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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Aalco Transportation & Storage, Inc.

Plaintiff,

-against-

Joseph Deguara and
Bel-Air Consulting & Design, LLC,

Defendants.

Joseph Deguara,

Counterclaim Plaintiff,

-against-

Jeffrey S. Krevat,

Counterclaim Defendant.

Clerk of the Court

Index No.: 17287/2010

Motion Sequence No.: 002; MOT.D
Motion Date: 7/1/11
Submitted: 8/10/11

Motion Sequence No.: 003; XMOT.D
Motion Date: 7/20/11
Submitted: 8/10/11

Attorney for Plaintiff:

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Attorney for Defendants:

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Upon the following papers numbered 1 to 57 read upon this motion dismiss, cross motion for leave to amend complaint: Notice of Motion and supporting papers, 1 - 17; Notice of Cross Motion and supporting papers, 18 - 50; Answering Affidavits and supporting papers, 51 - 54; Replying Affidavits and supporting papers, 55 - 57; Other: Defendants' Memorandum of Law; Plaintiff's Memorandum of Law, Defendants' Reply Memorandum of Law, Plaintiff's Reply Memorandum of Law.

This is an action to recover damages allegedly sustained when defendant Joseph DeGuara, a former employee of the plaintiff, allegedly misappropriated the plaintiff's proprietary and confidential information which he wrongfully used to solicit and divert a business opportunity from the plaintiff.

According to the complaint, the plaintiff is in the business of providing labor, equipment, engineering strategies and transportation and storage services in the crane and rigging industry. In 2003, the plaintiff hired DeGuara as an employee. DeGuara's duties and responsibilities while employed by the plaintiff included managing operations, planning engineering, labor and equipment strategies for various jobs performed by the plaintiff as well as marketing and contract procurement.

On May 5, 2008, DeGuara entered into an agreement with the plaintiff whereby the plaintiff agreed to pay DeGuara a bonus equal to 25% of the plaintiff's net earnings for the year 2008 and DeGuara agreed to a restrictive covenant providing that, for the calendar year ending December 31, 2009, "he will not become an employee, a partner, shareholder or an agent for any company that is in competition with [the plaintiff], or will be in competition with [the plaintiff]." The agreement further provided that, in the event DeGuara breached the restrictive covenant, the plaintiff would be entitled to a return of the bonus together with all damages which it incurred by reason of the breach. The plaintiff subsequently paid DeGuara a bonus in two installments totaling $203,300. At DeGuara's direction, the plaintiff made the bonus payments to defendant Bel-Air Consulting & Design, LLC ("Bel-Air"), a company formed by DeGuara specifically for the purpose of receiving those payments.

Sometime in 2009, DeGuara, on behalf of the plaintiff, entered into negotiations with R.B. Samuels, Inc. ("R.B. Samuels"), an electrical contractor, concerning a project involving the hoisting of four electrical transformers into a building under construction at 111 Eighth Avenue, New York, New York. In or about September 2009, DeGuara prepared and submitted a price quote for the job and, as the project was taking shape through the fall of 2009, he continued to discuss the job with Tony Kolb, an employee of R.B. Samuels, and to refine the plaintiff's proposal. As of December 31, 2009, the project had not been finalized and the rigging job which DeGuara and Kolb were discussing had not yet been awarded.

On January 5, 2010, DeGuara resigned from his employment with the plaintiff. Shortly thereafter, he prepared and submitted a price quote for the job, either on his own personal behalf or on behalf of Bel-Air, which was accepted by R.B. Samuels. This action followed.

The plaintiff alleges two causes of action in its amended complaint, both of which seek damages for breach of contract on the theory that the defendants' misappropriation of the plaintiff's proprietary and confidential information for use in soliciting and procuring the rigging job with R.B. Samuels constitutes a violation of the restrictive covenant contained in the May 5, 2008 agreement. By its first cause of action, the plaintiff seeks the return of the $203,300 bonus paid to the defendants; by its second cause of action, the plaintiff seeks compensatory and consequential damages incurred by reason of the alleged breach, including loss of profits, legal fees and the costs of collecting the bonus.

The defendants now move to dismiss the plaintiff's first and second causes of action. The defendants contend that there are no facts pleaded to support a finding that DeGuara became "an employee, a partner, shareholder or an agent" for any company in competition with the plaintiff on

or prior to December 31, 2009, that all the documentary evidence produced indicates that DeGuara did not work for anyone other than the plaintiff and did not become affiliated with any competing company until after December 31, 2009 and that Bel-Air cannot be held liable for breach of a contract to which it was not a party.

Initially, to the extent that the defendants seek relief under CPLR §3211 (a) (1), the plaintiff correctly notes that the defendants waived the documentary evidence defense by failing to raise it in their answer or in motion to dismiss before service of their answer (see, CPLR §3211 [e]; Masada Universal Corp. v. Goodman Sys. Co., 121 AD2d 518 [2nd Dept., 1986]).

When a defendant moves to dismiss a complaint under CPLR §3211 (a) (7), the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (see, Sokol v. Leader, 74 AD3d 1180 [2nd Dept., 2010]). A court must determine whether, accepting the facts as alleged in the complaint as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (see, Leon v. Martinez, 84 NY2d 83 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

Here, at paragraph 24 of its complaint, the plaintiff alleges that

> Upon information and belief, during the month of December, 2009, while DeGuara was still an employee of Aalco and in violation of the Agreement, he engaged in negotiations for the [111 Eighth Avenue job] on his own behalf or on behalf of or through defendant Bel-Air, using Aalco's confidential and proprietary information, including price quotes and engineering strategies he had developed and refined with R.B. Samuels over the course of the prior four months.

The plaintiff further alleges, at paragraph 30, that the job was subsequently awarded to DeGuara "in his own name or in the name of Bel-Air." Accepting the pleaded facts as true for purposes of this determination, the Court finds that the plaintiff has adequately stated causes of action for breach of contract against DeGuara.

It is not pleaded, however, that Bel-Air was a party to the May 5, 2008 agreement. Since Bel-Air cannot be held liable for breach of a contract to which it was not a party (see, Black Car & Livery Ins. v. H&W Brokerage, 28 AD3d 595 [2nd Dept., 2006]), and the plaintiff has failed to demonstrate that additional facts "may exist" to defeat that branch of the defendants' motion (see CPLR §3211 [d]), the Court is constrained to grant the defendants' request for an order dismissing the plaintiff's first and second causes of action as against Bel-Air and the plaintiff's request to adjourn or continue the motion pending the completion of discovery is correspondingly denied.

The plaintiff cross-moves, *inter alia*, to compel disclosure and for leave to serve and file a second amended complaint.

Insofar as the plaintiff seeks an order compelling the defendants to comply with outstanding discovery, it suffices to note that all disclosure was stayed upon service of the defendants' motion to dismiss and that the plaintiff failed to request or obtain an order directing that disclosure continue pending the determination of the defendants' motion (see, CPLR §3214 [b]). Now that the stay is no longer in effect, however, the Court directs that the parties expeditiously complete all outstanding discovery, including the continuation of DeGuara's deposition.

The plaintiff's proposed second amended complaint sets forth seven causes of action: the first and second, for breach of contract relating to the 111 Eighth Avenue job, the third and fourth, for breach of contract relating to another rigging job at 1585 Broadway, New York, New York, which the defendants allegedly solicited and procured in violation of the restrictive covenant contained in the May 5, 2008 agreement, the fifth, alleging breach of the duty of good faith and loyalty, the sixth, for conversion of proprietary information and the seventh, which ostensibly sounds in unjust enrichment.

Leave to amend a complaint pursuant to CPLR §3025 (b) is to be freely granted, provided that the proposed amendment does not prejudice or surprise the defendant, is not patently devoid of merit, and is not palpably insufficient (see, Lucido v. Mancuso, 49 AD3d 220 [2nd Dept., 2008]). A court will not examine the legal sufficiency or merits of a proposed amendment unless the insufficiency or lack of merit is clear and free from doubt (id.).

Here, absent prejudice or surprise to the defendants, the Court deems it appropriate to grant the plaintiff leave to amend as to its proposed causes of action for breach of the duty of good faith and loyalty and for conversion of proprietary information. A cause of action for breach of the duty of good faith and loyalty is adequately pleaded where, as here, it is alleged that a defendant used confidential or proprietary information obtained during the course of his or her employment to usurp one or more business opportunities properly belonging to his or her employer (see, Veritas Capital Mgt. v. Campbell, 82 AD3d 529 [1st Dept., 2011]). Likewise, an employee's unauthorized removal of written and electronic records from an employer's office to the exclusion of the employer's rights, as alleged here, is sufficient to support a cause of action for conversion, irrespective of whether the information contained in those records was proprietary (see e.g., Republic of Haiti v. Duvalier, 211 AD2d 379 [1st Dept., 1995]).

Leave to amend is otherwise denied, notwithstanding the liberal standard articulated in Lucido v. Mancuso (49 AD3d 220 [2nd Dept., 2008]). Inexplicably, the proposed complaint, unlike its predecessor, fails to allege that DeGuara became an employee, a partner, shareholder or an agent for any company in competition with the plaintiff on or prior to December 31, 2009, leaving the proposed causes of action for breach of contract "patently devoid of merit." Nor do the facts alleged support a cause of action for unjust enrichment independent of the proposed cause of action for breach of the duty of good faith and loyalty; a plaintiff may not amend a complaint to plead redundant causes of action (see, Feldman v. Finkelstein & Partners, 76 AD3d 703 [2nd Dept., 2010]).

Finally, relative to both the motion and the cross motion, the Court finds no frivolous conduct on the part of the parties or their attorneys as to warrant an award of costs or sanctions under 22 NYCRR §130-1.1.

Based on the foregoing, it is

ORDERED that the motion by the defendants for an order (i) pursuant to CPLR §3211 (a) (1) and (7), dismissing the first and second causes of action of the plaintiff's amended complaint, and (ii) pursuant to 22 NYCRR §130-1.1, imposing sanctions in the form of costs and attorney's fees incurred by the defendants in defending a frivolous action, is granted to the extent of dismissing the first and second causes of action of the plaintiff's amended complaint as against defendant Bel-Air Consulting & Design, LLC, and is otherwise denied; and it is further

ORDERED that the cross motion by the plaintiff for an order (i) holding in abeyance the defendants' motion to dismiss pending the completion of discovery, (ii) compelling the defendants to comply with outstanding discovery, including the continuation of Joseph DeGuara's deposition and the production of documents demanded pursuant to the plaintiff's first notice of discovery and inspection and supplemental notice of discovery and inspection, (iii) pursuant to CPLR §3025, granting leave to serve and file a second amended complaint pleading additional causes of action for breach of contract, breach of the duty of good faith and loyalty, conversion of proprietary information, and unjust enrichment, and (iv) pursuant to 22 NYCRR §130-1.1, imposing sanctions against the defendants and their attorneys for frivolous motion practice, misrepresentations made to the Court with respect to the procedural history of this case and for unprofessional and unethical conduct during the course of discovery in this action, is granted to the extent of granting leave to serve and file a second amended complaint, in a manner consistent with this order, pleading additional causes of action for breach of the duty of good faith and loyalty and for conversion of proprietary information, and is otherwise denied.

Dated: OCT 26 2011

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**