

Indy 3000, Inc. v Cirillo
2011 NY Slip Op 31849(U)
July 5, 2011
Supreme Court, Suffolk County
Docket Number: 40573-2010
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NUMBER: 40573-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
 J. S. C.

Original Motion Date: 12-2-10; 12-14-10; 12-05-10
 Motion Submit Date: 04-19-2011
 Motion Sequence No's.: 001 MD
 002 MOTD
 004 MOTD

FINAL
 NON FINAL

_____ X
INDY 3000, INC.,

Plaintiff,

-against-

**CARMINE CIRILLO, DAWN BOBAL,
 MEDOFRD FAST LUBE, INC., and
 MAXIMUM PERFORMANCE AUTO
 REPAIR, INC.,**

Defendant.

_____ X

Attorney for Plaintiff

Lamb & Barnosky, LLP
 By: Candace J. Gomez, Esq.
 534 Broadway, Suite 210
 PO Box 9034
 Melville, New York 11747

Attorney for Defendants

Stephen D. Kutner, Esq.
 Kutner & Gurlides
 300 Old Country Road, Suite 311
 Mineola, New York 11501

ORDERED that the Plaintiff's motion (motion sequence # 001) for a preliminary injunction is denied, and it is further

ORDERED that the temporary restraining order dated November 4, 2010, is vacated, and it is further

ORDERED that the branch of the Defendants' cross-motion (motion sequence # 002) for a hearing on damages, if any, sustained by reason of the temporary restraining order is

granted, and the cross-motion is otherwise denied, and it is further

ORDERED that the Plaintiff's motion (motion sequence # 004) is granted in part and denied in part, as set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Indy 3000, Inc. ("Plaintiff" or "Indy") commenced this action on November 2, 2010, against defendants Carmine Cirillo ("Cirillo"), Dawn Bobal ("Bobal"), Medford Fast Lube, Inc. ("MFL") and Maximum Performance Auto Repair, Inc. ("MPAR") for a permanent injunction and to recover damages for breach of contract, misappropriation of trade secrets/proprietary/confidential information, tortious interference with business relations, unfair competition, breach of duty of loyalty, and unjust enrichment.

In the complaint, Plaintiff alleges, among other things, that: Plaintiff is in the automotive lubrication and repair business; that Plaintiff employed both Cirillo (General Manager) and Bobal (Assistant Manager); and while employed by Plaintiff, Cirillo and Bobal formed MFL, an automotive lubrication and repair business in direct competition with and in close proximity to Plaintiff. According to plaintiff, Cirillo and Bobal had access to all of Plaintiff's proprietary and confidential information including Plaintiff's customer list, vendor list and sales records; Plaintiff periodically updated and distributed an employee handbook that explicitly prohibits employees from using Plaintiff's confidential information in an unauthorized manner; in 2006 and then again in September 2010, Cirillo signed a form acknowledging that he received and reviewed the employee handbook; and in September 2010, Bobal signed a form acknowledging that she received and reviewed the employee handbook. On October 15, 2010, Plaintiff's Human Resources Manager was advised by two of Plaintiff's employees that Cirillo and Bobal were starting a competing business. Plaintiff further alleges that Cirillo misappropriated Plaintiff's customer list, vendor list and sales records and stored this information in his smartphone; Cirillo used and continues to use Plaintiff's confidential information to conduct the business of MFL to Plaintiff's detriment; Cirillo and Bobal interfered with Plaintiff's contractual relationship with Valvoline by purposely reducing the amount of product that Plaintiff purchased from Valvoline causing Valvoline to send notices to Plaintiff claiming that Plaintiff was in breach of its contract; and Valvoline subsequently advised Plaintiff that it no longer wants to transact business with Plaintiff. Plaintiff terminated Cirillo on October 21, 2010; on October 6, 2010, one of Plaintiff's employees observed Bobal leaving Plaintiff's premises with

folders and binders containing the names, addresses, and service histories of Plaintiff's customers; Bobal resigned her employment with Plaintiff on October 8, 2010; and Cirillo and Bobal allegedly have used Plaintiff's confidential information to contact Plaintiff's vendors and solicit Plaintiff's customers for the benefit of MFL.

Defendants Cirillo, Bobal and MFL served an answer to the complaint with affirmative defenses and two counterclaims. The first counterclaim sounds in defamation and alleges that Plaintiff's employee made false statements concerning Cirillo that were published to a third-party with knowledge that the statements were false and intent to cause injury to Cirillo's trade, occupation and business, and that Cirillo has been damaged as a result. Specifically, Defendants allege that Plaintiff's employee sent a text message to a Jason Puntarich stating "u do know what he's doing is illegal right?" and "[stand behind him . . . not a wise decision Jay . . . but you'll figure that out when he screws you over . . .]" The second counterclaim alleges that the Plaintiff, its officers, directors, shareholders, and employees made false accusations concerning the honesty, integrity, and character of Cirillo, causing Cirillo to suffer severe emotional distress.

Plaintiff now moves for a preliminary injunction prohibiting Defendants from (1) divulging, disseminating or utilizing Plaintiff's customer list, vendor list, sales records, and service histories, (2) soliciting Plaintiff's vendors, and (3) soliciting Plaintiff's customers. Plaintiff also seeks a mandatory injunction requiring Defendants to (1) return all of Plaintiff's confidential information in Defendants' possession, and (2) provide an accounting of Plaintiff's confidential information.

By order to show cause dated November 4, 2010, this Court granted interim relief, *pending further order of the Court*, enjoining Defendants from (1) directly or indirectly soliciting any of Plaintiff's vendors concerning Plaintiff's pricing structures with its vendors, (2) soliciting any of Plaintiff's customers, and directing Defendants to immediately return all of Plaintiff's confidential information in their possession.

In support of its motion the Plaintiff submits, among other things, affidavits from Michael Rodgers, Courtney Hodell, Kevin Sturm, Thomas McKiernan and Rosemarie Algieri. Mr. Rodgers' affidavit essentially repeats the factual allegations in the complaint. He avers, among other things, that Plaintiff's customer list is unique, cannot be easily duplicated by competitors, and contains key information (contact information; year, make and model of

customers' vehicle; and service history) allowing Plaintiff to best meet the needs of its customers, and that Plaintiff's vendor list is inimitable because it contains information regarding pricing structure and products from Plaintiff's vendors unique to Plaintiff. Courtney Hodell, Plaintiff's Director of Human Resources, confirms, among other things, that on September 10, 2010, both Cirillo and Bobal signed forms acknowledging receipt and review of Plaintiff's Employee Handbook which prohibits, among other things, the use of Plaintiff's property and/or confidential information in an unauthorized manner. She also repeats many of the factual allegations in the complaint. Hodell also avers, upon information and belief, that as of November 22, 2010, Bobal had not returned any of Plaintiff's confidential information. Kevin Sturm, Plaintiff's Assistant Manager, states that in September and October 2010, he noticed a decline in the way that Cirillo was managing the Plaintiff and that Cirillo threatened to fire him if he reported the lack of proper management to Plaintiff's owners. He also states that on October 6, 2010, he observed Bobal leaving Plaintiff's office with folders and binders containing customers' names, addresses and service histories.

Plaintiff argues that its submissions demonstrate that it will suffer irreparable harm if a preliminary injunction is not issued because the customer list, vendor list, and sales records misappropriated by Cirillo and Bobal constitute trade secrets that have been used and continue to be used by Defendants to directly compete with Plaintiff. Plaintiff further argues that it has demonstrated that it is likely to succeed on its misappropriation of trade secrets claim. Specifically, Plaintiff argues that its customer list, vendor list and sales records qualify as trade secrets and that it has presented substantial evidence demonstrating that the Defendants are in possession of and are utilizing its trade secrets in breach of their contractual obligations pursuant to the Employee Handbook and the common law duty of loyalty. Plaintiff claims that Defendants misused Plaintiff's vendor list by discussing the opening of MFL with Plaintiff's vendor, Circle Lubricants, Inc., while he was still employed by Plaintiff, and that it is likely that Defendants will endeavor to misuse or continue to misuse Plaintiff's customer list and sales records. Plaintiff also argues that it has demonstrated that it is likely to succeed on its breach of contract claim as the evidence shows (1) that the agreement between the parties, i.e. the statement signed by Cirillo and Bobal acknowledging that they understood and agreed to abide by the terms of the Employee Handbook, was violated by Defendants, (2) that Plaintiff completely performed its obligations under the Agreement as set forth in the Employee Handbook, (3) that Cirillo and Bobal breached the terms of the Agreement as set forth in the Employee Handbook prohibiting the copying, misuse or removal of confidential information and that Cirillo misused Plaintiff's confidential information to solicit one of its vendors,

Valvoline, causing Valvoline to cease doing business with Plaintiff. Plaintiff also claims that Cirillo's actions dissuaded Valvoline from transacting further business with Plaintiff thereby constituting tortious interference with business relations. Plaintiff also argues that it is likely to succeed on its claims for breach of the duty of loyalty, unfair competition, and unjust enrichment based upon Cirillo's and Bobal's alleged misappropriation of Plaintiff's confidential information, profits and supplies.

Defendants oppose Plaintiff's motion for a preliminary injunction and cross-move, pursuant to CPLR 3211, to dismiss the first through fifth causes of action, and to vacate the temporary restraining order and for an assessment of damages sustained by Defendants as a result of the temporary restraining order.

In opposition to Plaintiff's motion Cirillo submits an affidavit in which he states, among other things, that he did not take nor is he in possession of any trade secrets or confidential information belonging to Plaintiff, that all of Plaintiff's allegations regarding he and Bobal are untrue, and that this action is an attempt by Plaintiff to put MFL out of business because Plaintiff is upset that he left its employ and started a competing business. Cirillo argues that the Plaintiff's employee handbook is not a contract as evidenced by the receipt he signed in September 2010, which states, among other things, that it "is not intended to create contractual relations with respect to any matter it covers . . ." Cirillo also notes that Plaintiff never had him sign a confidentiality or non-disclosure agreement regarding confidential information. Cirillo further states that although he has the name and number of Circle Lubricants, one of Plaintiff's suppliers, stored in his phone, such information is publicly available and is not confidential, and he denies that he has any of Plaintiff's confidential information stored in his phone. Cirillo also contends that service histories are not confidential information.

Bobal also submits an affidavit in opposition to Plaintiff's motion in which she states, among other things, that she is not an owner, officer, director, shareholder, or employee of MFL, that she has been wrongfully accused by Plaintiff of taking its trade secrets and confidential information, that she never took anything from Plaintiff nor did she give any trade secrets or confidential information to Cirillo.

Defendants argue that the Plaintiff does not have trade secrets or confidential information as the names and addresses of suppliers of oil and lubricants available on the

internet, the pricing policies and discounts offered by Plaintiff's vendors are available to all of the vendors' customers, and the service information of Plaintiff's customers is available on the inspection and oil change stickers on each vehicle. Thus, Defendants contend that the Plaintiff has failed to demonstrate, by clear and convincing evidence, a likelihood of success on the merits of its second cause of action for misappropriation of trade secrets and seek dismissal of this claim. In support of dismissal of the first (breach of contract) and fifth (breach of the duty of loyalty/breach of agreement) causes of action, Defendants argue that the Plaintiff has failed to demonstrate a likelihood of success on the merits of these claims because there is no contract between the parties as the employee handbook is not a contract. Finally, Defendants argue that plaintiff's claim for tortious interference with contract should be dismissed because Plaintiff has failed to allege that any third party breached a contract with Plaintiff.

In opposition to Defendants' cross-motion, and in reply to Defendant's opposition to Plaintiff's motion, Plaintiff argues that its motion for a preliminary injunction should be granted in order to maintain the status quo during the pendency of this action. Plaintiff contends that accepting Defendants' assertions that they do not possess any of Plaintiff's confidential information as true, then Defendants will not be harmed by a narrowly tailored preliminary injunction prohibiting them from using any of Plaintiff's confidential information. In opposition to Defendants' cross-motion to dismiss the first through fifth causes of action, Plaintiff argues that these causes of action have been properly pled. Plaintiff also states that Defendants misconstrue Plaintiff's claim for tortious interference with business relations as a claim for tortious interference with contract.

In reply to Plaintiff's opposition to Defendants' cross-motion to dismiss the first through fifth causes of action, Defendants' counsel states, among other things, that "[t]he basis of [Defendants'] motion is not that the plaintiff has improperly pleaded its causes of action, but that the undisputed facts show that those causes of action do not exist."

In a separate motion, Plaintiff moves, pursuant to CPLR 3211(a)(7), to dismiss the counterclaims asserted by Defendants. Plaintiff contends (1) that the defamation counterclaim should be dismissed because the alleged defamatory statements constitute non-actionable opinions rather than assertions of fact, and (2) that the counterclaim for infliction of emotional distress should be dismissed because it fails to establish the elements of either intentional or negligent infliction of emotional distress and because the damages sought fall within the ambit of the alleged defamation claim.

In opposition, Defendants contend, among other things, that the defamation claim has been properly pleaded, that the statements are assertions of fact and are not opinion in that the statement accuses Cirillo of having committed serious crimes, including felonies. With regard to the second counterclaim, Defendants contend the allegations of false accusations by Plaintiff that Cirillo stole files, money, an automobile constitute outrageous and extreme conduct causing Cirillo financial damage, support his claim for infliction of emotional distress.

DISCUSSION

“To establish entitlement to a preliminary injunction, a movant must demonstrate: (1) a likelihood 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” (*Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC*, 42 AD3d 420, 421 [2d Dept 2007] citing *Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862 [1990]; *Stockley v. Gorelik*, 24 AD3d 535, 536 [2d Dept 2005]). The party seeking a preliminary injunction has the burden of demonstrating the foregoing by clear and convincing evidence (*Temple-Ashram v. Satyanandji*, 84 AD3d 1158 [2d Dept 2011]).

Here, the Plaintiff failed to establish a likelihood of success on the merits. First, it is not clear that there was a contract between the Plaintiff and the individual defendants such that the Plaintiff is likely to prevail on its breach of contract claims. The issue of whether the Employee Handbook constitutes a contract is hotly contested by the parties. Second, even if the Defendants are in possession of Plaintiff's Confidential Information, which they vehemently deny, it has not been clearly demonstrated that the Defendants have in any way used such information, that they continue to use such information, and that the Plaintiff will be irreparably harmed in the absence of an injunction. Plaintiff's allegations on this point are conclusory and speculative (*see Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC*, supra at 421). Accordingly, the Plaintiff's motion for a preliminary injunction is denied, the temporary restraining order dated November 4, 2010, is vacated, that branch of the Defendants' cross-motion for a hearing on damages sustained by reason of the temporary restraining order is granted, and the scheduling of said hearing will be discussed at the status conference scheduled for July 12, 2011.

The branch of Defendants' cross-motion, pursuant to CPLR 3211, to dismiss the first

through fifth causes of action, is denied. Although the Defendants brought their cross-motion under CPLR 3211, in their reply papers they concede that “[t]he basis of our motion is not that plaintiff has improperly pleaded its causes of action, but that the undisputed facts show that those causes of action do not exist.” Given this concession, which indicates that the Defendants believe that they are entitled to summary judgment under CPLR 3212, together with the fact that the Defendants have not articulated a basis for dismissal of any of first through fifth causes of action under any of the sections of CPLR 3211, it is clear that dismissal under CPLR 3211 is not warranted.

CPLR 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff must be given the benefit of every favorable inference (*see Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Aberbach v. Biomedical Tissue Serv., Ltd.*, 48 A.D.3d 716, 854 N.Y.S.2d 143; *Mitchell v. TAM Equities, Inc.*, 27 A.D.3d 703, 812 N.Y.S.2d 611). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (*see 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 746 N.Y.S.2d 131, 773 N.E.2d 496; *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184; *Alsol Enters., Ltd. v. Premier Lincoln-Mercury, Inc.*, 11 A.D.3d 493, 783 N.Y.S.2d 59). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (*see Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565, 655 N.E.2d 661; *see also Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184; *Stucklen v. Kabro Assoc.*, 18 A.D.3d 461, 795 N.Y.S.2d 256). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (*see Lutz v. Caracapps*, 35 A.D.3d 673, 674, 828 N.Y.S.2d 426; *Matter of Loukoumi, Inc.*, 285 A.D.2d 595, 728 N.Y.S.2d 383).

(*Symbol Technologies, Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 193-194 [2d Dept 2009]).

The elements of a cause of action for defamation “are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se”

(*Salvatore v. Kumar*, 45 AD3d 560, 563 [2d Dept 2007] citing *Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999]). “[A] defamatory statement is libelous per se if it imputes fraud, dishonesty, misconduct, or unfitness in conducting one’s profession” (*Matovcik v. Times Beacon Recod Newspapers*, 46 AD3d 636, 637 [2d Dept 2007]).

“An expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be (see, *Rinaldi v. Holt, Rinehart & Winston*, *supra*, 42 N.Y.2d at p. 380, 397 N.Y.S.2d 943, 366 N.E.2d 1299; *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at pp. 339-349, 94 S.Ct. at pp. 3006-3011). A ‘pure opinion’ is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be ‘pure opinion’ if it does not imply that it is based upon undisclosed facts (see, *Ollman v. Evans*, 750 F.2d 970, 976 [D.C. Cir.], *cert. denied* 471 U.S. 1127, 105 S. Ct. 2662, 86 L.Ed.2d 278; *Buckley v. Littell*, 539 F.2d 882, 893 [2d Cir.], *cert. denied* 429 U.S. 1062, 97 S.Ct. 785, 786, 50 L.Ed.2d 777; Restatement [Second] of Torts § 566 comment c). When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a ‘mixed opinion’ and is actionable (see, *Hotchner v. Castillo-Puchel*, 551 F.2d 910, 913 [2d Cir.], *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95; *cf. Cianci v. New Times Pub. Co.*, 639 F.2d 54, 64, 65 [2d Cir.]).


(*Steinhilber v. Alphonse*, 68 NY2d 283, 289 [1986]).

Here, contrary to the Plaintiff’s contention, the allegation that the text message sent by Plaintiff’s employee to a third-party accusing Cirillo of having engaged in illegal conduct sufficiently states a cause of action for defamation (see *International Shoppes, Inc. v. Spencer*, 34 AD3d 429, 430 [2d Dept 2006][statements by former employee accusing plaintiff of fraudulent and illegal conduct sufficiently stated defamation cause of action]). The alleged defamatory statement by Plaintiff’s employee indicating that Cirillo was engaged in illegal conduct in connection with an ongoing business dispute between Plaintiff and Cirillo tends to impute dishonesty, misconduct, or unfitness to Cirillo in conducting his profession. Therefore, special damages need not be alleged (see *Hinsdale v. Orange County Publications, Inc.*, 17 N.Y.2d 284 [1966]). Moreover, the statement is not a pure opinion because it implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it (see *Brach v. Congregation Yetev Lev D’Satmar, Inc.*, 265 AD2d 360 [2d Dept. 1999][statements in article that successor had prevailed in lawsuit regarding competing claims “by lies and deceit,” and was a “robber,” constituted actionable statements of mixed opinion]). Accordingly, that branch of the Plaintiff’s motion to dismiss the first counterclaim is denied.

However, the Defendants' second counterclaim for intentional infliction of emotional distress based upon the allegation that the Plaintiff made false accusations concerning the honesty, integrity, and character of the Defendant Cirillo, is dismissed as duplicative of the counterclaim for defamation. The Defendants may recover for the alleged emotional distress caused by the defamatory statement under the counterclaim for defamation (see *Brancaleone v. Mesagna*, 290 AD2d 467, 468-469 [2d Dept 2002]).

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: July 5, 2011
Riverhead, New York



EMILY PINES
J. S. C.
 FINAL NON FINAL