

Newtok Video Corp v Koike

2011 NY Slip Op 31430(U)

May 25, 2011

Sup Ct, NY County

Docket Number: 600380/10

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

NEWTOK VIDEO CORP.,
Plaintiff,

Index No.: 600380/10

Motion Date: 09/17/10

- v -

Motion Seq. No.: 02

RYOSUKE KOIKE,
Defendant.

Motion Cal. No.: 118

The following papers, numbered 1 to 3 were read on this motion to dismiss.

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

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

FILED

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Upon the foregoing papers,

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Plaintiff video rental and sales business sues its former salesperson alleging conversion, breach of fiduciary duty and fraud among other claims. Plaintiff claims that defendant was given the discretion to discount videos for the purpose of increasing overall sales but that defendant abused this discretion by giving smaller discounts to customers while reporting a larger amount of discounts to plaintiff. It is alleged that defendant converted the difference between the amount he actually received versus that reported to plaintiff.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

It is also asserted that defendant gave volume discounts to customers that were not in line with plaintiff's policies. Finally, plaintiff asserts that defendant improperly took plaintiff's proprietary client files and used the information contained therein to benefit defendant's new employer.

Defendant moves pursuant to CPLR 3211 to dismiss the complaint. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v Martinez, 84 NY2d 83, 87-88 (1994) (citations omitted).

The court finds that plaintiff in the amended verified complaint has adequately pled causes of action for conversion and breach of fiduciary duty. "The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner." Republic of Haiti v Duvalier, 211 AD2d 379, 384 (1st Dept 1995) (citations omitted). Plaintiff's allegations that defendant without authority took DVDs owned by plaintiff, duplicated them and sold them are sufficient to sustain its pleading burden. With respect to the breach of fiduciary duty

claim "[i]t is well settled that an employee is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. Not only must the employee or agent account to his principal for secret profits but he also forfeits his right to compensation for services rendered by him if he proves disloyal" American Map Corp. v Stone, 264 AD2d 492, 493 (2d Dept 1999) (citations and internal quotations omitted). The facts alleged here, that defendant was an employee of plaintiff and secretly used that position to earn profits at the plaintiff's expense state a claim for breach of fiduciary duty.

The court shall however grant defendant's motion to dismiss the causes of action for interference with prospective business advantage and fraud. "To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby." Jacobs v Continuum Health Partners, Inc., 7 AD3d 312, 313 (2d Dept 2004). Importantly, the wrongful conduct must be alleged to have been directed at plaintiff's customers, not the plaintiff itself. Carvel Corp. v Noonan, 3 NY3d 182, 192 (2004).

Even assuming, as alleged in the complaint, that defendant wrongfully offered discounted DVDs to the plaintiff's customers, such acts are insufficient to constitute the type of pressure that would give rise to liability. The plaintiff itself does not allege it engaged in any efforts independent of the defendant to contract with the 'customers defendant, acting as its agent, serviced on its behalf. In fact, the complaint by its very terms concedes that plaintiff's customers still purchased DVDs from plaintiff because of defendant's efforts although at allegedly reduced prices.

The fraud cause of action also fails because the complaint only alleges that misrepresentations were made to plaintiff's customers about the prices of plaintiff's merchandise. See Stein v McDowell, 74 AD3d 1323, 1326 (2d Dept 2010) ("the plaintiffs' purported cause of action sounding in fraud is duplicative of their cause of action to recover damages for breach of fiduciary duty . . . [t]herefore, their fraud cause of action must be dismissed").

Accordingly, it is

ORDERED that defendant's motion to dismiss is GRANTED only to the extent that the plaintiff's SECOND (interference with prospective advantage) and FOURTH (fraud) causes of action are hereby dismissed; and it is furthe

ORDERED that defendant's motion is otherwise denied; and it is further

ORDERED that the parties are directed to attend a compliance conference on June 7, 2011 in IA5 Part 59, Room 103, 71 Thomas Street, New York, NY 10013 at 9:30 A.M.

This is the decision and order of the court.

Dated: May 25, 2011

ENTER:

~~_____~~
DEBRA A. JAMES J.S.C.

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