

**Oppenheimer & Co., Inc. v Northstar Agri Indus.,
LLC**

2013 NY Slip Op 32832(U)

January 2, 2013

Supreme Court, New York County

Docket Number: 651839/2012

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

OPPENHEIMER & CO., INC.,

Plaintiff,

-against-

NORTHSTAR AGRI INDUSTRIES, LLC and
HAYDEN CAPITAL USA, LLC,

Defendants.

INDEX NO. 651839/2012

MOTION DATE Dec. 13, 2012

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to dismiss action.

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion to dismiss action is decided in accordance with the accompanying decision and order.

Dated: January 2, 2013


O. PETER SHERWOOD, 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: PART 49

-----X
 OPPENHEIMER & CO., INC.,

Plaintiff,

-against-

NORTHSTAR AGRI INDUSTRIES, LLC and
 HAYDEN CAPITAL USA, LLC,

Defendants.
 -----X

O. PETER SHERWOOD, J.:

Defendants Northstar Agri Industries, LLC (“Northstar”) and Hayden Capital USA, LLC (“Hayden”) move in two separate motion sequences, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint.

Background

As these are motions to dismiss, the allegations are taken from the complaint. Where the allegations are ambiguous, the court resolves the ambiguities in plaintiff’s favor.

In 2008, defendant Northstar was in search of investors to provide financing to develop a canola processing facility in Minnesota. Plaintiff, Oppenheimer & Co., Inc. (“OPCO”), an investment bank, found Northstar an investor, PICO Holdings, Inc. (“PICO”). PICO ultimately arranged for a \$160 million investment in the canola facility. This action is to recover a finder’s fee on behalf of OPCO.

In 2008, Peter Williams (“Williams”) was an Executive Director in the Investment Banking group at OPCO. In April 2008, Williams was introduced to Northstar CEO, Neil Juhnke (“Juhnke”), by Northstar’s agent/broker, The Irish Financial Group, Inc. and MDL Consulting Group, LLC (“MDL/Irish”). OPCO and Northstar executed a non-disclosure agreement (“NDA”) “intended to facilitate ongoing business dealings between [Northstar] and Oppenheimer associated with the development of a Canola Processing facility in Northwestern Minnesota.”

OPCO next introduced Northstar to several OPCO clients who were interested in investing in the agricultural space. OPCO believed that it would be paid a finder’s fee for its services.

In July 2008, Paul Parhar ("Parhar"), an OPCO employee informed Williams that PICO might be interested in the Northstar canola project. Williams spoke with PICO and set up a conference call between PICO and Northstar. At the end of July 2008, Northstar and PICO entered into a Memorandum of Understanding ("MOU"), the purpose of which was to outline PICO's intent to provide equity to and acquire control of Northstar's business in order to facilitate investment in the canola plant.

On August 11, 2008, OPCO confirmed an oral agreement with Northstar regarding a finder's fee. OPCO then provided Northstar with a written finder's fee agreement which set forth the terms and conditions of the alleged oral agreement. Northstar refused to sign the agreement, taking the position that it intended to negotiate further with OPCO regarding the appropriate fee. Northstar purportedly did not advise OPCO that it objected to the 3% fee set forth in the draft agreement. The parties proceeded with performance: Northstar continued its discussions with PICO, and OPCO continued to expend efforts working with PICO to explore bringing a potential Northstar investment to fruition.

As the financial crisis hit in the fall of 2008, the deal stalled. On September 22, 2010, PICO and Northstar publicly announced that they entered an agreement pursuant to which PICO would make a \$60 million equity investment in Northstar in connection with the canola facility, subject to Northstar securing a commitment for a \$100 million construction loan. On December 30, 2010, Northstar announced that it had secured a \$100 million loan from ING and had closed its deal with PICO. PICO committed to fund up to \$50 million of the ING financing if ING was unable to fully syndicate the loan.

After the NDA was executed, Hayden directed Williams, who was also a director of Hayden, to induce Northstar to enter into a finder's fee agreement *with Hayden*. Hayden did so knowing that Williams was an OPCO employee whose job responsibilities encompassed procuring investment banking opportunities, such as the Northstar deal, *for Oppenheimer*. Hayden knew that Williams was not permitted to engage or assist in the engagement of potential investment banking clients for entities other than OPCO. Despite this, Hayden directed and permitted Williams to engage Northstar on behalf of Hayden. Williams presented a Hayden finder's fee agreement to Northstar's agent/broker MDL/Irish. MDL/Irish presented this agreement to Northstar and identified Hayden as

an OPCO competitor. On May 2, 2008, Northstar signed the Hayden finder's fee agreement. Northstar did not sign the OPCO finder's fee agreement.

Northstar understood that in doing work for Northstar, Williams was acting in his capacity as an employee of OPCO. Indeed, after signing the finder's fee agreement with Hayden, Northstar never heard from Hayden again until it received an invoice for a \$4.8 million finder's fee in the fall of 2010. Northstar refused to pay Hayden a finder's fee, and Hayden sued Northstar in the United States District Court for the Second District of New York ("SDNY case"). OPCO demanded payment of a 3% finder's fee from Northstar, but Northstar refused to pay. OPCO sought leave to intervene in the SDNY case which request was denied. OPCO then filed the present suit.

The complaint alleges causes of action for breach of contract (against Northstar), unjust enrichment (against Northstar), tortious interference with contract (against Hayden), tortious interference with contract and/or prospective economic advantage (against Hayden), unfair competition (against Hayden), and misappropriation and misuse of confidential information (against Hayden).

DISCUSSION

I. Standard, CPLR § 3211 (a) (1)

To succeed on a motion to dismiss, pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means judicial records such as

judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, “the contents of which are ‘essentially undeniable’” (*id.* at 84-85).

II. Standard, CPLR § 3211 (a) (7)

On a motion to dismiss a plaintiff’s claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander’s, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a CPLR 3212 motion for summary judgment, the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 “*unless they ‘establish conclusively that [plaintiff] has no * * * cause of action’*” (*Lawrence v Miller*, 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.*, 40 NY2d *supra* at 636). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

III. Northstar’s Statute of Frauds Defense (Mot. Seq. 001)

Under General Obligations Law 5-701(a)(10),

[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged

therewith, or by his lawful agent, if such agreement, promise or undertaking . . . Is a contract to pay compensation for services rendered in negotiating . . . a business opportunity. . . . 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law

Thus, GOL §5-701(a)(10) applies to claims sounding in both contract and quasi-contract.

A. The Breach of Contract Claim

Northstar contends that since there is no writing evidencing the finder's fee agreement signed by the party to be charged (Northstar), OPCO's breach of contract claim is barred by the statute of frauds and the claim must be dismissed. OPCO responds that Northstar is essentially raising the statute of frauds as a sword instead of as a shield. OPCO argues that Northstar should be estopped from asserting the statute of frauds because Northstar has admitted that it engaged OPCO, that it would be typical for OPCO to receive a fee under the circumstances, and that OPCO was entitled to a fee for the PICO referral. In support of its argument, OPCO asserts that in *Onbank & Trust Co v James P. Burr Enterprises*, 235 AD2d 799 [3d Dept 1997], the court held that where a party does not deny the existence of a contract to pay fees for another party's services, but merely takes issue with one of the terms of the contract, the statute of frauds may be deemed waived. In this case however, Northstar denies that the PICO transaction is covered by any agreement with OPCO. The only signed agreement involving these parties is a non-disclosure agreement, which does not contain any of the essential terms of a finder's fee agreement.

OPCO argues that the NDA is a valid signed contract and is sufficient to take its claim out of the statute of frauds. However, the NDA is devoid of any finder's fee provision. Citing *Willow Bay Associates*, 2003 WL 1475030 [D Del 2003], OPCO maintains that the statute of frauds does not dictate which terms must be included in a signed writing, but leaves it to the fact-finder to determine what terms are material. The case is inapposite. It involved an alleged breach of a signed confidentiality agreement. Here, OPCO does not allege that Northstar breached the NDA. Rather, OPCO alleges that Northstar breached an oral finder's fee agreement.

OPCO also argues pursuant to *Crabtree v Elizabeth Arden Sales Corp*, 305 NY 48 [1953], a contract "may be pieced together out of separate writings, some signed, others not, connected with

one another either expressly or by internal evidence of subject matter and occasion.” OPCO asserts that the NDA establishes the contractual relationship and the oral fee agreement can be considered part of that contract. The argument fails, because the signed writing must contain all of the essential terms of a contract (*see Morris Cohon v Russell*, 23 NY2d 569 [1969]). The NDA makes no reference to compensation, an essential term. The first count in the complaint (for breach of contract) is barred by the statute of frauds.

B. The Unjust Enrichment

The second count in the complaint alleges a cause of action for unjust enrichment. “The theory of unjust enrichment lies as a quasi-contract claim” (*IDT v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], *rearg. denied* 12 NY3d 889 [2009], quoting *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). “It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned” (*id.*). Courts developed unjust enrichment as a theory of recovery to remedy the absence of a formal contract and, consequently, the absence of a remedy provided by law. “To prevail on a claim for unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party’s expense, (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Old Republic Natl. Title Ins. Co. v Luft*, 52 AD3d 491 [2d Dept 2008]). In general, courts examine: (1) whether defendant has received a benefit under a mistake of law or fact, (2) if the benefit still remains with the defendant, (4) whether there has been a change of position by the defendant, and (5) whether the defendant’s conduct was tortious or fraudulent (*see Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]).

Accepting for purposes of this motion to dismiss that the complaint states a cause of action for unjust enrichment, Northstar asserts that the claim is barred by the statute of frauds (*see Snyder v Bronfman*, 13 NY3d 504, 509 [2009] and *MP Innovations, Inc. v Atlantic Horizon Int’l, Inc.*, 72 AD3d 571, 572 [1st Dept 2010]). The Court of Appeals has observed that “[t]he Statute of Frauds was designed to guard against the peril of perjury; to prevent the enforcement of unfounded fraudulent claims” *Morris Cohon & Co. v Russell*, 23 NY2d 569, 574 (1969). Upon a finding that the “peril of perjury is largely, if not entirely absent,” a writing relied on by plaintiff which identifies the parties to the contract and the subject matter of the contract, an acknowledgment that the

defendant dealt only with plaintiff and an admission that plaintiff in fact performed the work, the Court of Appeals, held that the memorandum (which did not state the rate of compensation) was sufficient to satisfy the statute of frauds in a action in *quantum meruit*.

In this case, the NDA references “ongoing business dealings between [Northstar and OPCO] associated with the development of a Canola Proceeding facility.” Further, in verified pleadings and deposition testimony, senior Northstar officials acknowledged that Northstar had engaged with OPCO, that OPCO referred Northstar to PICO, that Northstar expected to give OPCO “some sort of fee” if a deal was consummated with PICO and that typically when an institution makes a referral, a referral fee is paid as part of the overall compensation. Thus, this is not a case where the unjust enrichment claim is based on little more than self-serving allegations of an interested party. There is no dispute that Williams played an important role in connection with the Northstar/PICO transaction. Instead, the dispute appears to concern which entity (OPCO or Hayden) should receive a fee for the services rendered. In these circumstances, the NDA provides enough of a writing to defeat a motion to dismiss a cause of action for unjust enrichment on the ground that the claim is barred by the statute of frauds.

IV. Hayden’s Motion to Dismiss (Mot. Seq. 002)

In motion sequence number 002, Hayden seeks dismissal of the complaint as to it. The counts pleaded against Hayden are : Count Three (tortious interference with contract); Count Four (tortious interference with contract and/or prospective economic advantage); Count Five (Unfair Competition); and Count Six (misrepresentation and misuse of confidential information).

A. Tortious Interference With Contract and Tortious Interference With Prospective Economic Advantage

As to Count Four, OPCO asserts that “Hayden intentionally, maliciously and unjustly interfered with Oppenheimer’s employment agreement with Williams (1) by using Williams to procure a finder’s fee agreement with Northstar” and (2) “by asserting a claim against Northstar for a finder’s fee based on Williams introducing Northstar to Oppenheimer clients, including PICO, whose identity and interest in such an investment constitutes Oppenheimer’s confidential business information.” In Count Three, OPCO asserts as follows: “Oppenheimer has a business and/or contractual relationship with Northstar and has expended time and resources developing that

relationship. Hayden was aware of that relationship. Hayden, through its director Williams, an Oppenheimer employee, has interfered with that relationship and Oppenheimer's prospective economic advantage by engaging in the conduct [described in the complaint]. Further, Hayden, in wrongfully claiming it is entitled to a finder's fee resulting from Williams' work in introducing Northstar to PICO, has interfered with that relationship and Oppenheimer's prospective economic advantage."

Hayden argues that to the extent these claims are based on Hayden's commencement of a federal suit, such a claim is not actionable under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine holds that parties may not be subjected to liability merely for petitioning the government or a governmental agency, including filing a lawsuit (*I.G. Second Generation Partners v Duane Reade*, 17 AD3d 206, 208 [1st Dept 2005]). The complaint does not state and OPCO does not argue that its claims against Hayden are based on the filing of a lawsuit by Hayden. Accordingly, the court need not address this defense further.

To assert a claim for tortious interference with contract, a plaintiff must allege (1) a valid agreement with a third party, (2) the defendant's knowledge of that agreement, (3) the defendant's intentional and improper interference with that agreement that causes a breach, and (4) damages to the plaintiff as a result of the breach (*White Plains Coat & Apron Co. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

As to the claims based on alleged interference with Williams' employment agreement, Hayden offers a written consent through OPCO's predecessor-in-interest which authorizes Williams to serve as a director of Hayden as documentary evidence that Williams' employment arrangement with OPCO was not a bar to Williams soliciting competing business opportunities for Hayden. The consent, although arguably broadly worded, is not limitless. The consent letter places certain limits on the activities in which Mr. Williams may engage on behalf of Hayden, including the following:

Further, due to potential for conflict of interest and/or the receipt of material, non-public information arising from his dual capacity as both an employee of CIBC and a Director with Hayden, please be advised that it is the policy of CIBC that Mr. Williams must abstain from voting on decisions relating to potential business activities; investment opportunities or banking engagements that could involve CIBC or one of its affiliates, and we have advised Mr. Williams of this condition. Finally, we have reserved the right to require Mr. Williams to resign as a Director at any time.

Accordingly, the consent letter does not rise to the level of documentary evidence that forms the basis for a defense that resolves all factual issues and definitively disposes of the plaintiff's claims (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 152).

Hayden also asserts that OPCO was not damaged by the alleged breach of Williams employment because Hayden's fee arrangement with Northstar was non-exclusive and therefore OPCO cannot establish but-for causation, i.e., but for Hayden's breach, OPCO would have been paid a finder's fee. The claim cannot be dismissed on this basis because OPCO may be able to show that Northstar did not sign the OPCO contract and instead executed the Hayden contract due to Williams' disloyalty at the behest of Hayden thereby causing OPCO to lose a finder's fee for its work in introducing PICO to Northstar. The elements of a tortious interference with contract claim, tortious interference with prospective economic advantage requires a plaintiff to show (1) illegal or wrongful acts or malice on the part of the defendant, and (2) a "but for" expectancy of obtaining a contract (*"NY Pepsi-Cola Distrib. Ass'n v PepsiCo Inc.*, 240 AD2d 315, 316 [1st Dept 1997]). For the reasons discussed above, this claim too survives a motion to dismiss.

B. Unfair Competition

OPCO contends that Hayden's conduct constitutes commercially improper and immoral acts, and as such, Hayden has engaged in unfair competition. Hayden responds that this cause of action "fails to identify the transaction and indicate the theory of recovery with sufficient precision" (citing *Foley v D'Agostino*, 21 AD2d 60, 62 [1st Dept 1964]; CPLR 3013). OPCO responds correctly that it has a cause of action, because the complaint alleges that "Hayden unfairly competed with OPCO when it encouraged Williams to misappropriate the identity of PICO as an investor who may be interested in Northstar and provided it to Hayden so that it could reap the benefit of a finder's fee. Additionally, Hayden knew Williams' conduct was in contravention of restrictions in his employment contract with OPCO and tortiously interfered with OPCO's agreement with Northstar." Count Five states a cause of action. Hayden further argues that this claim is barred by the three-year statute of limitations which applies to unfair competition claims based on an injury to property. OPCO does not dispute that a three-year statute of limitations applies.

As Hayden observes, Williams introduced Northstar to PICO in July 2005. However, the alleged unfair competition was ongoing. Moreover, the alleged damages did not occur until 2010 when the transaction closed. Court Five is not barred by the statute of limitations.

C. Misappropriation and Misuse of Confidential Information

In order to establish a claim for misappropriation, a plaintiff must prove (1) possession of a trade secret and (2) that defendant is using that trade secret “in breach of an agreement, confidence, or duty, or as a result of discovery by improper means” (*DoubleClick Inc. v Henderson*, 1997 WL 731413 [Sup Ct NY Co 1997]). Hayden contends that PICO is a well-known institutional investor which publicly discloses its interest in agriculture-related businesses and that its interest in non-traditional investments is public information. Accordingly, this knowledge does not constitute a protectable trade secret. The identity of a client is not a trade secret “where the customers are readily ascertainable outside the employer’s business as prospective users or consumers of the employer’s services or product” (*Leo Silfen v Cream*, 29 NY2d 387, 392 [1972]). The identity of a client will only constitute a trade secret where “the customers are not known in the trade or are discoverable only by extraordinary efforts” (*id.*)

OPCO respond that the fact that PICO was the right fit for and interested in investing with Northstar was a trade secret and was misappropriated by Hayden. OPCO notes that customer specific particulars about requirements and investment interests is confidential information (*see Marcone APW, LLC v Servall Co.*, 85 AD3d 1693 [4th Dept 2011] and *USI Ins. Svs. LLC v Miner*, 801 F Supp2d 175, 195 [SDNY 2011]).

As Hayden observes, OPCO alleges that Williams made the initial introduction on behalf of OPCO. Accordingly, Hayden did not make use of OPCO’s confidential information (*see Falconwood Corp. v In-Touch Techs. Ltd.*, 227 AD2d 215 [1st Dept 1996][misappropriation claim fails absent a showing that the trade secret was actually used by the offending party]). Count Six must be dismissed.

It is hereby,

ORDERED that the motion of Northstar to dismiss the complaint (motion sequence number 001) is GRANTED to the extent that Count One is DISMISSED; and it is further

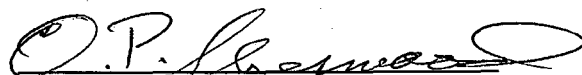
ORDERED that the motion of Hayden USA to dismiss the complaint (motion sequence number 002) is GRANTED to the limited extent that Count Six is DISMISSED; and it is further

ORDERED that counsel shall appear for a preliminary conference at Part 49, Courtroom 252, 60 Centre Street, New York, New York on Wednesday, February 20, 2013 at 10:30 AM.

This constitutes the decision and order of the Court.

DATED: January 2, 2013

ENTER,



O. PETER SHERWOOD

J.S.C.