbull.

The Turnbull and Freibaum agreements contained similar provisions requiring Turnbull and Freibaum to "hold all Trade Secrets of COMPANY in confidence" and defining "Trade Secrets" as "the information described in the Description of Trade Secrets (Attachment B) and any other information that from time to time may be identified by NOISE as confidential or is otherwise known to you as being confidential" (Geisler Aff., Ex. A; Berke Aff., Exs. D and E). Freibaum's February 2, 2008 employment agreement contains the "Description of Trade Secrets" from Attachment B, which includes "[m]arketing plans and strategies of NOISE, including information pertaining to prospective customers"

(Geisler Aff., Ex. A). The agreements also require Turnbull and Freibaum to keep "Proprietary Information in strict confidence and trust" (Berke Aff., Ex. D; Geisler Aff., Ex. A).

Non-party Absolut Spirits Company, Inc. (Absolut) was a client of defendant Great Works America, Inc. (Great Works). From December 2007 through July 2008, Great Works subcontracted Absolut's online public relations strategy and marketing work to Noise. While the subcontracts, copies of which are submitted, do not contain a non-compete clause or other restrictive covenant, they did include "Work For Hire" and "Confidentiality" provisions (Berke Aff., Exs. B and C). The "Work For Hire" provision stated that "Great Works shall be the owner of all of the results and proceeds of Noise's services" and Noise agreed that, "[i]n the event that any of proceeds of Noise's work are not considered a work for hire, then Noise's copyright to such work is hereby assigned to Great Works in perpetuity" (*id.*).

Turnbull and Freibaum allegedly worked closely with both Great Works and Absolut on the subcontract work and, Noise contends, Absolut then decided to work directly with Noise (although Noise claims that it never pitched Absolut to move from Great Works). Noise claims that Great Works knew of, and approved, Absolut's decision to work directly with Noise. In July 2008, a one year agreement was drafted and circulated between Noise and Absolut, but apparently not signed.

Noise alleges that Great Works then set upon a course of conduct to take back the Absolut account even though Great Works lacked expertise in online public relations strategies and marketing work. To this end, Great Works allegedly met with and convinced Turnbull to leave Noise and work for it, and to solicit Freibaum to join her. During these meetings, Great Works allegedly received Noise's proprietary and confidential information from Turnbull. Turnbull allegedly accepted employment with Great Works, and thereafter solicited Freibaum to join Great Works. Noise claims that Turnbull and Freibaum's close work with Noise clients enabled them to "leverage[] extensive proprietary and confidential Noise information in support of the Absolut work" (Complaint, ¶ 29) in breach of their employment agreements, allowing Great Works to interfere with Noise's proposed agreement with Absolut.

To the extent that additional facts are necessary to the resolution of defendants' motion, those facts are stated in the discussion below.

Discussion

Breach of Contract (First Cause of Action)

Defendants seek dismissal of the first cause of action for breach of contract--based upon Turnbull's solicitation of Freibaum, arguing that it is based solely upon conclusory allegations.

The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*Furia v Furia*, 116 AD2d 694 [2d Dept 1986]). A cause of action for breach of contract "must allege the provisions of the contract upon which the claim is based" (*Atkinson v Mobil Oil Corp.*, 205 AD2d 719, 720 [2d Dept 1994] [citation omitted]), and the complaint "must be sufficiently particular to give the court and [the] parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved as well as the material elements of each cause of action or defense" (*id.* [internal quotation marks and citation omitted]). "[V]ague and conclusory allegations are insufficient to sustain a breach of contract cause of action" (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]).

Here, the complaint identifies the non-solicitation provision contained in the employment agreements, and defendants themselves submit copies. Turnbull's employment agreements contain the following language:

> While employed by the COMPANY and for a period of one (1) year after termination of such employment for any reason whatsoever (whether voluntary or involuntary) you will not, directly or indirectly, solicit, recruit or hire any employee of the COMPANY to work for a third party other than the COMPANY or engage in any activity that would cause any

> employee to violate any agreement with the COMPANY

(Berke Aff., Exs. D and E). The complaint alleges that Turnbull breached this provision by soliciting Freibaum, damaging Noise. Therefore, Noise properly has stated this cause of action.

Citing *Murphy v Sheldon* (13 Misc 3d 1223[A], 2006 NY Slip Op 51959[U], 2006 WL 2955926, *3 [Sup Ct, Nassau County 2006]), defendants' argument focuses on Noise's purported failure to "particularize the manner" in which Turnbull breached the non-solicitation provision. At this juncture, the allegations of the complaint are sufficiently particular to notify the court and defendants of the transactions and occurrences intended to be proved and the material elements of the cause of action. For the foregoing reasons, defendants' motion to dismiss the first cause of action is denied.

Breach of Contract (Second Cause of Action)

The second cause of action is based upon breaches of the confidentiality provisions of the employment agreements. Defendants argue that this cause of action should be dismissed for failure to identify the confidential information imparted to defendants and how the alleged breach caused damages.

In support of their argument, defendants rely upon *Gordon* (141 AD2d 435, *supra*); the parties there allegedly entered into a joint venture to purchase a subsidiary of the Coca-Cola Company after the plaintiff was unable to purchase the company

itself. The confidentiality agreement required each party to refrain from using confidential information obtained from the other, during any unilateral negotiations with the Coca-Cola Company. The First Department determined that the pleading alleged "in boilerplate fashion that defendant disclosed confidential information to Coca-Cola and that as a consequence plaintiffs were damaged in the sum of $35 million" (*id.* at 436). The Court held that these allegations were "vague and conclusory" and "insufficient to sustain a breach of contract cause of action" (*id.*).

The Court's holding was based on the fact that the plaintiffs had "not identified any confidential information imparted to defendant other than the specifics of their prior proposal to Coca-Cola and the financial due diligence with respect to [the target company]" (*id.*). The Court reasoned that the information could not "be classified as confidential or secret since it was already in Coca-Cola's possession before plaintiffs disclosed it to defendant" (*id.*). The Court also held that the complaint failed to "demonstrate how the defendant's alleged breach of the confidentiality agreement caused plaintiffs any injury" and contained "only boilerplate allegations of damage" (*id.*).

Unlike *Gordon*, here there is no indication that the alleged confidential information was already in Great Works'

possession. Moreover, Noise alleges that it was injured because defendants' actions took away Noise's business. The essence of Noise's claim is that Turnbull and Freibaum's association with Noise enabled them to begin working with Great Works. Great Works allegedly did not provide the same services as Noise. While Noise had expertise in online public relations strategies and marketing, Great Works did not, and Turnbull and Freibaum brought their Noise-acquired services, including the strategies and processes described in their employment agreements, to Great Works.

In his affidavit, Erik Geisler (Geisler), Chief Strategy Officer for Noise, sets forth at length the ways in which Turnbull and Freibaum "are performing the same work they were to perform for [Noise] on the Absolut account for Great Works" (Geisler Aff., ¶ 30). Among other things, he states that "Noise has created strategies and underlying concepts that are unique and distinct to the advertising industry" and that Turnbull and Freibaum "learned how Noise worked with similar projects with other clients on similar programs," thereby learning "how Noise crafted online marketing and public relations strategies that would support and integrate successfully with advertising campaigns, marketing programs, and other media to create consumer awareness in ways that traditional tactics and competitive agencies could not achieve". The work allegedly

"requested by Absolut from Noise, and the agreement in place, was for a set of projects different than that which Great Works had previously subcontract the work to Noise".

These allegations are not vague and conclusory. Nor are they boilerplate allegations that do not demonstrate how defendants' breach caused injury. Contrary to defendants' arguments, at this juncture, giving Noise the benefit of every favorable inference, these allegations sufficiently identify the confidential information imparted to Great Works by Turnbull and Freibaum, and how the alleged breach caused damages to Noise. In short, the allegations of the complaint are sufficient to put defendants on notice of the acts or conduct complained of, the confidential information that was purportedly utilized by Great Works, and how it was allegedly used (*see* CPLR 3013 ["pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense"]).

Defendants argue that the "Work For Hire" provision of the Subcontracts negates any inference of wrongdoing, because all work for Absolut belonged to Great Works, not Noise. However, as discussed above, Noise claims that "[t]he work requested by Absolut from Noise ... was for a set of projects different than that which Great Works had previously subcontracted the work to

Noise" (Geisler Aff., ¶ 23). Therefore, this argument is unpersuasive.

Defendants also argue that the absence of any non-compete provision in the employment agreements negates any inference of wrongdoing by defendants. However, Noise's claim is based upon Turnbull and Freibaum's alleged failure to hold Noise's trade secrets and proprietary and confidential information in confidence, and their purported appropriation of the strategies utilized by Noise to create the final product for Absolut. Therefore, this argument also is unpersuasive. For the foregoing reasons, defendants' motion to dismiss the second cause of action is denied.

Breach of Fiduciary Duty (Third Cause of Action) and Aiding and Abetting (Fifth Cause of Action)

Defendants argue that the cause of action for breach of fiduciary duty should be dismissed as duplicative of the breach of contract claim.

"A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand" (*William Kaufman Org., Ltd. v Graham & James LLP* 269 AD2d 171, 173 [1st Dept 2000]; *see also Kaminsky v FSP Inc.*, 5 AD3d 251, 252 [1st Dept 2004] [granting motion to dismiss claim for breach of fiduciary duty for failure "to allege conduct by defendants in breach of a duty other than, and independent of, that contractually established between the parties"]). Moreover, a

cause of action for breach of the implied covenant of good faith and fair dealing will be dismissed if it is redundant of a cause of action for breach of contract (*Business Networks of N.Y., Inc. v Complete Network Solutions Inc.*, 265 AD2d 194, 195 [1st Dept 1999]).

Here, the complaint alleges that "Turnbull and Freibaum knew that clients imparted to Noise information that would otherwise be unavailable to the public" (Complaint, ¶ 55), and they allegedly "knew that the information they gained as employees of Noise, with respect to the Absolut account and other work of Noise, would assist Noise's competitor, Great Works" (*id.*, ¶ 56). Noise claims that, because of their status as Noise employees, Turnbull and Freibaum "were provided with information as to how Noise created and continued with its successful business - information which would be a valuable asset to any competitor" (*id.*). According to Noise, "Turnbull and Freibaum had a duty, while employed by Noise, to act only in the best interest of Noise and to not utilize information at their disposal, while employed by Noise, and thereafter, for the personal benefit of themselves and their new employer, Great Works" (*id.*, ¶ 57).

However, as discussed above, Noise's second cause of action is based upon Turnbull and Freibaum's alleged knowing violation of "their contractual obligations when they took from

Noise confidential and proprietary information" (*id.*, ¶ 50) and "utilized such proprietary information for their benefit and to the detriment of Noise" (*id.*, ¶ 51). Thus, the conduct relating to breach of duties alleged in Noise's third cause of action for breach of fiduciary duty is no different from the conduct relating to defendants' alleged breach of contract. Moreover, to the extent that Noise's third cause of action asserts a claim for violating a duty of good faith and fair dealings, that claim is also redundant of Noise's claim for breach of contract. Accordingly, defendants' motion to dismiss Noise's third cause of action is granted.

Noise's fifth cause of action claims that Great Works assisted Turnbull and Freibaum's breach of fiduciary duty. However, "[b]ecause the breach of fiduciary duty claim fails, there can be no cause of action for aiding and abetting breach of that fiduciary duty" (*Kassover v Prism Venture Partners, LLC*, 53 AD3d 444, 449 [1st Dept 2008]). Accordingly, defendants' motion to dismiss the fifth cause of action is granted.

Tortious Interference (Fourth Cause of Action)

Defendants argue that the fourth cause of action should be dismissed for failure to allege malice and wrongful means. Noise counters that Great Works acted with malice. Noise also argues that wrongful means are required only where the parties are direct competitors, and that Great Works and Noise were not

competitors, because "[p]rior to their nefarious conduct, Great Works did not perform the services that Absolut required" (Noise Opp. Mem. of Law, at 16).

A cause of action for tortious interference with prospective business relations requires: "(a) business relations with a third party; (b) the defendant's interference with those business relations; (c) [that] the defendant act[ed] with the sole purpose of harming the plaintiff or using wrongful means; and (d) injury to the business relationship" (*Advanced Global Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 779 [Supt Ct, NY County], *affd* 44 AD3d 317 [1st Dept 2007]). "'Wrongful means' includes physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; [it does] not, however, include persuasion alone[,] although it is knowingly directed at interference with the contract" (*Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]). "[I]t must be alleged that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby" (*Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312, 313 [1st Dept 2004]).

Here, the fourth cause of action alleges that

defendants knew of "Noise's contractual and/or prospective business relationship with Absolut and Noise's expectancy to incur a *financial benefit* from the contractual and/or prospective business relationship" (Complaint, ¶ 60, at 10 [emphasis added]). Defendants allegedly intended "to divert the transaction and business away from Noise and to Great Works," and "[t]hey did so in an improper manner" (*id.*, ¶ 54, at 11). The complaint acknowledges the "highly competitive nature of the marketing field," and avers that, "[i]n this instance, the Defendants improperly took Noise's proprietary tactics and marketing expertise and utilized it for the benefit of themselves" (Complaint, ¶ 30). Noise claims that "Great Works set upon a course of conduct to take back the [Absolut] account" from Noise (*id.*, ¶ 32), and that, but for defendants' actions, Noise "would have received the anticipated *economic advantage* of the agreement and/or prospective business relationships with Absolut," but instead, "the benefit of the prospective transaction and future business has been wrongly, and intentionally, diverted from Noise to Defendants" (*id.*, ¶ 55 [emphasis added]).

Other than Noise's conclusory allegations of improper conduct, nothing contained in the complaint alleges that Great Works acted with malice or wrongful means, or that its efforts to hire Turnbull and Freibaum were intended solely to injure Noise, without any other legitimate purpose. Indeed, based upon the

allegations of the complaint, Noise and Great Works were competing for the same business, with Great Works motivated, at least in part, by its own economic interest in attempting to keep the work that it had subcontracted to Noise in servicing Absolut (*Phoenix Capital Inv. v Ellington Mgt. Group*, 2007 WL 4101654, 2007 NY Slip Op 33650[U] [Sup Ct, NY County], *affd as modified* 51 AD3d 549 [1st Dept 2008] [dismissing cause of action for tortious interference with prospective business relationship where, because the "allegations suggest that [defendant's] self-interest motivated its alleged conduct, at least in part, [plaintiff] cannot assert that [defendant] acted 'solely out of malice'"] [citation omitted]).

Noise's argument that it was not in competition with Great Works is without merit. As a preliminary matter, while "[t]he existence of competition may often be relevant, since it provides an obvious motive for defendant's interference other than a desire to injure the plaintiff" (*Advanced Global Tech.*, 15 Misc 3d at 780), "as long as the defendant is motivated by legitimate economic self-interest, it should not matter if the parties are or are not competitors in the same marketplace" (*Carvel Corp. v Noonan*, 3 NY3d 182, 191 [2004]).

In any event, this argument is contradicted by the allegations of the complaint. Specifically, the complaint alleges that Noise and Great Works were both marketing companies

(Complaint, ¶¶ 6, 19); that "Turnbull breached the terms of her employment agreement by soliciting Freibaum to leave Noise and work for *a direct competitor*" (Complaint, ¶ 47 [emphasis added]); that "Turnbull and Freibaum knew that the information they gained as employees of Noise, with respect to the Absolut account and other work of Noise, would assist *Noise's competitor, Great Works*," and that Turnbull and Freibaum were provided with "information which would be a valuable asset *to any competitor*" (*id.*, ¶ 56, at 10 [emphasis added]). As a result, the motion to dismiss the fourth cause of action is granted.

Quantum Meruit and Unjust Enrichment (Sixth Cause of Action)

Defendants argue that Noise fails to allege the elements of quantum meruit and unjust enrichment. Plaintiff counters that it has stated a claim for unjust enrichment, but does not oppose dismissal of the claim for quantum meruit. Therefore, the court addresses only the claim for unjust enrichment, which requires a showing that "a benefit was bestowed upon the property by plaintiff[] and that defendants will obtain such benefit without adequately compensating plaintiffs therefor" (*Tarrytown House Condominiums, Inc. v Hainje*, 161 AD2d 310, 313 [1st Dept 1990]).

Here, the complaint alleges that "Defendants should not be permitted, in any equitable fashion, to walk away from the transaction with Absolut's money in their bank accounts that was

misdirected from Noise" (Complaint, ¶ 63). Thus, Noise's unjust enrichment claim appears to be premised upon its potential contract with Absolut, not that it bestowed a benefit on Great Works for which it has not been properly compensated. Therefore, defendants' motion to dismiss this cause of action is granted.

Leave to Replead or Amend

In its opposition papers, Noise requests that, if any claim is insufficient, it be granted leave to replead, amend or supplement those causes of action. Noise also seeks leave to amend to add claims of unfair competition and misappropriation of trade secrets.

Under CPLR 3025 (b), leave to amend a pleading will be freely granted "in the absence of prejudice or unfair surprise" (*Aetna Cas. and Sur. Co. v LFO Constr. Corp.*, 207 AD2d 274, 277 [1st Dept 1994]), but "not granted upon mere request without a proper showing. Rather, in determining whether to grant leave to amend, a court must examine the underlying merit of the causes of action asserted . . ." (*Wieder v Skala*, 168 AD2d 355, 355 [1st Dept 1990]). Here, Noise submits no proposed amended pleading nor explains how it might do so. The request thus is denied.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the third, fourth, fifth and sixth causes of action of the complaint are dismissed, and the motion is otherwise

denied; and it further is

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55 on June 22, 2009 at 12 noon.

Dated: April 28, 2009

ENTER:

J.S.C.

[redacted] SOLOMON

FILED
APR 29 2009
COUNTY CLERK'S OFFICE
NEW YORK