

**MidAmerica Prods., Inc. v Derke**

2013 NY Slip Op 30605(U)

March 20, 2013

Supreme Court, New York County

Docket Number: 601381/08

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

MIDAMERICA PRODUCTIONS, INC. and PETER TIBORIS,

INDEX NO. 601381/08

Plaintiffs,

MOTION SEQ. NO. 018

-against-

IRIS DERKE, individually, JONATHAN GRIFFITH, individually, and DISTINGUISHED CONCERTS INTERNATIONAL, LLC, d/b/a DISTINGUISHED CONCERTS INTERNATIONAL NEW YORK,

Defendants.

**FILED**  
MAR 28 2013  
NEW YORK  
COUNTY CLERKS OFFICE

The following papers were read on this motion for summary judgment by defendants and cross-motion by plaintiff for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

In motion sequence 018, the defendants Iris Derke (Derke), Jonathan Griffith (Griffith), and Distinguished Concerts International, LLC d/b/a Distinguished Concerts International New York (Distinguished Concerts) move, pursuant to CPLR 3212, for summary judgment dismissing the remaining claims in the complaint for unfair competition, violations of the Electronic Communications Privacy Act (ECPA), 18 USC §§ 2510 - 2522, and violations of the Stored Wire and Electronic Communications Act (SECA), 18 USC §§ 2701 - 2711. Plaintiffs MidAmerica Productions, Inc. (MidAmerica) and Peter Tiboris (Tiboris) cross-move, pursuant to CPLR 3212, for summary judgment in their favor on these claims. Discovery in this matter is complete and the Note of Issue has been filed.

As the factual background has been discussed in detail in the Court's prior decision, dated December 27, 2010, familiarity is presumed, and the Court will only discuss facts that are relevant for the purpose of these motions. This action arises out of alleged wrongful conduct by defendants, whereby plaintiffs maintain that the defendants, among other things, misappropriated proprietary and confidential materials belonging to plaintiffs and used same in starting a competing business.

Plaintiffs allege that throughout MidAmerica's 25 year existence, it has collected information, observations, impressions, idiosyncrasies, insights, leads, facts, and notes from its clients and compiled this information onto customer information sheets (the CIS), and that defendants used the CIS in an anti-competitive manner and were able to produce concerts using this information. It is also alleged that defendants solicited MidAmerica's clients from the information in the CIS, as well as from contact lists, and diverted business opportunities concerning certain MidAmerica clients.

Plaintiffs also allege that Derke and Griffith downloaded file eraser software onto their desktops at MidAmerica for the purposes of erasing communications, information, and files contained on their work computers, and that they wrongfully accessed Tiboris' email account and intercepted his electronic communications to the plaintiffs' detriment.

In March 2010, plaintiffs served a second amended complaint alleging several causes of action including injury to reputation and goodwill, breach of a duty of loyalty under the faithless servant doctrine, breach of restrictive covenant, claims for violations of the ECPA, SECA, and the Computer Fraud and Abuse Act, claims for violating privacy laws of the State of New York, conversion, unfair competition, punitive damages, an accounting, a permanent injunction, and statutory damages. On December 27, 2010, this Court dismissed all claims against defendants except those for unfair competition and violations of the ECPA and SECA. The parties now move and cross-move for summary judgment on these remaining claims.

## STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

An unfair competition claim can be based upon allegations of the "bad faith misappropriation of a commercial advantage belonging to another 'by exploitation of proprietary information or trade secrets'" (*Beverage Mktg. USA, Inc. v South Beach Bev. Co., Inc.*, 20

AD3d 439, 440 [2d Dept 2005], quoting *Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203 [4th Dept 1998]). Here, plaintiffs' claim is predicated on allegations that defendants misappropriated the CIS, and the CIS constitutes a trade secret.

A trade secret is defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 123 [1st Dept 1998], quoting Restatement of Torts § 757, comment b). To be a trade secret, the information must be secret (*see Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]). This is an essential requisite for legal protection against misappropriation of a trade secret. Where the information at issue could be easily acquired and duplicated, it is not a trade secret (*id.*). Further, customer lists will not be entitled to trade secret protection "where the names and addresses of customers are readily ascertainable" and "publicly available" (*ENV Servs., Inc. v Alesia*, 10 Misc 3d 1054[A], 2005 NY Slip Op 51947[U], \*6 [Sup Ct, Nassau County 2005]). While the issue of whether a trade secret is secret is generally a question of fact (*see Ashland Mgt. v Janien*, 82 NY2d at 407), it is clear from the record before this Court that the CIS does not constitute a trade secret.

There are six factors courts may look at when determining whether information qualifies as a trade secret:

"(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others'" (*Wiener v Lazard Freres & Co.*, 241 AD2d at 124, quoting Restatement of Torts § 757, comment b).

## DISCUSSION

The record clearly demonstrates that plaintiffs did not take any reasonable measures to guard the secrecy of the CIS. In fact, plaintiffs do not dispute that the CIS was not password protected and could be accessed by anyone with access to a computer in the office (see Affirmation of Steve I. Locke [Locke Aff.], exhibit B, deposition of Peter Tiboris at 416). While the CIS was on a database in the plaintiffs' computer system, as it was never protected and was available to anyone with access to a computer in the office, it cannot qualify as a trade secret (see *Downtown Women's Ctr., Inc. v Carron*, 237 AD2d 209, 209 [1st Dept 1997]).

In addition, recruiters were permitted to take print screens containing the customer information out of the office (see Locke Aff., exhibit B, Deposition of Peter Tiboris at 497). Plaintiffs also admit that remote access to the CIS was given to Dennis Loy, a former executive director, and a conductor in residence. Plaintiffs also never took any measures to prevent defendants from using the information contained in the CIS once they left plaintiffs' employment, as defendants were never required to execute a restrictive covenant or confidentiality agreement, nor did they ever execute one (see *Starlight Limousine Serv. v Cucinella*, 275 AD2d 704, 705 [2d Dept 2000] [summary judgment granted in favor of defendants where plaintiff failed to take measures to guard the secrecy of its customer lists or prevent defendants from using such information after they left the company]).

Plaintiffs argue that they never allowed employees to have laptops, and the server with the CIS could only be accessed via computers in the office. However, this argument does not change the fact that the CIS was not secret, as it could be easily accessed by anyone in plaintiffs' office and employees were allowed to take print sheets of customer information home with them, as well as the remote access given to Loy.

The fact that plaintiffs publish the identities of its customer/performers on promotional materials and their website, which are available to the public, also negates any argument that

the CIS is a trade secret (*see Starlight Limousine Serv. v Cucinella*, 275 AD2d at 705). While plaintiffs argue that they expended time and money into creating the CIS, the customer information can, nevertheless, admittedly be acquired from other sources, including plaintiffs' own promotional materials and website, as well as industry lists published by commercial sources for purchase. Accordingly, the portion of defendants' motion for summary judgment dismissing plaintiffs' claim for unfair competition is granted.

Plaintiffs also allege that Derke and Griffith are liable to them for violating the ECPA and SECA. In regard to their claims under the ECPA, plaintiffs allege that Derke and Griffith accessed Tiboris' email account, without his consent or authorization, and reviewed and copied these electronic communications contemporaneously with their transmission. Defendants argue that this cause of action must be dismissed because there is no evidence that the emails allegedly intercepted were intercepted contemporaneously with transmission. The Court agrees that, in order for there to be a violation of the ECPA, the intercepted emails must have been intercepted contemporaneously with transmission (*see Fraser v Nationwide Mut. Ins. Co.*, 352 F3d 107, 113-114 [3d Cir 2003]; *Pure Power Boot Camp v Warrior Fitness Boot Camp*, 587 F Supp 2d 548, 557 [SD NY 2008]). However, neither party has met their burden for summary judgment. While the evidence presented indicates that the emails accessed were accessed from Tiboris' AOL account after delivery, it is not completely clear if the defendants were also accessing the emails as they were being transmitted. Thus, summary judgment cannot be granted at this time.

In regard to the SECA, this statute "creates civil liability for anyone who intentionally accesses without authorization a facility through which an electronic communication service is provided and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage" (*Rozell v Ross-Holst*, 2007 US Dist LEXIS 46450, \*19 [SD NY, June 21 2007, No. 05 Civ 2936] [internal citations omitted]).

Defendants argue that the court should revisit the issue as to whether this cause of action can be brought against employees, and not high tech computer hackers as the statute was designed to combat. The Court maintains its previous holding that it can be brought in actions between employees and employers (*see e.g. Pure Power Boot Camp v Warrior Fitness Boot Camp*, 587 F Supp 2d 548).

The parties have raised issues of fact as to who, whether Derke or Griffith, or both, accessed Tiboris' emails, and whether Derke and/or Griffith had authorization to access Tiboris' email account (*id.* at 556). Thus, summary judgment cannot be granted to either party.

Defendants argue that plaintiffs have no damages based on any alleged access to the emails. However, there is also an issue of fact as to whether the accessing of the information contained in the emails caused damage to plaintiffs.

#### CONCLUSION

Accordingly, it is

ORDERED that defendants Iris Derke, Jonathan Griffith, and Distinguished Concerts International, LLC's motion for summary judgment is granted, in part, to the extent that plaintiffs MidAmerica Productions, Inc. and Peter Tiboris' cause of action for unfair competition against all defendants is dismissed, and the remainder of the motion is denied; and it is further,

ORDERED that plaintiffs MidAmerica Productions, Inc. and Peter Tiboris' cross-motion for summary judgment is denied; and it is further,

ORDERED that the action shall continue as to the third and fifth causes of action against Iris Derke and Jonathan Griffith; and it is further,

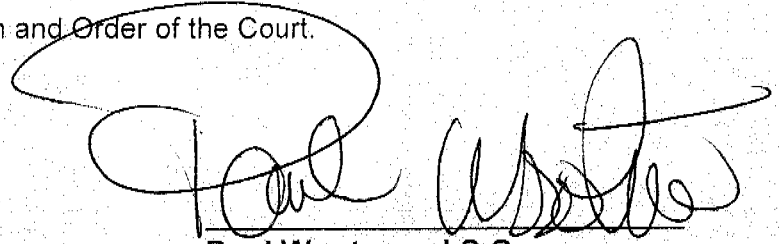
ORDERED that the parties are directed to appear for a pre-trial conference in Part 7, 60 Centre Street, Room 341 on May 30, 2013 at 11:00 a.m.; and it is further,

ORDERED that the parties shall bring to the pre-trial conference all marked pleadings and motions in limine, if any; and it is further,

ORDERED that counsel for defendants is directed to serve a copy of this Order upon the plaintiffs and upon the County Clerk who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 3/20/13

  
Paul Wooten J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

**FILED**  
MAR 28 2013  
NEW YORK  
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