McKinnon Doxsee Agency, Inc. v Gallina
2011 NY Slip Op 33669(U)
October 26, 2011
Supreme Court, Nassau County
Docket Number: 022005-07
Judge: Timothy S. Driscoll
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[* 1]

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MCKINNON DOXSEE AGENCY, INC. &
MILLENNIUM ALLIANCE GROUP, LLC

Plaintiffs,

-against-

FRANK G. GALLINA, DANIEL MARKLIN,
A.C. EDWARDS FINANCIAL SERVICES, LLC
d/b/a EDWARDS AND COMPANY,

Defendants.

---x

TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 022005-07
Motion Seq. Nos: 4 and 5
Submission Date: 9/23/11

Papers Read on these Motions:

Notice of Motion, Affirmation in Support, Affidavits in Support and Exhibits.......x
Defendants' Memorandum of Law in Support..x
Notice of Cross Motion..x
Affirmation in Opposition/Support..x
Affidavit of E. Diamond in Support/Opposition..x
Affidavit of L. Callahan in Support...x
Affidavit of J. McKinnon in Support/Opp...x
Volume I of Exhibits to Affidavits and Affirmation..x
Volume II of Exhibits to Affidavits and Affirmation...x
Deposition Transcript of D. Marklin...x
Deposition Transcript of F. Gallina..x
Plaintiffs' Memorandum of Law in Opposition/Support..x
Plaintiffs' Reply Memorandum of Law in Support...x
Reply Affirmation/Affirmation in Opposition..x
Defendants' Memorandum of Law in Opposition/Reply...x

This matter is before the court on 1) the motion by Defendants filed on July 19, 2011, and 2) the cross motion by Plaintiffs filed on August 17, 2011, both of which were submitted on September 23, 2011. For the reasons set forth below, the Court denies the motion and cross

motion.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 3212, granting Defendants summary judgment against Plaintiffs dismissing all claims except those claims made by Millenium Alliance Group, LLC ("Millennium") against Frank G. Gallina ("Gallina") in the fifth and sixth causes of action in the second Amended Verified Complaint ("Amended Complaint") (Ex. A to Margolin Aff. in Supp.), and against Plaintiffs establishing their liability on Defendants' counterclaim for defamation *per se*.

Plaintiffs oppose Defendants' motion and cross move for an Order, pursuant to CPLR § 3212, granting Plaintiffs summary judgment on each cause of action and ordering an immediate trial on damages.

B. The Parties' History

The parties' history is set forth in a prior decision of the Court dated March 18, 2011 ("Prior Decision"), in which the Court granted Plaintiff leave to file and serve an amended complaint. The Court incorporates the Prior Decision herein by reference. As noted in the Prior Decision, the initial complaint, filed on or about December 10, 2007, sought damages against Gallina and Marklin, *inter alia*, for their allegedly wrongful appropriation of over 500 insurance accounts from Plaintiffs. On or about December 21, 2010, the initial Complaint was amended as of right to add Defendant A.C. Edwards Financial Services, LLC ("Edwards"). The first amended complaint alleged, *inter alia*, that Edwards aided and abetted Gallina and Marklin's alleged breaches of their fiduciary duties to Plaintiffs by knowingly using Plaintiffs' trade secrets in soliciting Plaintiffs' clients and acting as the Broker of Record on accounts that formerly belonged to Plaintiffs. In the Prior Decision, the Court granted Plaintiffs' motion to amend the complaint again to 1) more specifically allege damages for Defendants' alleged intentional diversion of corporate opportunities and facts relating to Defendants' alleged breach of their duty of loyalty to Plaintiffs; and 2) delete references to Defendant A.C. Edwards Financial Services, LLC ("Edwards") who is no longer a party to the action.

[* 3]

Plaintiffs subsequently filed the Amended Complaint, titled *McKinnon Doxsee Agency, Inc. & Millennium Alliance Group, LLC v. Frank G. Gallina and Daniel Marklin*, which contains thirteen (13) causes of action asserted against Defendants Gallina and Marklin: 1) conversion, 2) unjust enrichment, 3) negligence, 4) breach of duty of loyalty, 5) breach of fiduciary duty, 6) aiding and abetting breach of fiduciary duty, 7) request for an accounting, 8) misappropriation of customer relationships, 9) unfair competition, 10) misappropriation of trade secrets, 11) unjust enrichment, 12) tortious interference with business relationships, and 13) request for injunctive relief. [1]

In support of Defendants' motion for summary judgment, counsel for Defendants provides a copy of the transcript of the hearing conducted by the Court (Austin, J.) on January 28 and 29, 2008 regarding Plaintiffs' prior application for injunctive relief ("PI Decision") (Exs. E anf F to Margolin Aff. in Supp.). In the PI Decision, Justice Austin denied Plaintiffs' motion for a preliminary injunction and vacated the temporary restraining order ("TRO") previously issued by the Court (Ex. E at p. 7).

In their Affidavits in Support of Defendants' motion for summary judgment, Gallina and Marklin provide details regarding, *inter alia*, 1) the circumstances under which they developed a book of business, 2) the proposed agreement between Defendants and McKinnon Doxsee, 3) McKinnon's refusal to execute the proposed agreement, 4) McKinnon's formation of Millenium, 5) Marklin and Gallina's decision to leave McKinnon Doxsee, 6) the absence of an employment agreement or restrictive covenant executed by Defendants, 7) the information that Defendants downloaded from McKinnon Doxsee's computer in 2007, and 8) the procedure that Defendants followed in contacting insurance clients to advise them of their decision to move to a new agency ("Departure").

[1] Some of the causes of action in the Amended Complaint are asserted against "all Defendants" and others are asserted against "Gallina and Marklin." Given that the Amended Complaint names only two Defendants, Gallina and Marklin, the Court surmises that Plaintiffs are asserting all of the causes of action against both Defendants.

Gallina affirms that, within days of Defendants' Departure, Defendants learned that Jason L. Abelove ("Abelove"), counsel for Millennium and McKinnon Doxsee, had sent a letter ("Letter") to Defendants' new employer Edwards (Ex. C to Gallina Aff. in Supp.), and had sent copies of the Letter to at least nine insurance carriers and brokers ("Recipients"). In the Letter, Abelove advised the Recipients, *inter alia*, that 1) Abelove's office had been retained by Millennium and McKinnon Doxsee to represent their interests in a potential lawsuit against Defendants for a breach of trade secrets and fiduciary duty; 2) the book of business was "stolen" by Marklin and Gallina; and 3) Marklin and Gallina's "theft" of the book of business constituted a breach of contract with McKinnon Doxsee. Marklin and Gallina affirm that the allegations in the Letter that they stole the book of business are untrue.

In opposition to Defendants' motion and support of Plaintiffs' motion, Abelove affirms that Defendants failed promptly to provide Plaintiffs with relevant Authorization for Change of Broker letters ("Broker of Record Letters"). Abelove also asserts that Defendants were less than candid with the Court and Abelove regarding the number of these Letters in their possession. Abelove submits that his review of the Broker of Record Letters (Ex. T to Abelove Aff. in Supp./Opp.) reveals that Edwards conspired with Marklin and Gallina to have the Broker of Record Letters, which were signed by numerous policy holders and authorized Edward to become their broker of record, signed while Marklin and Gallina were still employed by McKinnon Doxsee and Gallina was a member of Millenium's Board of Directors. Abelove contends, further, that some of these Letters are dated after the TRO which prohibited Defendants' communication with a client of McKinnon Doxsee, except that any Broker of Record Letters already in the possession of Defendants as of December 17, 2007 would be honored and processed. Abelove also submits that some of the Broker of Record Letters appear to contain forged signatures, and affirms that Justice Austin made a similar observation.

McKinnon, the sole shareholder of McKinnon Doxsee and Managing Partner of Millennium, affirms that Millenium and McKinnon Doxsee spent "hundreds of thousands of dollars and thousands of hours" (McKinnon Aff. in Supp./Opp. at ¶ 4) developing a book of

business. This business was co-owned and managed by Gallina and Marklin who, while negotiating to purchase McKinnon's interest in their books of business, resigned and joined a competing firm. McKinnon submits that, rather than compensating McKinnon for his share of the book of business, Defendants instead downloaded information from Plaintiffs' computer system and provided that information to a competitor. McKinnon cites to relevant documentation and deposition testimony confirming Gallina's position as a member of the Millenium Board of Directors, and submits that Gallina breached the fiduciary duty he owed in that position.

McKinnon submits that the documentation provided by Plaintiffs establishes, *inter alia*, that 1) Defendants admitted that, at the time of their Departure, they were in active negotiations to purchase McKinnon's interest in the books of business; 2) Gallina and Marklin accepted employment with Edwards, a competitor of McKinnon Doxsee; 3) prior to their Departure, Defendants copied data from Plaintiffs' computer containing clients, policy numbers, policy expiration dates and other relevant information; 4) while employed by McKinnon and when Gallina was a member of the Millenium Board, Defendants provided this information to Edwards, who prepared Broker of Record Letters; 5) prior to their Departure, Broker of Record Letters were signed by clients and submitted to insurance companies, "effectively stealing McKinnon Doxsee clients from McKinnon Doxsee" (McKinnon Aff. in Supp./Opp. at ¶ 34); and 6) following Defendants' extensive delay in providing relevant tax forms, Defendants provided Plaintiffs with tax information reflecting that, between 2000 and 2007, Defendants placed insurance policies outside of Plaintiffs' business believed to be in excess of $300,000 ("Diverted Income"). [2]

E. Al Diamond ("Diamond"), the President of Agency Consulting Group, Inc., affirms that his business involves consulting with all facets of insurance agency and company operations. Diamond affirms that he has known Defendants and McKinnon for 20 years, and that he was "intricately involved" (Diamond Aff. in Supp./Opp. at ¶ 3) in McKinnon Doxsee's purchase of 50% of Gallina and Marklin's books of business from their prior employer. Diamond describes

[2] Defendants' delay in producing this tax information is discussed in the Prior Decision.

as "patently false" (id. at ¶ 7) Gallina and Marklin's claim that they own more than 50% of the business they developed since their employment with McKinnon Doxsee which began in 1994. Diamond affirms that Defendants' claims are not credible in light of the fact that 1) non-owner employees of insurance companies generally have no ownership interests in the books of business they develop in the course of their employment; 2) Gallina and Marklin, who owned 50% of their books at the time their employment commenced with McKinnon Doxsee, would maintain a 50% interest in new business; 3) during conversations prior to their Departure, Gallina and Marklin acknowledged to Diamond that they each owned a 50% interest in their respective books of business, and expressed their interest in purchasing the 50% owned by McKinnon; and, therefore, 4) McKinnon owned all of the business generated outside of Gallina and Marklin, as well as 50% of Gallina and Marklin's books of business.

Larry Callahan, the Controller of Millennium, addresses the Diverted Income, and disputes Defendants' claim that certain clients' insurance needs required specific carriers that were not accessible by McKinnon Doxsee or Millenium and, in those cases, the client was referred to another agency and part of the commission was payable to the referrer (Ds' Mem. of Law in Opp. at p. 15). Callahan describes this claim as an "impossibility given the workings of any insurance agency's business" (Callahan Aff. in Supp. at ¶ 3). Callahan affirms that 1) if a policy were referred out to another insurance agency, the tax form 1099 would come from the agency to which the policy was referred and not from the insurance company; 2) the 1099 forms provided by Defendants include numerous companies with which Millennium has a business relationship; 3) there is no "legitimate reason" (*id.* at ¶ 5) for Defendants to be writing business outside of Millennium and McKinnon Doxsee for these carriers and, therefore, one can infer that Defendants' sole motivation was to hide money from Plaintiffs; and 4) to the extent that Defendants are asserting that Millennium and McKinnon were aware of Defendants' conduct which resulted in the Diverted Income, those claims are false.

C. The Parties' Positions

Defendants submit that 1) the Court should dismiss the cause of action for conversion on the grounds that a) an interest or expectancy in a business opportunity, which is intangible, cannot be converted; and b) Plaintiffs cannot establish the elements of conversion, in part because they cannot demonstrate that McKinnon had a superior right to the book of business and because they never exercised unauthorized dominion over the information; 2) in light of the fact that Defendants' duplication of information to which they had an equal right was not unlawful or in violation of any agreement, the Court should also dismiss the second, fourth, seventh, eighth, ninth, tenth, eleventh and thirteenth causes of action which are premised on the same permissible conduct; 3) the third cause of action, relating to the Defendants' alleged negligent diversion of customers in violation of their duty of loyalty to Plaintiffs, cannot survive because Defendants' allegedly improper conduct occurred after they left Plaintiffs' employ; and 4) the twelfth cause of action, alleging tortious interference with business relationships, is not viable because Plaintiffs have not alleged or demonstrated that Defendants' solicitation of clients was motivated by malice.

Defendants submit, further that they are entitled to summary judgment on their counterclaim, based on defamation *per se*. They argue that they have demonstrated their right to judgment by establishing that the breach of contract claims made in the Letter were false, the Letter referred to Gallina and Marklin by name, and the Latter was published to persons who related directly to Defendants' business, trade and profession.

Plaintiffs submit that they have demonstrated their right to summary judgment, and provided support for the denial of Defendants' motion, by establishing that 1) McKinnon paid Defendants for a 50% interest in their books of business; 2) Plaintiffs alone incurred the costs and expenses of developing, maintaining and expanding the books of business; 3) Defendants owed a fiduciary duty to Plaintiffs by virtue of Gallina's position on the Board of Directors and Defendants' positions as chief operating officers, which they breached by secretly writing business and receiving commissions; 4) despite the parties' joint ownership of the books of business and Gallina's position on the Millenium Board of Directors, Defendants conspired to deprive Plaintiff of their interest in the books of business while working for Plaintiff, and using

Plaintiffs' offices and staff; 5) prior to their Departure, Defendants provided Plaintiffs' trade secrets to Edwards; and 6) Defendants executed the Broker of Record Letters prior to their Departure, thereby depriving Plaintiffs of their interest in the books of business without compensating them.

RULING OF THE COURT

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

The Court concludes that there are numerous material issues of fact that make summary judgment inappropriate on any of the causes of action, including whether 1) Defendants' writing and benefitting from the separate policies was permissible; 2) Defendants had the right to download information from Plaintiffs' computers; 3) Defendants acted properly in executing the Broker of Record Letters; and 4) the statements about Defendants in the Letter were false and otherwise actionable. See *Epifani v. Johnson*, 65 A.D.3d 224, 233 (2d Dept. 2009) (elements of a cause of action to recover damages 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). Accordingly, the Court denies the motion and cross motion.

All matters not decided herein are hereby denied.

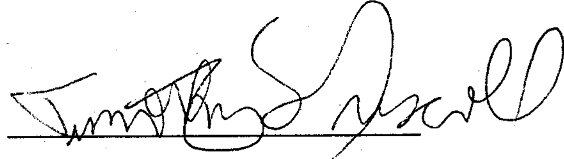
This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Certification Conference on December 2, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

October 26, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

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