

TPP Acquisition, Inc. v CPI Corp.

2012 NY Slip Op 33485(U)

February 2, 2012

Sup Ct, New York County

Docket Number: 650883/11

Judge: Eileen Bransten

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ELLEN BRANSTEN
Justice

PART 3

Index Number : 650883/2011
TPP ACQUISITION, INC.
VS.
CPI CORP.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 650883/11
MOTION DATE 10/14/11
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

| PAPERS NUMBERED | |
|-----------------|-------|
| 1 | _____ |
| 2 | _____ |
| 3 | _____ |


Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 2-2-12


HON. ELLEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 3

-----X

TPP ACQUISITION, INC.,

Plaintiff,

-against-

Index No. 650883/11
Motion Seq. No. 001
Motion Date: 10/14/11

CPI CORP.,

Defendant.

-----X

Eileen Bransten, J.:

Defendant CPI Corp. moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing this action in its entirety.

In the amended complaint, plaintiff TPP Acquisition, Inc. (“TPP Acquisition”) alleges that CPI breached a confidentiality agreement executed on January 20, 2011 in connection with its possible purchase of TPP Acquisition’s predecessor-in-interest, The Picture People, Inc. (“TPP”).

TPP and CPI were admittedly competitors. *See Confidentiality Agr., ¶ 15; Amended Complaint, ¶ 15.* Both operated portrait photography studios in retail stores and shopping malls nationwide. In January 2011, TPP allegedly operated 173 such studios under the trade name and mark “The Picture People.”

Pursuant to the confidentiality agreement, TPP conditionally agreed to provide CPI access to certain nonpublic, confidential, or proprietary information for the limited purpose of considering a potential acquisition of the company. The agreement also provides that CPI would not disclose the confidential information in any manner, in whole or in part, or use the

information for any purpose other than to consider or implement an acquisition of TPP. The agreement further provides that CPI's disclosure or use of the information in a manner not authorized by the agreement may result in irreparable harm to TPP.

TPP Acquisition alleges that between January 20 and 28, 2011, TPP provided CPI with detailed confidential information regarding its operations not available to the public.

CPI did not make an offer to acquire the company.

Instead, on February 9, 2011, TPP Acquisition acquired TPP's secured debts and its default on those debts. Subsequently, TPP Acquisition, through its leasing agent, nonparty RCS Real Estate Advisors ("RCS"), commenced negotiations of lease assignments and amendments and new lease agreements with TPP's landlords. On March 1, 2011, TPP Acquisition acquired TPP's assets, becoming a CPI competitor. By March 11, 2011, TPP Acquisition had allegedly reached lease agreements or agreements in principle on new lease terms regarding 109 of the 120 TPP studio locations then in operation.

TPP Acquisition alleges that, on March 4, 2011, several of the landlords of these studio locations advised RCS that CPI had expressed an interest only in retail spaces operated by TPP as portrait studios, and had made lease offers on approximately 75 such locations. TPP Acquisition further alleges that CPI also operates portrait studios within Sears stores located in approximately 70% of the shopping malls containing TPP studios.

TPP Acquisition alleges that, beginning in March 2011, RCS was unable to memorialize in writing the lease terms to which certain TPP landlords had agreed between

February 18 and early March 2011. TPP Acquisition alleges that, in order to break these verbal agreements, CPI offered landlords “extraordinary” lease terms, including rent provisions that would subject CPI to a financial commitment that its executives could only make within the bounds of their fiduciary duties and the business judgment rule, if they had the type of detailed financial and operational data about TPP's operations that CPI had obtained pursuant to the confidentiality agreement.

TPP Acquisition alleges that, as a result of CPI's interference with its lease deals, it incurred damages. TPP Acquisition's asserted damages include the loss of its legitimate and reasonable business expectation to continue operating TPP at its original locations because of CPI's interference, and increased leasing costs and less favorable lease terms that it was required to accept in order to lease TPP locations targeted by CPI.

On these allegations, TPP Acquisition asserts causes of action for past and continuing breaches of the confidentiality agreement, tortious interference with prospective economic advantage and unfair competition. TPP Acquisition seeks a preliminary injunction, and recovery of \$40 million in compensatory damages, together with punitive damages and attorneys' fees.

CPI has not served an answer to the amended complaint, and now seeks to dismiss the action in its entirety.

Analysis

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true, and liberally construe the allegations in the light most favorable to the pleading party. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994); *Joel v. Weber*, 166 A.D.2d 130, 135-136 (1st Dep't 1991); see CPLR 3211 (a)(7). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d at 87-88. However, "'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence,' are not presumed to be true and [are not] accorded every favorable inference." *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999), *aff'd* 94 N.Y.2d 659 (2000), quoting *Kliebert v. McKoan*, 228 A.D.2d 232, 232 (1st Dep't), *lv. denied* 89 N.Y.2d 802 (1996); see CPLR 3211 (a) (1). A cause of action will be dismissed where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Held v. Kaufman*, 91 N.Y.2d 425, 430-431 (1998) (internal quotation marks and citation omitted).

A. Breach of the Confidentiality Agreement

CPI contends that Plaintiff's first cause of action for breach of the confidentiality agreement must be dismissed. CPI bases its argument on documentary evidence which it alleges conclusively proves that TPP was forced to vacate certain retail locations, resulting in a loss of revenue from business interruption, lost customer good will and the incurring of relocation costs. CPI alleges that this occurred not because of CPI's alleged misconduct, but as a result of TPP's own failure to pay its rent obligations.

In opposition, TPP Acquisition contends that it alleges facts sufficient to support its claim of breach.

The claim is legally viable. To prevail on a claim for breach of contract, a party must show “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep’t 2010). TPP Acquisition has sustained this burden.

The confidentiality agreement is, without dispute, the result of arms’ length negotiations between TPP and CPI, and was freely executed by CPI. The confidentiality agreement defines protected information as used in the agreement as:

any information or material regarding or proprietary to [TPP] furnished to [CPI] or [its] Representatives by [TPP] or any of its Representatives, or of which [CPI] may obtain knowledge through access to [TPP’s] premises or communications with [TPP] or its Representatives. Information also shall be deemed to include all notes, analyses, compilations, studies, projections, interpretations or other documents or computer software prepared by [TPP] or [its] Representatives that contain, reflect or are based upon, in whole or in part, the Information furnished to [CPI] or [its] Representatives pursuant to this Agreement. The Information includes not only written information, but also information transferred orally, visually, electronically, or by any other means

Confidentiality Agr., ¶ 1.

In the amended complaint, TPP Acquisition alleges that CPI obtained, and then misused, the following types of protected information: the identity of every landlord for each of TPP’s retail portrait studios; spreadsheets showing a detailed listing by studio of each

studio lease, including expiration date, rent amount, shopping mall name and location, and square footage; weekly sales and portrait data by individual studio; detailed profit and loss statements by studio with all line item detail by studio on studio-level revenue and expenses for operating each studio in each existing shopping mall location from January 1, 2006 through August 31, 2010; and detailed salary and store employee information for each of the TPP studios. *See* Amended Complaint, ¶¶ 26-29. TPP Acquisition further alleges that CPI misused the protected information for its own commercial and competitive advantage in targeting leases for retail spaces occupied by TPP. *See id.*, ¶¶ 30, 65. TPP Acquisition also alleges that, as a result of CPI's misuse of the protected information, at least one landlord executed leases of approximately 20 of TPP's retail spaces with CPI, effectively putting TPP out of business at those locations, and forcing TPP Acquisition to enter into leases for other retail spaces under less favorable terms than had initially been negotiated. *See id.*, ¶ 66.

Plaintiff's allegations are sufficiently specific and detailed to support a claim for breach of the confidentiality agreement. *Compare Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988) (holding that "the complaint is fatally deficient because it does not demonstrate how the defendant's alleged breach of the confidentiality agreement caused plaintiffs any injury"); *see also Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, LLC*, 2009 WL 362118, *4, 2009 US Dist LEXIS 15486, *12 (S.D.N.Y.), *aff'd* 355 Fed. Appx. 516 (2d Cir. 2009) (dismissing the action, and holding that, "[i]n the absence of allegations showing misuse of confidential information for a prohibited purchase, plaintiff has not alleged a cause of action for breach of the Confidentiality Agreement").

Contrary to CPI's contentions, discovery is necessary before a determination may be made regarding whether the cited information is confidential, and, if so, whether CPI misused any confidential information in negotiating with TPP's landlords. Where, as here, significant factual issues exist with regard to the breach of a confidentiality agreement, dismissal of the claim will be denied. *See Art Capital Group, LLC v. Getty Images, Inc.*, 24 Misc. 3d 1247[A], 2009 Slip Op 51909[U], at * 5 (Sup. Ct., NY County 2009). The confidentiality agreement expressly excepts from the definition of confidential information publicly available information, information obtained by CPI from third-party sources who are not known to CPI as bound by a confidentiality agreement with respect to TPP, and information independently developed by CPI. *See Confidentiality Agr.*, ¶ 2.

CPI contends that TPP listed its locations on its website, and that the identity of TPP's landlords, including the mall names, locations and contact information, is public information. CPI further contends that CPI obtained financial and operational information, including retail space size, rent, and sales history, from TPP's former landlords, many of whom already had business relationships with CPI, as a result of CPI's operation of mall-based portrait studios.

However, TPP Acquisition contends that any information provided by the landlords may not be exempted from the scope of the agreement, and alleges that many of the TPP leases contain confidentiality provisions governing the lease terms, and that CPI was aware of the existence of these provisions. The documents now before the court do not permit a

determination regarding whether the information cited by TPP Acquisition comes within the ambit of the categories of exempted information.

Contrary to CPI's contention, the fact that TPP defaulted on perhaps 20 of its rent obligations in January and February 2011 does not permit a determination that CPI's conduct in negotiating with some of TPP's landlords could not have caused TPP to lose some 75 rental spaces. Discovery on these issues is necessary.

For the foregoing reasons, the branch of the motion to dismiss the first cause of action for breach of contract is denied.

B. Tortious Interference

Next, CPI contends that the claim for tortious inference is fatally defective. CPI argues on the grounds that, inter alia, TPP Acquisition admits that CPI acted in pursuit of its own economic self-interest and TPP Acquisition cannot convert its contract claim into a tort.

In opposition, TPP Acquisition contends that it adequately alleges that CPI interfered with TPP Acquisition's lease negotiations. TPP Acquisition argues that CPI used wrongful means and tortious conduct independent from the obligations imposed on CPI by the confidentiality agreement.

In order to state a legally cognizable claim for tortious interference with prospective contract rights or economic advantage, the plaintiff must allege direct interference with a third party, and that the defendant acted wrongfully, by the use of dishonest or wrongful

means or was motivated solely by a desire to inflict intentional harm on the plaintiff. *Fonar Corp. v. Magnetic Resonance Plus, Inc.*, 957 F. Supp. 477, 482 (S.D.N.Y.); *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189-192 (2004). Tortious interference may take many forms, and, where one competitor interferes with the business relations of another, a wide range of possibilities is presented. *NBT Bancorp Inc. v. Fleet/Norstar Fin. Group, Inc.*, 87 N.Y.2d 614, 621 (1996). “Wrongful means” has been defined as “physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone” *Carvel Corp. v. Noonan*, 3 N.Y.3d at 191, quoting *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980), citing Restatement (Second) of Torts § 768, Comment e; § 767, Comment c.

While competition between entities that is motivated by a desire to profit does not constitute a wrongful motive (*see, e.g., Strasser v. Prudential Sec., Inc.*, 218 A.D.2d 526, 527 (1st Dep’t 1995), here, TPP Acquisition alleges facts, which, when accepted as true, as they must on this motion to dismiss, are adequate to support a legally viable claim for tortious interference with prospective economic advantage. TPP Acquisition alleges that CPI misused “TPP’s proprietary and confidential information to obtain a commercial and competitive advantage over TPP in the market for portrait services by forcing TPP out of its retail service locations.” Amended Complaint, ¶ 74.

While CPI strenuously disputes the allegations that it misused any confidential information, it cannot be concluded as a matter of law that the documentary evidence negates

all possibility of misconduct, particularly in view of the timing of the release of the information to CPI, and CPI's contact with TPP's landlords. Allegations that the defendant made improper use of confidential, proprietary information to induce third parties to terminate business negotiations with the plaintiff are sufficient to support a legally viable claim for tortious interference with prospective business relations. *CBS Corp. v. Dumsday*, 268 A.D.2d 350, 353 (1st Dep't 2000); *B-S Indus. Contrs. Inc. v. Burns Bros. Contrs. Inc.*, 256 A.D.2d 963, 965 (3d Dep't 1998). Therefore, discovery is required regarding, among other things, the circumstances of CPI's acquiring of the same information from public sources and CPI's use of the information in its communications with TPP's landlords.

Contrary to CPI's contention, the claim is not duplicative of the breach of contract claim. The two claims are not identical, inasmuch as a claim for tortious interference with prospective economic relations requires culpable conduct beyond that required for a claim of breach of contract. *NBT Bancorp Inc. v. Fleet/Norstar Fin. Group, Inc.*, 87 N.Y.2d at 621. Thus, a tortious interference claim is not a breach of contract claim improperly alleged as a tort. *30 CPS, LLC v. Board of Mgrs. of Cent. Park S. Med. Condominium*, 23 Misc. 3d 1024, 1031 (Sup. Ct., NY County 2009). Here, TPP Acquisition has adequately alleged that CPI exploited TPP's confidential information in order to eliminate TPP as a competitor by taking over its profitable retail locations. *See Amended Complaint*, ¶¶ 74, 77.

For the foregoing reasons, the branch of the motion to dismiss the second cause of action for tortious interference with prospective business relations is denied.

C. Unfair Competition

Next, CPI contends that the claim for unfair competition is fatally defective. CPI alleges that TPP Acquisition has failed to plead sufficient underlying facts and special damages.

In opposition, TPP Acquisition contends that misuse of propriety information may constitute unfair competition, and that special damages need not be pleaded at this stage of the litigation.

To state a claim for unfair competition, the plaintiff must allege that the defendant misappropriated a commercial advantage that belonged exclusively to the plaintiff (*LoPresti v. Massachusetts Mut. Life Ins. Co.*, 30 A.D.3d 474, 476 (2d Dep't 2006)), a confidential relationship between the parties or a valid agreement to refrain from unfairly competing (*V. Ponte & Sons, Inc. v. American Fibers Intl.*, 222 A.D.2d 271, 272 (1st Dep't 1995)), and special damages. *Waste Distillation Tech., Inc. v. Blasland & Bouck Engrs., P.C.*, 136 A.D.2d 633, 634 (2d Dep't 1988).

Courts have held claims for unfair competition legally viable when those claims arise out of allegations that the defendant used the plaintiff's proprietary information to obtain a competitive advantage on contracts or for its own commercial advantage, particularly where the defendant used the information in breach of a nondisclosure or confidentiality agreement. *See, e.g., Ruder & Finn v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 673, *rearg. denied* 54 N.Y.2d

753 (1981); *Beverage Mktg. USA, Inc. v. South Beach Beverage Co., Inc.*, 20 A.D.3d 439, 440 (2d Dep't 2005) (holding that a cognizable claim of unfair competition may be predicated "upon the alleged bad faith misappropriation of a commercial advantage belonging to another by 'exploitation of propriety information or trade secrets'").

TPP Acquisition alleges that CPI was granted access to TPP's proprietary and confidential information under the confidentiality agreement in exchange for CPI's agreement not to "use the [Confidential] Information for any purpose other than in connection with [CPI's] consideration and implementation of a Potential Transaction." See Amended Complaint, ¶¶ 3, 22. TPP Acquisition further alleges that it discovered that CPI used the information to interfere with TPP Acquisition's lease negotiations, and lease the retail studio spaces itself, and put TPP out of business. See *id.*, ¶¶ 4, 40-47, 86.

Significantly, however, TPP Acquisition has wholly failed to allege special damages. Instead, it pleads merely that it "has been and continues to be damaged in an amount presently unknown and to be determined at time of trial." Amended Complaint, ¶ 91. The failure to plead special damages mandates dismissal of an unfair competition claim. *Waste Distillation Tech., Inc. v. Blasland & Bouck Engrs., P.C.*, 136 A.D.2d at 634; *Private One of N. Y., LLC v. JMRL Sales & Serv., Inc.*, 21 Misc. 3d 1106[A], 2008 Slip Op 51989[U], *14 (Sup. Ct., Kings County 2008).

For these reasons, the branch of the motion to dismiss plaintiff's third cause of action for unfair competition is granted, and the claim is dismissed.

Last, the branch of the motion to enforce the prevailing party provision of the confidentiality agreement (*see* Confidentiality Agr., ¶ 12), and award CPI litigation expenses, including reasonable attorneys' fees and costs, upon dismissal of this action, is denied without prejudice as premature.

Order

Accordingly, it is

ORDERED that the motion to dismiss is granted to the limited extent that the third cause of action for unfair competition is dismissed; and it is further


ORDERED that the remainder of the claims shall continue; and it is further

ORDERED that the defendant CPI Corp. is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on March 27, 2012, at 10:00 A.M.

Dated: New York, New York

February 2, 2012

ENTER

Hon. Eileen Bransten, J.S.C.