

Bison Commercial Leasing, LLC v Linkner
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October 28, 2009
Supreme Court, Suffolk County
Docket Number: 01394-07
Judge: Elizabeth H. Emerson
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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

_____x
BISON COMMERCIAL LEASING, LLC,

Plaintiff,

-against-

WILLIAM LINKNER, BARRY FINK, HARRY
FUCHS and STERLING CAPITAL LEASING,
LLC,

Defendants.

_____x

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DECISION AFTER TRIAL

The plaintiff, Bison Commercial Leasing, LLC (hereinafter "Bison"), is in the business of brokering commercial lease transactions between equipment vendors, lending institutions, and its customers. In 1995, the defendant William Linkner began working for Bison's predecessor in interest, Bison Commercial Leasing Corp., which was owned by Michael Berg and Larry Matros. Linker subsequently acquired a 50% interest in Bison Commercial Leasing Corp. The other 50% shareholder was Michael Berg. In 2004, Bison Commercial Leasing Corp. became Bison Commercial Leasing, LLC.

In October 2005, Michael Berg went to work for Churchill Technology Finance, LLC, while still retaining a 50% ownership interest in Bison. Before he left Bison, Berg began negotiating with David Sunshine from the Tyree Organization, Ltd. (hereinafter "Tyree"), regarding Tyree's acquisition of an interest in Bison. Pursuant to an agreement dated May 31, 2006, Tyree acquired a 70% ownership interest in Bison from Berg, although Berg only owned a 50% interest in Bison on that date. Linker subsequently sold his 50% ownership interest in Bison

to Berg pursuant to a purchase agreement dated June 9, 2006. Also on that date, Linker entered into an employment agreement with Bison for a renewable term of two years at a base salary of \$50,000 plus commissions.¹ Linker was employed as a Vice President and later as the President of Bison. The employment agreement contained a non-competition clause, which provided in pertinent part as follows:

For a period of one (1) year after the termination of [Linkner's] employment with [Bison] for any reason other than [Bison's] termination of [Linkner] without Cause, [Linkner] will not call on, solicit, or take away for [Linkner] or for any other person or entity for commercial equipment leasing business any person or entity who or which was: (i) a customer of [Bison] during [Linkner's] employment with [Bison]; and (ii) sourced by The Tyree Organization, Ltd.

The employment agreement also provided, inter alia, that Bison reimburse Linkner for his legal, accounting, and other expenses incurred in connection therewith; that Linkner receive a signing bonus in the amount of \$50,000 less such reimbursed expenses; that Bison reimburse Linkner for his travel and business expenses; that Bison pay Linkner's commissions within three days of receiving its commissions; and that Linker receive severance pay in the amount of \$250,000 if his employment were terminated by Bison without cause. Additionally, the purchase agreement provided that Bison and Berg remove Linker as a personal guarantor from any and all Bison obligations and agreements including, but not limited to, Bison's line of credit with M&T Bank.

On May 19, 2006, Linker formed the defendant Sterling Capital Leasing, LLC (hereinafter "Sterling"), a company in which he has a 100% ownership interest. On May 25, 2006, Sterling was assigned a taxpayer identification number by the New York State Department of Taxation and Finance. On November 8, 2006, Linkner registered a domain name for Sterling. On November 29, 2006, Sterling opened a business checking account at M&T Bank with an initial deposit of \$75,000, which came from Linkner's personal account. In December 2006, Sterling entered into a commercial lease for office space, purchased a telephone system and computers, and registered with Experian North America. On December 7, 2006, Linkner deposited into the Sterling business checking account a check in the amount of \$4,041.31 from Urology Associates. Linkner testified that Urology Associates was a customer of the defendant Harry Fuchs, a Bison salesperson. Linker was still employed by Bison on December 7, 2006. He testified that he decided to fund the Urology Associates transaction through Sterling without consulting anyone from Bison. Linkner left Bison's employ on December 26, 2006, taking with him 40 Bison customer files and several Bison employees, including the defendants Barry Fink

¹The evidence adduced at trial reveals that, in 2006, Bison actually paid Linkner a salary in the amount of \$52,000.

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and Harry Fuchs. On January 9, 2007, this court signed an order to show cause with a temporary restraining order directing the defendants to return to Bison by 5:00 p.m. on January 10, 2007, all customer files removed from Bison's offices or computers. Linker subsequently returned the files that he had taken.

The plaintiffs commenced this action against Linkner, Sterling, Fink, and Fuchs on January 8, 2007. The amended complaint contains 10 causes of action sounding in fraud, conversion, breach of contract, and breach of fiduciary duty, among other things. In the answer, the defendants Linkner and Sterling asserted five counterclaims sounding in fraud, breach of contract, and tortious interference with prospective business relations.

This matter was tried by the court without a jury on March 23, 24, 25, and 26, 2009, and April 3, 2009. Three witnesses testified: Linker and Sunshine were called as witnesses by Bison, and Berg was called as a witness by the defendants. By stipulation of the parties, 209 exhibits were introduced into evidence by Bison and 16 by the defendants. The parties subsequently submitted post-trial memoranda of law. In reaching its determination, the court has considered the pleadings, the testimony and credibility of each of the trial witnesses, the trial exhibits, and the post-trial memoranda of law submitted by the plaintiff and the defendants.

Preliminarily, the court notes that the plaintiff voluntarily discontinued its action against the defendant Harry Fuchs, who died on September 8, 2008, and that there was no evidence adduced at trial regarding the plaintiff's claims against the defendants Fink and Sterling. Moreover, in their submissions to the court, the parties have narrowed the issues to the plaintiff's claim for breach of fiduciary duty against Linkner and Linkner's counterclaim for breach of contract against the plaintiff.

The law provides that officers and directors of a corporation stand in a fiduciary relationship to the corporation and owe their undivided and unqualified loyalty to the corporation (**Howard v Carr**, 222 AD2d 843, 845). They are prohibited from profiting personally at the expense of the corporation and from promoting personal interests that are incompatible with the superior interests of the corporation (**Adirondack Capital Mgt., Inc. v Ruberti Girvin and Ferlazzo, P.C.**, 43 AD3d 1211, 1215). Likewise, they may not divert and exploit an opportunity that should be deemed an asset of the corporation (**Id.** at 1215). Although participation in a business similar to that of the corporation is not precluded by an officer or director, conduct that cripples or injures the corporation is impermissible (**Howard v Carr**, *supra* at 845).

Similar to the fiduciary duty of an officer or director, but more stringent, is the faithless servant doctrine, which prohibits an employee from acting in any manner inconsistent with his agency or trust and requires him, at all times, to exercise the utmost faith and loyalty in the performance of his duties (**Maritime Fish Prods. v World-Wide Fish Prods.**, 100 AD2d 81, 88). When an employee engages in a business that, by its nature, competes with the employer's

business, a double breach of duty occurs. Not only is the principal deprived of the services for which he has contracted, but he finds such services turned against himself (**Id.** at 88). Thus, an employee is not free to take business for himself or direct it to a competitor for his profit without the express consent and approval of his employer (**Id.** at 89). It is not enough that the employee merely refrains from harming his employer. He has an affirmative duty to act at all times in his employer's best interests (**Id.** at 89).

Whether as an employee or officer, Linkner had an obligation to communicate any business opportunity to Bison (**Id.** at 89). While the evidence supports a finding that Linkner secretly formed Sterling while still in Bison's employ, such conduct, without more, does not constitute actionable employee disloyalty (*see*, **American Print. Converters v JES Label & Tape**, 103 AD2d 787, 788; **Maritime Fish Prods. v World-Wide Fish Prods.**, *supra* at 88). An agent may secretly incorporate a competitive business prior to his departure as long as he does not use his principal's time, facilities, or proprietary secrets to build the competing business (**Id.** at 88, *see also*, **Feiger v Iral Jewelry**, 41 NY2d 928, 929; **Bon Temps Agency v Greenfield**, 212 AD2d 427, 428).

The evidence adduced at trial reveals that, between May 19 and December 7, 2006, Linker formed Sterling, obtained a taxpayer identification number, registered a domain name, opened a business checking account, entered into a commercial lease for office space, purchased a telephone system and computers, and registered with Experian North America. The court finds that all of these actions were merely preliminary steps to entering into a competitive business and, as such, were not a breach of fidelity (**Id.** at 428). Bison has failed to establish that Linkner used its time, facilities, or proprietary secrets in building Sterling prior to December 7, 2006. Contrary to Bison's contentions, its customers, vendors, and funding sources were not trade secrets. Trade secret protection will not attach when the alleged confidential information is readily ascertainable from non-confidential sources (**J & L Am. Enterprises v DSA Direct**, 10 Misc 3d 1076[A] at *4 [and cases cited therein]). Additionally, matters of public knowledge or general knowledge in an industry cannot be appropriated by one as a trade secret (**Delta Filter Corp. v Morin**, 108 AD2d 991, 992). The evidence adduced at trial reveals that the identities of Bison's customers, vendors, and funding sources were not obtained from confidential sources. Moreover, Bison failed to establish that it took reasonable measures to protect or guard such information, thereby completely negating any claim that it was a trade secret (**J & L Am. Enterprises v DSA Direct**, *supra* at *5). Accordingly, the court finds that Linkner did not breach his fiduciary duty to Bison prior to December 7, 2006.

On that date, however, Linkner deposited a check from Urology Associates, a Bison customer, into the Sterling business checking account that he had opened on November 29, 2006. Linkner testified that Urology Associates was a customer of Fuchs, who was working as a Bison salesperson at the time. Linkner also testified that he decided to fund the Urology Associates transaction through Sterling without notifying anyone at Bison of his intention. Linkner further testified that there were other transactions on which he began working in the

