

**Saperstein Agency, Inc. v Concorde Brokerage of
L.I., Ltd.**

2010 NY Slip Op 33466(U)

December 7, 2010

Supreme Court, Nassau County

Docket Number: 020877-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
SAPERSTEIN AGENCY, INC.,
Plaintiff,

TRIAL/IAS PART: 22
NASSAU COUNTY

-against-

Index No: 020877-08
Motion Seq. Nos: 6 & 7
Submission Date: 10/15/10

CONCORDE BROKERAGE OF L.I., LTD.,
STEVEN W. TASCARELLA, an individual,
ANTHONY MAROTTA, an individual,
EUGENE MARICHAL, an individual, and
SUZANNE PRATO, an individual,

Defendants.

-----x

Papers Read on these Motions:

- Notice of Motion, Affidavit in Support,**
- Affirmation in Support and Exhibits.....x**
- Notice of Cross Motion,**
- Affirmation in Support/Partial Opposition and Exhibits.....x**
- Affidavit in Opposition to Cross Motion.....x**
- Reply Affirmation and Exhibits.....x**

This matter is before the court on 1) the motion by Plaintiff filed on September 16, 2010, and 2) the cross motion filed by Defendants on October 1, 2010, both of which were submitted on October 15, 2010. For the reasons set forth below, the Court 1) grants Plaintiff's motion in part; and 2) denies Defendants' motion. Specifically, the Court 1) grants Plaintiff leave to file and serve an amended complaint conforming with this Order; 2) grants Plaintiff's motion for consolidation and directs that the cases of *Saperstein Agency, Inc. v. Concorde Brokerage of L.I., Ltd. et al.*, Nassau County Index Number 20877/08 and *Saperstein Agency, Inc. v. Alicia Prato*, Index Number 13963-10 will proceed jointly for all purposes; and 3) grants Plaintiff's motion for

an Order directing a representative of Defendant Concorde Brokerage of L.I., Ltd. (“Concorde”) to execute the authorization contained in Plaintiff’s Discovery Demand (Ex. D to P’s motion) and hereby directs that a representative of Concorde execute that authorization on or before December 20, 2010.

The Court directs counsel for the parties in the cases of *Saperstein Agency, Inc. v. Concorde Brokerage of L.I., Ltd. et al.*, Nassau County Index Number 20877/08 and *Saperstein Agency, Inc. v. Alicia Prato*, Index Number 13963-10 to appear for a conference before the Court on February 23, 2011 at 9:30 a.m. **Counsel will not be required to appear at the conference on January 10, 2011 that was previously scheduled by the Court.**

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order: 1) pursuant to CPLR § 3025(b), granting Plaintiff to amend its complaint; 2) pursuant to CPLR § 602, consolidating the instant action (“Instant Action”) with the related matter of *Saperstein Agency, Inc. v. Alicia Prato*, Nassau County Index # 013963-10 (“Related Action”); and 3) directing Defendant Concorde Brokerage of L.I., Ltd. (“Concorde”) to execute an authorization permitting Plaintiff to obtain from Applied Systems, Inc., data pertaining to Plaintiff’s customers that were allegedly wrongfully taken by Defendant.

B. The Parties’ History

The parties’ history is set forth in a prior decision of the Court dated August 11, 2009 in which the Court denied Plaintiff’s application for injunctive relief (“Prior Decision”). Plaintiff Saperstein Agency, Inc. (“Saperstein” or “Plaintiff”) and Defendant Concorde are in the insurance brokerage business. As outlined in the Prior Decision, the Instant Action involves allegations by Plaintiff that Defendants breached a Producer Brokerage Agreement and Employee/Producer Agreement by, *inter alia*, 1) writing business and placing it directly with Concorde; and 2) using Saperstein’s proprietary and confidential information unlawfully to solicit Saperstein’s customers and clients.

In his Affidavit in Support, Jeffrey Saperstein (“Jeffrey”) provides a copy of the proposed Second Amended Complaint (“Proposed Complaint”) that Plaintiff seeks permission to file (Ex. A to Jeffrey Aff. in Supp.). Jeffrey affirms that, in its Proposed Complaint, Plaintiff seeks to add

the following causes of action: 1) reimbursement of commissions from all Defendants, 2) for damages against Defendant Suzanne Prato (“Prato”) for wrongful access to Plaintiff’s private corporate files including federal and state income tax returns, computer network passwords, credit documents, corporate buy/sell agreements and its owners and employees’ personal files, which include salary, social security numbers, employment records, income tax returns, divorce settlements, personal correspondence and other information, 3) as to Defendant Prato, for damages arising from the fraudulent modification of documents submitted to insurance carriers to procure insurance for Plaintiff’s customers without the knowledge or consent of the Plaintiff, 4) as to Defendant Prato, for wrongfully printing documents containing proprietary information that was used to solicit Plaintiff’s clients, and to have clients place insurance through Defendant Concorde, and 5) as to all Defendants, for damages resulting from the illegal conversion of Plaintiff’s customers to Defendant Concorde by means of misrepresentation of customers’ proprietary information to insurance companies in order to obtain artificially low quotes.

Jeffrey affirms that Plaintiff recently obtained information warranting the Proposed Complaint as a result of a new auditing program that it obtained from its software developer. This program allowed Plaintiff to run reports to determine which documents were viewed from individual employees’ computers, and which documents were printed, deleted, e-mailed, faxed or altered from the Plaintiff’s central computer/imaging system.

In support of Plaintiff’s application, Jeffrey provides documentation including 1) a breakdown of the commissions due from several of the named Defendants (Jeffrey Aff. in Supp. at Ex. E) which Defendants have refused to return to Plaintiff, 2) documentation allegedly reflecting that Prato, while still employed by Plaintiff, bypassed Plaintiff’s customer management system used by all employees and printed forms with client information that were later used to procure insurance with other companies (*Id.* at Ex. F), and 3) documentation allegedly reflecting that Prato fraudulently modified information contained in documents regarding certain Saperstein clients, without the permission of Plaintiff or the clients, which enabled the clients to obtain a lower insurance rate and ensure that Prato could retain the clients and receive commissions (*Id.* at Ex. G). Jeffrey affirms that Plaintiff faces financial exposure as a result of these illegal modifications, including fines and penalties.

With respect to Plaintiff's application for consolidation of the Instant Action with the Related Action, Jeffrey affirms that, using its new computer auditing program, Plaintiff has ascertained that Alicia Prato ("Alicia"), the sister of Defendant Prato, improperly bypassed Plaintiff's customer management system and printed proprietary documents from certain customer files. Jeffrey provides documentation that Alicia printed without Plaintiff's knowledge or consent (Jeffrey Aff. in Supp. at Ex. H). Jeffrey avers that this documentation includes clients' quarterly federal filings disclosing mileage and fuel which are required by an insurance carrier before it will place insurance. Jeffrey affirms, based on his conversations with a particular insurance company, that one of the clients reflected in this documentation subsequently obtained insurance through Defendant Concorde. In the complaint against Alicia (*Id.* at Ex. B), Plaintiff asserts causes of action for, *inter alia*, conversion of misappropriation of trade secrets.¹

Jeffrey also affirms that Plaintiff is requesting an Order directing Defendant Concorde to execute the authorization ("Authorization") provided (Jeffrey Aff. in Supp. at Ex. D). The proposed Authorization provides that Concorde authorizes Applied Systems, Inc. ("Applied Systems"), a company located in Illinois, to release and forward to Plaintiff's counsel certain documents. Plaintiff previously requested that Concorde sign the Authorization but it has not done so. Plaintiff's counsel affirms that the Authorization is needed to obtain data of Concorde pertaining to Plaintiff's former customers, which data is stored by Applied Systems. It is Plaintiff's understanding that all documents pertaining to customers of Concorde are remotely maintained on the hard drives of Applied Systems. Plaintiff needs to obtain a copy of the data maintained by Applied on its hard drive which will contain documents that have been scanned or copied from Plaintiff's computer. Plaintiff submits that Defendants used this information to obtain insurance with different insurance carriers at lower rates by manipulating the information it allegedly took wrongfully from Plaintiff. Plaintiff served Applied Systems with a subpoena

¹ While the sufficiency of the complaint in the Related Action is not before the Court, the Court notes that this complaint includes allegations that defendant Alicia Prato improperly obtained confidential information and trade secrets of Plaintiff "for purposes of converting the Plaintiff's customers to Concorde" (Compl. of Related Action at ¶ 15). Conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (2006). As discussed *infra*, there is an issue whether Plaintiff's customers constitute "personal property" that can properly be the subject of a conversion claim.

but Applied Systems, as a company located outside of New York, took the position that the subpoena was not enforceable. Counsel for Applied, however, advised Plaintiff's counsel that it would furnish the requested information upon receipt of the Authorization.

With respect to the Authorization, counsel for Defendants affirms that counsel for Plaintiff, on or about July 12, 2010, mailed a subpoena to Applied Systems requesting certain documentation (Matturro Aff. at Ex. A). Ten days later, Ethan Hayward ("Hayward"), counsel for Applied Systems, contacted Defendants' counsel regarding the subpoena. Hayward stated that he had contacted Plaintiff's counsel who had not returned his telephone call, and expressed his belief that the subpoena had not been served pursuant to the New York CPLR. Hayward also advised Defendants' counsel that technical support personnel of Applied Systems advised Hayward's office that Jeffrey had contacted Applied Systems claiming to be calling on behalf of Concorde, and requested that the technical personnel provide information regarding clients and records of Concorde. Hayward advised Defendants' counsel that he directed all staff of Applied Systems to direct any inquiries to Hayward's office. Hayward also stated that he would not be disclosing records of Concorde.

On or about July 20, 2010, Defendants' counsel received correspondence from Hayward (Matturro Aff. at Ex. B), addressed to counsel for Plaintiff and counsel for Defendants. In that letter, Hayward states that Applied Systems is unable to comply with the subpoena. Hayward 1) notes his objections to the form and service of the subpoena; 2) states that Applied Systems is not in a position to furnish the requested information because it only acts as the custodian of its customers' data and has no proprietary interest in it; rather, all right, title and interest in the data lie solely with the particular customer, in this case Concorde; 3) expresses concern that the records "likely contain confidential customer information, the disclosure of which could expose Applied Systems to liability under privacy protection laws;" 4) objects that the subpoena does not provide sufficient notice as to why the information sought is material and necessary for the litigation; and 5) objects because the gathering and copying of the requested data would be unduly burdensome.

Following the letter from Hayward, Plaintiff's counsel served a Demand for Discovery ("Discovery Demand") dated August 10, 2010 (Maturro Aff. at Ex. C) requesting that Defendants execute the Authorization. Defendants' counsel notes that the list of entities for which Plaintiff requests documents includes all trucking customers of Plaintiff and objects that 1) the request is not limited, e.g., to a specific time period, client or type of insurance; 2) the request is overly broad; and 3) the request seeks confidential information of the Defendants.

In response, Jeffrey affirms that "[i]t is clear to your deponent that the documents submitted by the Defendants to procure insurance for Plaintiff's former customers were all wrongfully copied and taken from the Plaintiff's proprietary data base and scanned into the Defendant, Concorde's data base, which is hosted by Applied" (Jeffrey Aff. in Opp. at ¶ 6). He affirms, further, that "Plaintiff is requesting information on its former trucking clients which were either cancelled for non payment, or at the insured's request, or the company's request, or had lapsed or were not renewed for policies that ended during the time period August 1, 2006, through August 5, 2010 in the commercial trucking division"(Id. at ¶ 11).

C. The Parties' Positions

Plaintiff submits that the Court should permit the filing of the Proposed Complaint in light of information recently obtained by Plaintiff through its new auditing program, particularly because Plaintiff has not delayed in seeking leave to amend upon discovery of this new information. Plaintiff also contends that Defendants will not be surprised or prejudiced by the amendment. Defendants acknowledge that leave to amend is freely granted, but suggests that it would be premature to permit the requested amendment prior to consolidating the actions.

Plaintiff also submits that consolidation of this matter with the Related Action is appropriate because 1) both actions involve common questions of law and fact; and 2) consolidation will avoid unnecessary duplication of proceedings, save costs and expenses and possibly prevent the injustice that would result from divergent decisions. Defendants do not oppose the proposed consolidation if the Court agrees to extend the discovery schedule in light of the additional discovery that will be required.

With respect to its application for an Order directing Defendant Concorde to execute the Authorization, Plaintiff submits that the requested information is relevant and that it needs the signed Authorization to obtain the requested documents from Applied Systems, a company that is located outside of New York State. Defendants oppose Plaintiff's application, objecting that the Authorization is overbroad, lacking in specificity and seeks confidential information of the Defendants. Defendants thus seek a protective order with respect to the Discovery Demand.

RULING OF THE COURT

A. Leave to Amend

Leave to amend a complaint shall be freely given unless the proposed amendment would cause prejudice to the opposing party. CPLR § 3025(b); *Benyo v. Sikorjak*, 50 A.D.3d 1074 (2d Dept. 2008); *39 College Point Corp v. Transpac Capital Corp.*, 27 A.D.3d 454 (2d Dept. 2006). No evidentiary showing of merit is required for leave to amend a pleading under § CPLR 3025(b); the court need only determine whether the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit. *Lucido v. Mancuso*, 49 A.D.3d 220, 229 (2d Dept. 2008); *see Dickinson v. Ignoni*, 76 A.D.3d 943 (2d Dept. 2010); *DeMato v. Mallin*, 68 A.D.3d 711 (2d Dept. 2010). Leave to amend a pleading to add a duplicative cause of action should be denied. *Hylan Elec. Contracting, Inc. v. MasTec North America Inc.*, 74 A.D.3d 1148 (2d Dept. 2010).

The Court concludes that leave to amend is appropriate because 1) the proposed claims, other than the proposed Eleventh Cause of Action, are not palpably insufficient or patently devoid of merit; and 2) Defendants have failed to demonstrate that they will be prejudiced by the proposed amendment. The Eleventh Cause of Action in the Proposed Complaint, however, is problematic. In the Eleventh Cause of Action, Plaintiff alleges that Defendant Prato improperly obtained information from Plaintiff "to wrongfully convert the Plaintiff's customer[s] to her and the other Defendant[s] named herein." Conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. New York Organ Donor Network, Inc*, 8 N.Y.3d 43, 49-50 (2006). As the clients at issue are not personal property, they may not be the subject of conversion. Moreover, Plaintiff has already alleged claims for

conversion of its computer data, fraudulent modifications, misrepresentations, and misappropriation of trade secrets. The Court thus concludes that the Eleventh Cause of Action in the Proposed Complaint is duplicative and lacking in merit and should not be included in the amended complaint to be filed by Plaintiff.

Accordingly, the Court grants Plaintiff leave to file and serve an amended complaint conforming with this Order on or before January 14, 2011. The Court directs Defendants to serve an answer to the amended complaint on or before February 10, 2011.

B. Consolidation

The Court concludes that consolidation is appropriate in light of the fact that 1) the two actions involve common questions of law and fact; and 2) there has been no showing of prejudice to Defendants if consolidation is granted. *See Viafax Corp. v. Citicorp Leasing Inc.*, 54 A.D.3d 846 (2d Dept. 2008); *Best Price Jewelers.Com, Inc. v. Internet Data Storage & Systems, Inc.*, 51 A.D.3d 839 (2d Dept. 2008). Accordingly, the Court grants Plaintiff's motion and directs that the cases of *Saperstein Agency, Inc. v. Concorde Brokerage of L.I., Ltd. et al.*, Nassau County Index Number 20877/08 and *Saperstein Agency, Inc. v. Alicia Prato*, Index Number 13963-10 will proceed jointly for all purposes

C. Authorization for Documents from Applied Systems

New York favors open and far-reaching pretrial discovery. *Kavanaugh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 954 (1998), quoting *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 193 (1992), *rearg. den. sub nom. Poole v. Consolidated Rail Corp.*, 81 N.Y.2d 835 (1993), *cert. den.*, 510 U.S. 816 (1993). CPLR § 3101(a) provides for full disclosure of all evidence material and necessary in the prosecution or defense of an action, with the test being one of "usefulness and reason." *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968). Plaintiff's request for the Authorization meets this test, and is limited to specific former clients that Plaintiff maintains were wrongfully taken by Defendant Concorde. The request is further limited to the time period August 1, 2006 through August 5, 2010, and policy type is limited to the commercial trucking division. On this record Plaintiff has demonstrated that its request is appropriate.

Defendants provide an Affidavit of Defendant Steven W. Tascarella dated May 2, 2009

(Ex. A to Maturro Reply Aff.) in which he affirms, *inter alia*, that Concorde used a variety of sources to obtain potential customer leads, including Truck Paper, Owner-Operator Independent Drivers Association (OOIDA), Safety and Fitness Electronic Records (SAFER) system, and various referral programs known throughout the insurance industry such as DOTAuthority.com. Defendants, however, submit no documentary evidence in support of this claim and do not provide detail regarding their interaction with these sources.

The Court further notes that Plaintiff's demand for execution of the Authorization was made on August, 10, 2010, pursuant to CPLR §§ 3101 and 3120, but Defendants' application for a protective order was not made until September 30, 2010 in its cross-motion. Where objections to discovery demands are not made within twenty days of service of the demand as required by CPLR § 3122(a), the Court's review is limited to whether the requested material is privileged or whether the demand is palpably improper. *See Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 168 (2d Dept. 2010), citing *Coville v. Ryder Truck Rental, Inc.*, 30 A.D.3d 744, 745 (3d Dept. 2006), quoting *McMahon v. Aviette Agency*, 301 A.D.2d 820, 821 (3d Dept. 2003); *Marino v. County of Nassau*, 16 A.D.3d 628 (2d Dept. 2005). Conclusory objections, such as those presented by Defendants, do not suffice. *See Wilner*, 71 A.D.3d at 168. Finally, to the extent that production of the information plaintiff seeks from non-party Applied Systems requires a showing of something more than "mere relevance and materiality," *Kooper v. Kooper*, 74 A.D.3d 6, 18 (2d Dept. 2010), that standard has also been met here. No other source of the information sought has been identified.

Accordingly, the Court grants Plaintiff's motion for an Order directing Concorde to execute the Authorization contained in its Discovery Demand dated August 10, 2010, and directs a representative of Concorde to execute that Authorization on or before December 20, 2010.

The Court thus denies Defendants' cross-motion for a protective order.

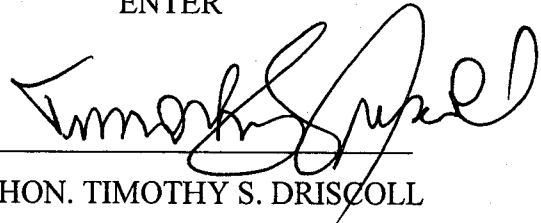
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties in the cases of *Saperstein Agency, Inc. v. Concorde Brokerage of L.I., Ltd. et al.*, Nassau County Index Number 20877/08 and *Saperstein Agency, Inc. v. Alicia Prato*, Index Number 13963-10 to appear for a conference before the Court on February 23, 2011 at 9:30 a.m. **Counsel will not be required to appear at the conference on January 10, 2011 that was previously scheduled by the Court.**

DATED: Mineola, NY
December 7, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

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