

Epstein Engr. P.C., v Cataldo
2010 NY Slip Op 30032(U)
January 5, 2010
Supreme Court, New York County
Docket Number: 603146/08
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Epstein Engineering
P.C.

- v -
Thomas Cataldo et al

INDEX NO. 603146/2008
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

FILED

JAN 11 2010

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*and PC Scheduled for
Feb 18, 2010 @ 9:30
in Part 10*

JAN 05 2010

Dated: _____

[Signature]
HON. JUDITH J. GISCHE *cc.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
Epstein Engineering, P.C.,

Plaintiff (s),

-against-

Thomas Cataldo, Cataldo Engineering, P.C., and
Steven Gregorio,

Defendant (s).
-----x

DECISION/ORDER

Index No.: 603146/08

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
Def Gregorio n/m (dismiss and sanctions) w/IDT affirm, exhs	1
Plt x/m (amend complaint), AMP affirm, ASE affd exhs	2
Def Gregorio reply w/IDT affirm, exhs	3

FILED
JAN 11 2010
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the court's decision and order is as follows:

Gische J.:

This is a tort action based upon allegations of unfair competition. Issue has been joined by defendant Steven Gregorio ("Gregorio") who now moves for dismissal of the complaint against him on the ground that it fails to state a cause of action him (CPLR 3211 [a][7]). Alternatively, Gregorio seeks a conditional order of dismissal of the complaint as a sanction for non-compliance with his discovery demands of the plaintiff.

Plaintiff Epstein Engineering, P.C. ("Epstein") opposes defendant's motion and has separately cross moved for leave to serve an amended complaint (CPLR 3025 [b]).

Though Cataldo and Cataldo Engineering, P.C. answered and were served with these motions, the Cataldo defendants take no position on any of the relief sought.

Since Gregorio seeks the dismissal of the complaint pursuant to CPLR § 3211[a][7], the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiff with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st Dept. 1997]).

Leave to amend a pleading is freely given (CPLR 3025[b]), absent prejudice or surprise resulting directly from the delay (McCaskey, Davies & Assoc. v. New York City Health & Hosps. Corp., 59 N.Y.2d 755 [1983]).

Applying these legal principles to the motion and cross motion, they are decided as follows:

Arguments

Defendants Thomas Cataldo ("Cataldo") and Gregorio were employed by Epstein. Cataldo left Epstein to establish his own engineering company, Cataldo Engineering, P.C. Alan S. Epstein, the owner of Epstein contends Cataldo not only betrayed their cordial personal relationship, but also misappropriated trade secrets and proprietary information about Epstein's past, present and future projects. According to Epstein, Cataldo was a key employee in Epstein and had daily involvement in strategy session in which business ventures were discussed, debated and decided. Cataldo, who worked at Epstein for 10 years, had unfettered access to lists of clients, financial information, contracts and technical data. Epstein contends that Cataldo established

his new company while still employed at Epstein and he secretly created documents using Epstein's tools, facilities, and computer equipment. The principal of Epstein discovered this when a client showed him a document with inconsistent footers. One part of the document had the footer "Epstein Engineering" but the other part of the document (photographs) had the footer "Cataldo Engineering, P.C."

Epstein contends in (support of his cross motion to amend) that Cataldo was Gregorio's supervisor and, like Cataldo, Gregorio had access to much of the same information that Cataldo did. After the client brought the report to his attention, Allan Epstein confronted Gregorio, who first denied any wrongdoing, but then resigned the next day.

Epstein has since hired a computer consultant who prepared a log of the hours, manner and frequency that Epstein databases were accessed by Gregorio and discovered that Gregorio was retrieving and downloading files and other data from Epstein's computers onto a thumb drive. According to Epstein, this was all done after his standard work hours and Gregorio submitted falsified time sheets to conceal the time.

In support of its motion to dismiss, Gregorio principally relies on the defenses set forth in his answer and his claim that the complaint is deficient, as a matter of law, because the tort claims against him are not pled with specificity, as required by the heightened pleading requirements of CPLR § 3016[b] and the proposed amended complaint does not remedy those deficiencies. Alternatively, Gregorio seeks the dismissal of the complaint as a discovery sanction pursuant to CPLR §§ 3124 and 3126.

Discussion

At the outset, Gregorio's motion for an order striking or dismissing the complaint as a discovery sanction, pursuant to CPLR § 3126 is denied. Assuming that Gregorio's motion is not defective, notwithstanding that it does not contain a clearly identified and delineated affirmation of "good faith," Gregorio has not, in any event, established that Epstein has "wilfully" failed to provide the information demanded. The striking or dismissal of a pleading is a drastic measure and only justified when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith (Roman v. City of New York, 38 A.D.3d 442 [1st Dept 2007]). There are indications that the parties were making efforts towards settlement and Epstein represents that it is in the process of responding to plaintiff's demands.

Gregorio's motion pursuant to CPLR § 3124 for an order directing the plaintiff to answer Gregorio's discovery demand is, however, granted to the extent that a preliminary conference will be held in this case on **FEBRUARY 18, 2010 at 9:30 a.m.** In all other respects, Gregorio's motion for discovery sanctions is denied at this time.

Turning to Epstein's cross motion to amend its complaint, Gregorio has not shown any prejudice or surprise resulting directly from Epstein's delay in bringing its cross motion to amend (McCaskey, Davies & Assoc. v. New York City Health & Hosps. Corp., 59 N.Y.2d 755 [1983]). Furthermore, the court finds that it would be more prejudicial to Epstein to deny the motion than it would be prejudicial to Gregorio to grant the motion (Murray v. City of New York, 43 NY2d 400 [1977]). The proposed amended complaint presents a more complete statement of the facts relied upon by Epstein to

* 6]

support its claim against Gregorio (and the other defendants¹) for breach of fiduciary duty and duty of loyalty - knowing assistance- monetary damages. Thus, the amendment directly addresses (and is responsive to) Gregorio's motion to dismiss the original complaint on the basis that the tort claim against him is not pled with the specificity required by CPLR § 3016 [b]. Epstein also explains the delay in bringing the motion which is that he was doing a forensic investigation of the company's computerized files.

Although Gregorio strongly disagrees with the claim against him, and he argues that the proposed amended complaint should not be allowed, affording the pleadings a liberal construction, accepting the allegations of the original and proposed amended complaint as true, and providing Epstein with benefit of every possible inference the proposed amended complaint states a claim against Gregorio (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st Dept. 1997]). Whether Epstein can ultimately establish its allegations against Gregorio is not part of the calculus in determining Gregorio's motion to dismiss, and therefore, the motion to dismiss is denied (Goshen v. Mutual Life Ins. Co. of N.Y., *supra* at 326).

The court has considered Gregorio's application for costs as a condition of the amended complaint. This condition undermines the public policy of liberally allowing amendment in the absence of prejudice (Estate of Vitale v. Eventquest, Inc., 38 A.D.3d

¹ The other four claims are against the Cataldo defendants only. They are for injunctive relief, unfair competition, conversion and fraud.

330 [1st Dept 2007]). Therefore, Gregorio's application for costs is denied and the plaintiff's cross motion to serve the proposed amended complaint is granted. It shall be served on all the defendants who have answered or appeared in this action within **FIFTEEN (10) DAYS** of date of entry of this decision/order. Defendants' time to answer and plaintiff's time to reply, if any, shall be as provided under the CPLR.

Conclusion

Defendant Steven Gregorio's motion for the dismissal of this action against him for failure to state a cause of action or as a discovery sanction is denied. That branch of his motion for a conditional order of dismissal is granted only to the extent that a preliminary conference will be held in this case on **FEBRUARY 18, 2010 at 9:30 a.m.** in Part 10 at 60 Centre Street, Room 232. Otherwise, Gregorio's motion is denied.

Plaintiff Epstein's cross motion for permission to serve an amended complaint is granted. Gregorio's application for costs is denied.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
January 5, 2010

FILED
JAN 11 2010
So Ordered:
NEW YORK
COUNTY CLERK'S OFFICE
Hon. Judith J. Gische, JSC