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

HON. BARBARA R. KAPNICK

PART 29

Index Number : 603632/2009

WAYNE THOMAS SALON, INC.

VS

REGINA MOSER,

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

FILED
OCT 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

NYS SUPREME COURT
RECEIVED
OCT 14 2010
MOTION SUPPORT OFFICE

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

Dated: 10/12/10

HON. BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

----------X

WAYNE THOMAS SALON, INC.,

Plaintiff,

- against -

REGINA MOSER, FELIX SALDANA, PLATINUM SALON, INC. d/b/a PLATINUM SALON, RICK KELLY and PETER DIAZ,

Defendants.

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DECISION/ORDER
Index No. 603632/09
Motion Seq. No. 002

BARBARA R. KAPNICK, J.:

Defendants Platinum Salon, Inc. d/b/a Platinum Salon ("Platinum") and its alleged co-owners, Rick Kelly and Peter Diaz[1] (collectively, the "Platinum defendants") move for an order dismissing plaintiff's claims against them for tortious interference with prospective business relations (first cause of action), tortious interference with economic relations (second cause of action), unfair competition (third cause of action), and unjust enrichment (fourth cause of action).[2]

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[1] During the hearing on the preliminary injunction motion, defendant Rick Kelly testified that Peter Diaz is a Senior Stylist at Platinum but has never had any ownership interest therein.

[2] Plaintiff asserts a number of additional causes of action in its Complaint, but they were not pled against the moving defendants and thus are not addressed herein.

[*3]

Background

Co-defendant Regina Moser ("Moser") was hired by Wayne Thomas Salon, Inc. ("Wayne Thomas") as a hair stylist in November 2008. On December 5, 2008, she signed a document entitled "Wayne Thomas Salon, Inc. Policies and Procedures" (the "Manual").

The Manual provides, in relevant part, as follows:

> 24. Wayne Thomas Salon Inc. will not tolerate harassing of other individuals, whether it is of clients, colleagues, or management. Neither will Wayne Thomas Salon, Inc. tolerate any and/or all types of ethnic slurs, slang, or intimidation. Wayne Thomas Salon, Inc. is an equal opportunity employer. Professionalism with regard to clients is of equal concern. ***The salon is not a venue for flirting, making social contacts, internet contacts, or dating.*** [emphasis in the original]
>
> * * *
>
> 26. Obtaining unauthorized access . . . to any computer system is prohibited. Using the Internet on salon computers is also prohibited, unless cleared by management.
>
> 27. Using or obtaining other employees' log in passwords is prohibited.
>
> * * *
>
> 39. Clients which the salon has provided to the stylist either through advertising, or walk-ins, or by referral of the salon's clients, etc., will remain with the salon upon resignation or termination of the employee/stylist. Stylists are prohibited

> from making personal contact or sharing contact information with clients or accepting personal contact information from clients that the salon has provided either while they are employed or after they have resigned or have been terminated. However, any client(s) which the stylist has brought on their own into the salon are the stylist's clients and may be taken by the stylist upon resignation/termination. Any violation of this policy may result in immediate termination or future action.
>
> * * *
>
> 43. . . . The salon's "at will" policy is as follows: I understand that no provision of this set of policy and procedures is to be construed as a guarantee of employment. I understand that my employment with Wayne Thomas Salon, Inc. is terminable at will, that I or Wayne Thomas Salon, Inc. can terminate the employment relationship at any time for any reason with or without cause or notice, unless the terms of any applicable collective bargaining agreement provide otherwise. I also understand that I will return any previous set of policy and procedures and acknowledge that this version is the one that describes my employment. ***I understand that this set of policy and procedures is not a contract.*** Other than this "at will" agreement, Wayne Thomas Salon, Inc. reserves the right to make changes, additions, and deletions in and to these policies at any time and without notice, at its sole discretion. I agree to abide by the policies and procedures described here in numbers 1-47, amended 11/28/08 as they may be revised or interpreted by Wayne Thomas Salon, Inc. in the future and concerning any new policies. [emphasis added]
>
> * * *

In August 2009, Moser resigned from her employment with Wayne Thomas and was subsequently hired as a hair stylist by Platinum.

According to the Complaint, Moser violated restrictions set forth in the Manual, both while she was employed and upon her resignation, by accepting client's personal contact information, viewing client information on the salon computer, stealing confidential client information, informing clients of her resignation, and by soliciting Wayne Thomas' clients on behalf of Platinum.

The Complaint alleges that the moving defendants "have knowingly participated in Moser's wrongful conduct since, among other things, the Platinum defendants knew that Moser solicited and brought Wayne Thomas clients to Platinum for services and knew that Moser utilized confidential Wayne Thomas client information in order to develop Moser and Platinum's business." (Compl. ¶ 72).

The Platinum defendants now move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the Complaint insofar as it relates to them.

Discussion

It is well settled that in determining a motion to dismiss, "the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference." *Rivietz v. Wolohojian*, 38 AD3d 301 (1st Dep't 2007)(internal citation omitted). Allegations consisting of bare

legal conclusions, with no factual specificity, however, "are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 NY3d 358, 373 (2009); *see also, Caniglia v. Chicago Tribune N.Y. News Syndicate*, 204 AD2d 233, 233-34 (1st Dep't 1994).

First cause of action - Tortious Interference with Prospective Business Relations

> To prevail on a claim for tortious interference with business relations under New York law, a party must allege that "(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or [wrongful] means; and (4) the defendant's interference caused injury to the relationship."

Gmurzynska v. Hutton, 11 Misc3d 1076(A), at *3, (Sup. Ct. NY Co. March 29, 2005) (citing *State Street Bank and Trust Co. v. Innervisiones Errazuriz Limitada*, 374 F3d 158, 171 [2d Cir. 2004] [applying New York law]). The Appellate Division, First Department has held that "'[w]rongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required (citation omitted)." *Snyder v. Sony Music Entertainment, Inc.*, 252 AD2d 294, 300 (1st Dep't 1999).

Additionally, "[t]ortious interference with prospective economic [or business] relations requires an allegation that plaintiff would have entered into an economic relationship but for

the defendant's wrongful conduct (citations omitted)." *Vigoda v. DCA Prods. Plus*, 293 AD2d 265, 266 (1st Dep't 2002).

The Platinum defendants argue that the first cause of action should be dismissed because the Complaint does not allege that defendants acted solely out of malice or used wrongful means to interfere with prospective business relations. Furthermore, they argue that plaintiff failed to demonstrate that Wayne Thomas would have continued its economic relationship with Moser's clients "but for" the Platinum defendants' alleged wrongful conduct. Defendants contend that clients followed Moser to Platinum, not because of any wrongdoing, but because they were loyal to their hair stylist and interested in her services.

Plaintiff, on the other hand, argues that Moser improperly solicited clients and that it is sufficient to simply allege that this was done with malice or dishonesty. Plaintiff also argues that because the Platinum defendants knowingly participated in Moser's alleged wrongdoing, they are equally liable for tortious interference with prospective business relations.[3]

The Court finds that plaintiff has not met its burden of showing that the Platinum defendants took any action to cause

[3] Plaintiff also argues that it should be given the opportunity to conduct discovery to determine the extent of Moser's wrongdoing.

plaintiff's loss of clientele. At most, the Complaint alleges that Moser took the action of soliciting former Wayne Thomas clients and Platinum had knowledge of this alleged action. Knowledge, however, is insufficient to satisfy the third element of the cause of action, which requires conduct amounting to an independent tort or crime, on the part of the defendant. *See Carvel Corp. v. Noonan*, 3 NY3d 182, 190 (2004).

Even if plaintiff had alleged some action on the part of the Platinum defendants, the Complaint fails to allege, with any factual specificity, that the Platinum defendants acted solely out of malice or by wrongful means. As a result, the plaintiff has failed to meet the basic pleading requirements. *See Algomod Technologies Corp. v. Price*, 65 AD3d 974, 975 (1st Dep't 2009) (holding allegations of malice or the use of wrongful means must be pled in a nonconclusory manner).

Therefore, the motion to dismiss the first cause of action is granted, insofar as it was pled against the Platinum defendants.

Second cause of action - Tortious Interference with Economic Relations

The Platinum defendants next argue that the Complaint fails to state a cause of action for tortious interference with economic relations because it contains no allegation that plaintiff had a

contract with any of its former clients.

Plaintiff argues that the Complaint sufficiently alleges that Wayne Thomas had numerous contracts with clients, that Moser and the Platinum defendants knew of those contracts, and that they intentionally interfered with them by, among other things, improperly soliciting and servicing the plaintiff's clients.

In New York, "[t]ortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third party's breach of contract without justification, actual breach and damages (citation omitted)." *Vigoda v. DCA Prods. Plus, supra* at 266.[4]

The Court finds that the plaintiff has failed to meet its burden of making a prima facie showing that Wayne Thomas entered into any valid contracts with its patrons, and that even if it did have such contracts, that the Platinum defendants knew about these alleged contracts when the patrons sought hair services from

[4] Both sides cite to case law which states that it is well settled law that these elements must be met to allege a claim for tortious interference with economic relations.

Platinum.[5]

Therefore, the motion to dismiss the second cause of action is also granted, insofar as it was pled against the Platinum defendants.

Third cause of action - Unfair Competition

The Platinum defendants next argue that the allegations in the Complaint relating to plaintiff's claim for unfair competition merely restate the allegations set forth in connection with plaintiff's claim for tortious interference with prospective business relations, and fail to support a viable claim against them.

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[5] This Court finds plaintiff's reliance on *Comprehensive Community Dev. Corp. v. Lehach*, 223 AD2d 399 (1st Dep't 1996) misplaced. In that case, the defendant was a staff physician specializing in the treatment of allergies with plaintiff community health center until her employment was terminated. Plaintiff alleged therein that defendant had misappropriated various patient records from its office, thereby wreaking havoc on its ability to provide continuous care to its patients in wanton disregard for their well-being, and then used those records to solicit the patients for her private practice.

The Appellate Division rejected defendant's contention that the claim for tortious interference with contractual relations must fail because plaintiff did not have explicit contracts with its patients, finding that while treatment by a doctor does not give rise to an implied contract or give the doctor a property interest in the patient, the doctor and patient may have had a contractual relationship subject to unlawful interference.

The doctor-patient relationship involved in that case is clearly distinguishable from the relationship found in the instant case.

Plaintiff argues that the Complaint sufficiently alleges that the Platinum defendants knowingly participated in Moser's misappropriation and utilization of plaintiff's confidential client information in order to promote and develop their business interests.

Under New York law, to sustain a claim of unfair competition, "it must be shown that the defendant 'misappropriated the plaintiff['s] labors, skills, expenditures, or goodwill and displayed some element of bad faith in doing so (citations omitted)." *CCCLF, Inc. v. Bonin*, 24 Misc3d 1221(A), at *10, (Sup. Ct. Kings Co. July 17, 2009).

The Complaint here fails to allege any action on behalf of the Platinum defendants, besides hiring Ms. Moser and allowing her to perform hair services on clients that may have been former Wayne Thomas clients. This conduct does not meet the basic pleading requirements. Moreover, there is no showing that the Platinum defendants acted in bad faith.

Therefore, the Court finds that the Complaint fails to state a claim against the Platinum defendants for unfair competition.

Fourth cause of action – Unjust Enrichment

Finally, the Platinum defendants argue that the Complaint fails to state a cause of action against them for unjust enrichment because there is no allegation that they engaged in any unlawful or wrongful conduct.

Plaintiff argues that unjust enrichment does not require the performance of any wrongful act by the party allegedly enriched. Plaintiff further asserts that there are factual questions as to whether the Platinum defendants earned income from illicit conduct on the part of Moser and whether said defendants knowingly participated in that conduct.

To state a claim for unjust enrichment, "a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor (citations omitted)." *Nakamura v. Fuji*, 253 AD2d 387, 390 (1st Dep't 1998).

In the instant case, while the Complaint alleges that the Platinum defendants "improperly reaped significant benefits including, but not limited to, income from former Wayne Thomas clients" (Compl. ¶ 99), there is no allegation that the plaintiff itself conferred any benefit upon the Platinum defendants, which

would entitle it to recover under the theory of unjust enrichment.

Accordingly, that portion of defendants' motion seeking to dismiss the fourth cause of action is granted, insofar as it was pled against the Platinum defendants.

The action is hereby dismissed as against the defendants Platinum Salon, Inc. d/b/a Platinum Salon, Rick Kelly and Peter Diaz with prejudice and without costs or disbursements. The action is severed and continued as to defendants Regina Moser and Felix Saldana.

This constitutes the decision and order of this Court.

Dated: October 12, 2010

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
OCT 15 2010
COUNTY CLERK'S OFFICE
NEW YORK