

New York Packaging II, LLC v Peace Prod. Co.

2010 NY Slip Op 32570(U)

September 10, 2010

Supreme Court, Nassau County

Docket Number: 006300/2010

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

NEW YORK PACKAGING II, LLC,

Plaintiff,

-against-

INDEX NO.: 006300/2010
MOTION DATE: 07/07/2010
MOTION SEQUENCE: 001

PEACE PRODUCTS COMPANY and ANGEL
DeBENEDETTO,

Defendants.

The following papers were read on this matter:

Notice of Motion, Affirmation & Exhibits Annexed	1
Memorandum of Law in Support of Motion	2
Affirmation of Edward Weissman in Opposition, Verified Complaint & Exhibit Annexed	3
Affidavit of Jeffrey Rabiea in Opposition & Exhibits Annexed	4
Reply Memorandum of Law in Further Support of Motion	5

PRELIMINARY STATEMENT

Defendant moves for summary judgment dismissing the complaint in toto, or in the alternative, dismissing the complaint as to Peace Products Company, LLC (“Peace”) alone.

BACKGROUND

Plaintiff alleges in its complaint that it is entitled to damages and injunctive relief as a result of the conduct of Angel DeBenedetto (“DeBenedetto”), formerly employed as a sales representative, who removed, and made available to Peace, “proprietary and

confidential” information which plaintiff developed over a number of years and at substantial expense. The complaint alleges five causes of action as follows:

- breach of fiduciary duty;
- unfair business practice;
- unjust enrichment;
- fraud;
- entitlement to injunction.

Peace’s motion contends as follows:

- the First Cause of Action fails to contain the necessary elements to constitute a claim of aiding and abetting a breach of fiduciary duty;
- the complaint fails to include the necessary elements of a claim for unfair competition;
- the complaint fails to include the necessary elements of a claim for unjust enrichment;
- the claim of fraud is facially insufficient and does not contain the elements of a fraud claim, and does not identify the claimed fraud with adequate particularity;
- plaintiff is not entitled to an injunction as requested in the Fifth Cause of Action;
- plaintiff is not entitled to punitive damages, or the award of counsel fees.

DISCUSSION

Standard of Review

Defendant moves for dismissal based upon CPLR §§ 3211 (a)(1) and (a)(7), which provide as follows:

- (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or

* * *

7. the pleading fails to state a cause of action; or

* * *

In this case defendant submits order slips reflecting their transactions with some of the customers whom plaintiff alleges were improperly acquired by defendant as a result of the misconduct of DeBenedetto, all of which predate the actions complained of in the complaint. In order for a defendant to succeed on a motion to dismiss under § 3211 (a)(1), they” ‘ must submit documentary evidence that resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim’ ”. (*Paramount Transportation Systems, Inc. v. Lasertone Corporation*, 2010 WL 3023872 [2d Dept. 2010]) (internal citations omitted). The fact that defendant may have a former, or even continuing, business relationship, with some of the customers that plaintiff contends were purloined by unfair trade practices does not even remotely conclusively dispose of plaintiff’s claim.

On a motion to dismiss pursuant to CPLR § 3211 (a)(7), the court must determine, “accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated”. (*Malik v. Beal*, 54 A.D.3d 910, 911 [2d Dept. 2008]); *See also Simmons v. Edelstein*, 32 A.D.3d 464, 465 [2d Dept.2006]); (*Manfro v. McGivney*, 11 A.D.3d 662, 663 [2d Dept.2004]).

Breach of Fiduciary Duty

The essential elements of a claim for breach of fiduciary duty are “ ‘(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct’ ”. (*Rut v. Young Adult Institute, Inc.*, 74 A.D.3d 776 [2d Dept. 2010]) (internal citations omitted). Employees owe a fiduciary duty to their employer requiring the exercise of the utmost good faith and loyalty during their employment. Misappropriation of trade

secrets during the course of employment falls within the definition of breach of a fiduciary duty (*Great American Trucking Co., Inc. v. Swiech*, 267 A.D.2d 1068 [4th Dept. 1999]). The complaint adequately asserts the claim that DeBenedetto breached her fiduciary duty to plaintiff by the misappropriation of information allegedly developed over a number of years at substantial expense. While the specifics are not included in the complaint, it adequately alleges a claim against DeBenedetto. Even in the absence of a non-compete agreement, an employee may be guilty of a breach of fiduciary duty. (*Design Strategies, Inc. v. Davis*, 384 F.Supp.2d 649 [U.S.D.C., S.D.N.Y. 2005])

A cause of action for “aiding and abetting a breach of fiduciary duty requires a prima facie showing of a fiduciary duty owed to plaintiff, a breach of that duty, and defendant’s substantial assistance in effecting the breach, together with resulting damage. (*Monaghan v. Ford Motor Company*, 71 A.D.3d 848 [2d Dept. 2010]) (internal citations omitted). Plaintiff’s allegations as to “substantial assistance” by Peace is, to say the least, minimal. The First Cause of Action alleges that the information obtained by DeBenedetto was given to others, including Peace, and that this enabled them to use samples of the plaintiff and manufacture merchandise to directly compete directly with plaintiff.

As previously noted, plaintiff is entitled to the benefit of every reasonable doubt, and pleadings are to be evaluated solely on the basis of whether any cognizable claim can be extracted. Under these circumstances, the motion to dismiss the First Cause of Action is denied.

Unfair Business Practice

The Second Cause of Action reiterates the alleged conduct of DeBenedetto, claiming that this gave Peace an unfair advantage in dealing with former customers of plaintiff, leaving it with undelivered inventory. This claim should more appropriately be referred to as “unfair competition”. The claims are not just conclusory, and, despite the apparent lack of an employment agreement with a non-compete clause, the allegations adequately give notice of the event out of which the claim arises, that the misconduct of DeBenedetto enabled Peace to duplicate plaintiff’s products, and thereby obtained an unfair advantage in competing for plaintiff’s customers.

The motion to dismiss the Second Cause of Action is Denied.

Unjust Enrichment

A claim for unjust enrichment must include a claim that (1) defendant was enriched, (2) the enrichment was at the expense of plaintiff, and (3) the circumstances were such that equity and good conscience require defendant to make restitution. (*Miller v. Schloss*, 218 N.Y. 400 [1916]). Plaintiff, as it is required to do, has alleged that Peace has obtained a benefit, entre to plaintiff's customer base, by means of the use of allegedly confidential information which Peace obtained through defendant DeBenedetto, who was duty-bound not to reveal it to Peace, a competitor of her employer.

Plaintiff has adequately stated a claim for unjust enrichment, and, under the scope of review required on a motion under § 3211, the motion to dismiss the Third Cause of Action is denied.

Fraud

Allegations of fraud are subject to the heightened requirements of CPLR § 3016. The requisite elements are (1) a representation made as a statement of a material existing or pre-existing fact; (2) that the representation was untrue; (3) that it was known to be untrue at the time by the party making it; (4) or, under the circumstances, was recklessly or negligently made; (5) it was made with an intent to deceive and for the purpose of inducing the other party to act upon it; (6) that the other party justifiably relied on the representation and was induced to act, or refrain from acting; and (7) that as a result of its action or inaction the claimant was injured or damaged.

The complaint in this action is deficient in numerous of the foregoing requirements. It does not allege what representation was made, who made it, that it was knowingly false, that it was made with intent to deceive, that plaintiff justifiably relied upon such representation, and that it either acted or refrained from acting in a certain way, as a result of which it sustained damages.

The Fourth Cause of Action for Fraud is dismissed.

Injunctive Relief

"To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction." (*De Fabio v. Omnipoint Communications, et al.*, 2009 WL 3210142 [N.Y.A.D. 2d Dept., 2009]); citing,

CPLR 3201, *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988), *W.T. Grant v. Srogi*, 52 N.Y.2d 496, 517 (1981); See also, *Automated Waste Disposal, Inc., v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 — 1073 (2d Dept. 2008).

“Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient”. (*Walsh v. Design Concepts*, 221 A.D.2d 454, 455 (2d Dept. 1995)). On the contrary, “(e)conomic loss, which is compensable by money damages, does not constitute irreparable harm”. (*EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2d Dept. 2007)). Failure to enunciate non-economic loss constitutes a failure to demonstrate irreparable harm so as to warrant equitable relief in the form of an injunction (*Automated Waste Disposal at 1073*).

Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise of a court’s formidable equity power in cases where the moving party’s position, no matter how emotionally compelling, is without legal foundation (*Tucker v. Toia*, 54 A.D.2d 322, 326 [4th Dept. 1976]).

In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief. (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry. Thus, for example, where a pharmaceutical manufacturer of a non-prescription product was seeking to enforce exclusivity agreement and preliminarily enjoin defendant from importing and marketing the same product, the balance of equities favored defendant, since plaintiff could recover damages, while defendant would have to remove product from the shelves for an indeterminate length of time. (*OraSure Technologies, Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348 [1st Dept. 2007]).

Plaintiff has not adequately alleged entitlement to injunctive relief. The allegation is that it has been deprived of business as a result of the misconduct of defendants. If successful, plaintiff is entitled to restitution and monetary damages. When money damages can make the plaintiff whole, injunctive relief is not appropriate.

The motion to dismiss the Fifth Cause of Action, to the extent that it actually even sets forth a claim, as opposed to requesting a remedy is granted.

CONCLUSION

The motion to dismiss the First, Second and Third Causes of Action is denied. The motion to dismiss the Fifth and Sixth Causes of Action is granted.

On each cause of action plaintiff requests compensatory damages of \$2,000,000, punitive damages, and attorneys fees. The allegations of the complaint fall far short of the high degree of moral culpability, or willful or wanton negligence indicating a conscious disregard for the rights of others. As such the claim for punitive damages is stricken. (*Shovak v. Long Island Commercial Bank*, 50 A.D.3d 1118 [2d Dept. 2008]); (*Murray v. 600 East 21st Street, LLC*, 55 A.D.3d 805 [2d Dept. 2008]).

The general rule in New York is that each party is to bear its own legal expenses. There are narrow exceptions to the general rule, such in matrimonial actions, but these claims for breach of a fiduciary duty and unjust enrichment are not among them. (*American Broadcasting Companies, Inc. v. Engine Power Corp.*, 88 A.D.2d 842 [1st Dept. 1982]). The claims for legal fees are similarly stricken.

This constitutes the Decision and Order of the Court.

Dated: September 10, 2010


J.S.C.

ENTERED

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