

Quality Health Care Mgt. Inc. v Kobakhidze

2013 NY Slip Op 33735(U)

February 22, 2013

Sup Ct, Kings County

Docket Number: 27234/10

Judge: Carolyn E. Demarest

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This opinion is uncorrected and not selected for official publication.

At a Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of February, 2013.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

-----X
QUALITY HEALTH CARE MGT. INC., d/b/a
QUALITY LABORATORY SERVICE,
Plaintiffs,
- against -

**DECISION
AND
ORDER**

Index No. 27234/10

MERABI KOBAKHIDZE, VICTOR CONTI and
BENDINER & SCHLESINGER, INC.,
Defendants.

-----X
The following papers numbered 1 to 4 read on this motion:

Papers Numbered

	Papers Numbered
Notice of Motion	1
Notice of Cross Motion	2
Reply Affirmation in Further Support of Plaintiff's Cross Motion	3
Affirmation	4

In this action for, inter alia, breach of contract, breach of fiduciary duties, tortious interference with contract, and misappropriation of trade secrets, defendant corporation Bendiner & Schlesinger, Inc. ("B&S") and defendant individual Victor Conti ("Conti")(together, "Defendants") move for a protective order pursuant to CPLR 3103(a) denying demands by plaintiff Quality Laboratory Service ("QLS") for the production of documents relating to revenue earned by B&S and amounts earned by defendants Conti and Merabi Kobakhidze ("Kobakhidze"). Plaintiff QLS cross moves to compel disclosure. Plaintiff also moves to extend the filing of the Note of Issue for 60 days from the Order.

BACKGROUND

QLS contends that during parts of 2009 and 2010, Conti and Kobakhidze worked as sales

people and account managers for QLS, a medical testing facility, until some time in early October 2010 when Conti left, followed by Kobakhidze, on October 18, 2010, and began working for B&S, also a medical testing facility.¹ During their employment with QLS, Conti and Kobakhidze signed agency agreements, which were identical except as to dates of termination and which contained confidentiality provisions (“the Agreements”). Paragraph 3.4(a) - (b) of the Agreements states:

Upon termination of employment, sales agents are required to return all confidential information in their possession to QLS.

Confidential Information includes (1) all information related to such party’s customers, pricing, rates, employees, operations, technology, facilities, markets, products, capabilities, systems, procedures, security practices, research, development, business affairs and finances, ideas, concepts, inventions, designs, business methodologies, improvements, trade secrets, copyrightable subject matter, patents and other intellectual property and proprietary information.

The Agreements also contain non-solicitation provisions, which state at paragraph 3.5:

Agent agrees that for a period of six (6) months after the date of the termination of this Agreement, Agent agrees not to contact or solicit any of the customers who utilize the Laboratory Services as a result of Agent’s sales and marketing efforts for the purpose of switching any of said customers to another provider.

After Conti and Kobakhidze began working for B&S, QLS began losing many of its

¹In their motion, Defendants allege that Conti only worked with QLS until April 2010, when B&S determined that the agreement between Conti and QLS was void pursuant to Public Health Law § 587, and Conti began working for B&S and that a similar process occurred with respect to Kobakhidze.

Defendants allude to the argument that the contracts between QLS and Conti and Kobakhidze were invalid, but state that they will raise the issue in a separate motion. Defendants’ reply papers include additional briefing on this issue. Because there has been no separate motion filed addressing this issue, and because determination of the enforceability of the agreements is contingent upon facts not before the Court, the argument will not be entertained in this decision.

customers to B&S. QLS alleges that while Conti and Kobakhidze were still working for QLS, B&S conspired with them to divert customers to B&S. According to QLS, Conti and Kobakhidze used confidential information, such as client lists, to contact customers and recruit them for B&S, while also intentionally mismanaging customers accounts at QLS to give customers the impression that QLS was disorganized and incompetent to serve its clients.

Plaintiff initiated this action on November 4, 2010, then subsequently filed its first amended verified complaint on January 14, 2011. On March 1, 2012, Plaintiff filed its second amended verified complaint.² Plaintiff asserts various causes of action for breach of contract for “illegal termination,” “illegal use of confidential information,” and breach of the non-solicitation provision, breach of fiduciary duties, “tortious interference with plaintiff-customer relations,” and misappropriation of trade secrets against defendants Conti and Kobakhidze individually. Against B&S, Plaintiff asserts causes of action for unjust enrichment, misappropriation of trade secrets, and “tortious interference with plaintiff-customer relations.”

On September 19, 2012, QLS served on B&S a demand for the production of various documents, enumerated below. By motion filed November 9, 2012, defendants B&S and Conti moved,³ pursuant to CPLR 3103, for a protective order denying QLS the disclosure of the records it sought.

² By order dated February 15, 2012, Plaintiff was granted leave to file an amended complaint only to the extent of correcting the name of the plaintiff and interposing a properly pleaded cause of action for defamation. On March 1, 2012, Plaintiff filed the amended complaint (the “Second Amended Complaint”). No separate cause of action for defamation appears in the Second Amended Complaint.

³ Kobakhidze, who is not represented by the same counsel who appears for Defendants, does not join this motion.

By cross-motion filed November 21, 2012, QLS cross moved 1) for an order pursuant to CPLR 3124 compelling B&S to provide the requested responses, 2) to quash a subpoena issued upon Plaintiff's accountant by defendant Kobakhidze, 3) to protect the production of documents demanded by Kobakhidze in connection with a counter-claim for unpaid commissions, and 4) to extend the Note of Issue date. By signed stipulation dated December 7, 2012, the parties resolved the majority of issues surrounding Plaintiff's motions to quash and protect with respect to Kobakhidze's demands. The remaining issues related to Kobakhidze's demands were decided from the bench after oral arguments on December 12, 2012. Accordingly, the portions of Plaintiff's cross-motion referencing these issues need not be addressed in this decision.

The moving Defendants seek to protect the demanded documents, including:

1. Copies of any and all accounting records reflecting payments to Conti and Kobakhidze, individually and/or to business entities under their ownership and/or control from May 1, 2010 to up to present.
2. A copy of Attachment "A" of the May 24, 2010 "Non-Solicitation" Agreement between B&S and Conti, including any attachments. If Attachment "A" does not exist, demand that an officer of the company submit an affidavit as to whereabouts of document as it is required by the CPLR.
3. A copy of the "Non-Solicitation" Agreement between B&S and Kobakhidze, including any attachments. If Agreement does not exist, demand that an officer of B&S submit an affidavit as to whereabouts of document as it is required by the CPLR.
4. Copies of 1099 IRS forms issued by B&S to V&M Quality Service, or any other business entity under Conti's and Kobakhidze's ownership and/or control from May 1, 2010 up to present.
5. Copies of any W-2, 1099 IRS forms issued to Conti and Kobakhidze from May 1, 2010 up to present.
6. Any and all records demonstrating list of "accounts" and/or medical providers, which were serviced by Conti and/or Kobakhidze prior to October 1, 2010 and which subsequently became clients of B&S.

7. Any and all records demonstrating revenues earned by B&S from the "accounts" and/or medical providers who were serviced by Conti and/or Kobakhidze prior to October 1, 2010 and which subsequently became clients of B&S, from May 1, 2010 up to present.

At the December 12, 2012, oral arguments, the Court also ruled upon the motion as to demands 2 and 3. Accordingly, only demands 1, 4, 5, 6, and 7 remain at issue in this decision, as well as the motion to extend the Note of Issue filing deadline.

DISCUSSION

Pursuant to CPLR 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101(a)). However, "unlimited disclosure is not mandated, and the rules provide that the court may issue a protective order 'denying, limiting, conditioning or regulating the use of any disclosure device' to 'prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts'" (*Edward Montavalvo v CVS Pharmacy, Inc.*, 2013 WL 238786 [2d Dept 2013])(citations omitted). When discovery demands are "overbroad, burdensome, or lack specificity, or seek irrelevant or confidential information," the appropriate remedy is a protective order vacating the improper demands (*Kamanou-Goune v Swiss Intern. Airlines*, 100 AD3d 968, 969 [2d Dept 2012]); see also *Alpha Funding Group v Continental Funding, LLC*, 17 Misc3d 959, 970-71 [Sup Ct, Kings County 2007])(citing *Bell v Cobble Hill Health Ctr., Inc.*, 22 AD3d 620, [2d Dept 2005]). Accordingly, if Plaintiff's demands are irrelevant to its causes of action, the Court should grant a protective order vacating the improper demands (see *Kathleen Foley, Inc. v Gulf Oil Corp.*, 3 AD2d 928 [2d Dept. 1957])(it was proper to deny disclosure of tax returns when there was no "adequate showing that they would disclose any fact material or necessary to the prosecution or defense of the action").

At issue, therefore, is whether the requested information is relevant or material to Plaintiff's causes of action, which include claims based upon a breach contract, as well as on common law theories of breach of fiduciary duty, and "tortious interference with plaintiff-customer relations." Defendants argue that protection of B&S's and Conti's financial information is necessary as the information is irrelevant because, even if Defendants were found liable under Plaintiff's various theories, the appropriate measure of damages would be the profits lost by QLS, not the profits or revenue earned by B&S or Conti. QLS contends that it is entitled to full pecuniary loss of the benefits of the contract, here, the actual gross revenues derived by B&S from the customers diverted from QLS, and not merely its own lost profits. Plaintiff also argues that the evidence will show that Conti was paid by B&S while still employed by QLS.

Contrary to Defendants' assertions, materials sought in demands 1, 4, and 5 are relevant to Plaintiff's action, in which it contends that defendants Conti and Kobakhidze were diverting Plaintiff's customers to B&S during the time they were employed by Plaintiff. Information that may reveal payments made by B&S to Conti and Kobakhidze or their controlled entities from May 2010 (during the time they were alleged to be employed by Plaintiff) is material to the liability of the defendants for breach of their duties of loyalty to Plaintiff and should be disclosed. As there is no dispute over whether V&M Quality Service is an entity controlled by Conti or Kobakhidze, the Court finds no reason to limit demand 4.

Furthermore, payments made to Conti and Kobakhidze up to the present are relevant to the measure of damages. While damages based upon defendants' breach of contract would be

limited to Plaintiff's lost profits,⁴ should Plaintiff prevail on its breach of fiduciary duty claims, it would be entitled to all gains Kobakhidze and Conti acquired as a result of their wrongful acts. In *Gomez v Bicknell*, (302 AD2d 107 [2d Dept 2002]), the Second Department examined the appropriate measure of damages for an employee's breach of the duty of loyalty.⁵ Remarking that the purpose of damages for such breach was not only to compensate for wrongs, but to prevent them (citing *Diamond v Orealmino*, 24 NY2d 79[1969]), the court stated that a prevailing plaintiff may elect the remedy for such a breach to be calculated as either the disgorgement of the gain to the disloyal employee, or the employer's lost profits (*Gomez*, 302 AD2d at 114). Because demands 1, 4, and 5 may yield information revealing payments made to Conti and Kobakhidze by B&S and profits earned by the individual defendants from the allegedly poached clients, they are relevant, and the information must be produced. Plaintiff's motion to compel is granted and Defendants' motion to protect is denied with respect to these demands.

In response to demand 6, on October 19, 2011, B&S supplied a list of all of its customers

⁴ The appropriate measure of damages for a breach of a restrictive covenant like the non-solicitation agreement, is "the net profit of which plaintiff was deprived" (*Earth Alterations, LLC v Farrell*, 21 AD3d 873, 874 [2d Dept 2005] (plaintiff entitled to lost profits for defendant's breach of covenant not to compete); see also *Gomez v Bicknell*, 302 AD2d 107 [2d Dept 2002] (plaintiff must prove its own lost profits to recover when employee learned identity of potential client while employed by plaintiff, then resigned for ostensibly unrelated reasons and subsequently profited from the opportunity). Damages for early termination of contract, by virtue of defendants' alleged departure without giving the contractually specified notice, would be limited to the cost of replacing the employees (see *Marcus v Liner*, 85 Misc 368 [1st Dept 1914]).

⁵ Defendants' reliance upon *Epstein Engineering, P.C. v Cataldo* (2012 WL 485533 [Sup Ct, NY County 2012]), a New York County decision by Justice Gische, is misplaced. That decision, in stating that an employer could recover "any profits attributable to [an employee's] disloyalty while employed by plaintiff, as well as profits derived from [the] poached clients after resignation", does not appear to contradict the result reached here. At any rate, this Court is not bound by a decision made by a court of concurrent jurisdiction, but instead is controlled by decisions of the Second Department.

associated with Kobakhidze and Conti up to October 1, 2010. A list of QLS's former clients who subsequently became clients of B&S is relevant to Plaintiff's claim that the defendants conspired to divert QLS's customers to B&S. Defendants' response to this demand is inadequate in that the list does not include customers associated with Kobakhidze and Conti after October 1, 2010. Accordingly, Plaintiff's motion to compel with respect to demand 6 is granted.

Finally, documents demonstrating revenues earned by B&S from the allegedly poached accounts, demand 7, are not relevant to Plaintiff's action. Plaintiff argues that it is entitled to the "full pecuniary loss of benefits" of the contracts with which B&S interfered, which it measures as the gross revenues derived by B&S from the allegedly diverted clients. The Second Department, in an action for unfair competition and misappropriation of trade secrets, explained that "[t]he measure of damages for 'unfair competition and the misappropriation and exploitation of confidential information is the loss of profits sustained by reason of the improper conduct . . . limited to lost profits resulting from the defendant's actual diverting' of customer" (*Suburban Graphics Supply Corp. v Nagle*, 5 AD3d 663, 666 [2d Dept 2004]) (quoting *Allan Dampf P.C. v Bloom*, 127 AD2d 719, 720 [2d Dept 1987] (plaintiff dental practice was limited to its own lost profits when dentist employee took the client list and began soliciting clients for his new practice). In other words, "[t]he measure of damages in a case of unfair competition is the amount which the plaintiff would have made but for the defendant's wrong, and not the profits received by the defendants" (*Suburban*, 5 AD3d at 666)(citations omitted).

Moreover, in an action for the tortious interference with existing contractual relationships, the appropriate damages are the benefits of the bargain - here, the lost profits from the contracts of the allegedly diverted customers (*see Guard-Life Corp. v Parker Hardware Mfg.*

Corp., 50 NY2d 183, 197 [1980](plaintiff entitled to full benefit of contract with which defendant interfered); *Lurie v New Amsterdam Cas. Co.*, 270 NY 379 [1936](plaintiff attorney in tortious interference action against another law firm was limited to damages equaling what he could have received from the contract with the diverted client).

Furthermore, in an action for unjust enrichment, defendants may be liable in restitution for the benefit conferred by a plaintiff (*see Trotta v Ollivier*, 91 AD3d 8, [2d Dept 2011]). Here, the benefit conferred upon B&S by QLS could only be what rightfully belonged to Plaintiff - its lost profits resulting from the lost contracts.

Thus, even if Plaintiff were to prevail on its causes of action against B&S, it would be entitled only to its own lost profits (*see Duane Jones Co., Inc. v Burke et al.*, 306 NY 172 [1954])(plaintiff entitled to lost profits when defendant employees left advertising agency and solicited clients for new competitor agency). In *McRoberts Protective Agency, Inc. v Lansdell Protective Agency, Inc.*, (61 AD2d 652 [1st Dept. 1978]), a case involving similar facts, at trial it was found that defendant employee actively set out to divert plaintiff's customers to his newly formed company and that he represented to clients that plaintiff was no longer able to service its customers. The newly formed defendant company was liable, not for profits or revenues it actually received, but for the net profits lost by plaintiff on the diverted accounts for a reasonable period of time. Documents revealing revenue earned by B&S from the improperly diverted clients are therefore irrelevant to proving Plaintiff's lost profits and need not be produced. Moreover, B&S's revenue derived from the allegedly diverted clients is not relevant to Plaintiff's case on liability as the response to demand 6 would establish the relevant fact that Plaintiff's clients were serviced by B&S. Plaintiff's motion to compel is denied, and Defendants' motion to

protect is granted with respect to demand 7.

Accordingly, Plaintiff's motion to compel is denied and Defendants' motion for a protective order is granted with respect to demand 7. Plaintiff's motion to compel is granted, and Defendant's motion to protect denied, with respect to demands 1, 4, 5, and 6.

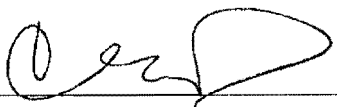
The Note of Issue filing deadline is extended to April 30, 2013.

CONCLUSION

Plaintiff's motion to compel is denied and Defendants' motion for a protective order is granted as to demand 7. Plaintiff's motion to compel is granted, and Defendants' motion to protect is denied, with respect to demands 1, 4, 5, and 6. Defendants shall provide the information requested within 20 days. The Note of Issue filing deadline is extended to April 30, 2013. All parties shall appear for a conference on May 1, 2013.

The foregoing constitutes the decision and order of the Court.

ENTER:



HON. CAROLYN E. DEMAREST, J.S.C.