Linium, LLC v Teeter
2014 NY Slip Op 30121(U)
January 22, 2014
Supreme Court, Albany County
Docket Number: 5853-13
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

LINIUM, LLC,

Plaintiff,

-against-

PAUL DOUGLAS TEETER,

Defendants.

DECISION and ORDER
INDEX NO. 5853-13
RJI NO. 01-13-112182

Supreme Court Greene County All Purpose Term, December 27, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Plaintiff, an IT consulting and development firm, formerly employed Defendant as a Business Process Consultant. Toward the end of Defendant's employment with Plaintiff he was working to secure a subcontractor relationship for Plaintiff with non-party Capstone Consulting, Inc. (hereinafter "Capstone"). Soon after his employment was terminated, Defendant took a position with Capstone.

Plaintiff commenced this action alleging that Defendant misappropriated confidential

information and breached his employment contract's restrictive covenants. The complaint also includes causes of action sounding in breach of duty of loyalty and good faith, breach of fiduciary duty, and unfair competition. Prior to answering, Defendant moves to dismiss pursuant to CPLR §3211(a)(7). Plaintiff opposes the motion. Because Defendant failed to establish its entitlement to dismissal, its motion is denied.

"[I]n assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts as alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference." (Landon v Kroll Laboratory Specialists, Inc., 22 NY3d 1 [2013], quoting J.P. Morgan Sec. Inc. v Vigilant Ins. Co., 21 NY3d 324, 334 [2013][citations and quotation marks omitted]; Smith v Meridian Tech., Inc., 52 AD3d 685 [2d Dept 2008]). In addition, "Courts may consider affidavits submitted in opposition to such a motion to cure any defects in the complaint." (Torok v Moore's Flatwork & Foundations, LLC, 106 AD3d 1421 [3d Dept 2013]). "At the same time, however, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." (Simkin v Blank, 19 NY3d 46, 52 [2012], quoting Maas v Cornell Univ., 94 NY2d 87 [1999][internal quotation marks omitted]).[1]

The relevant inquiry determines only "whether the facts as alleged fit within any cognizable legal theory." (Scheffield v Vestal Parkway Plaza, LLC, 102 AD3d 992, 993 [3d Dept 2013]).

Starting with Plaintiff's breach of contract cause of action and request for injunctive

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[1] Although Defendant failed to submit the complaint with his motion, because it was attached to Plaintiff's opposition its factual allegations can be considered and this motion will be decided on its merits.

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relief, Defendant failed to demonstrate that Plaintiff's allegations fit within no cognizable legal theory. It is uncontested that Plaintiff employed Defendant pursuant to a written agreement[2] that contained a restrictive covenant, which was recited in the complaint. The applicable law is well established. Such a covenant is judicially disfavored and enforceable only "to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." (BDO Seidman v Hirshberg, 93 NY2d 382, 389 [1999], quoting Reed, Roberts Assocs. v Strauman, 40 NY2d 303 [1976]; Goodman v New York Oncology Hematology, P.C., 101 AD3d 1524, 1526 [3d Dept 2012]).

Contrary to Defendant's assertions, Plaintiff sufficiently alleged its "legitimate interests," i.e. protection from either misappropriation of trade secrets and confidential customer lists or competition with a unique employee. (BDO Seidman v Hirshberg, supra). Affording the complaint as supplemented by Strang's affidavit the benefit of every favorable inference, Strang identified Plaintiff's "Linium Delivery Methodology (LDM)" as a trade secret that requires the protection the restrictive covenant affords. The complaint too sufficiently alleged that Plaintiff's customer lists require protection because they were compiled only with the use of substantial resources and are not publicly available. (Leo Silfen, Inc. v Cream, 29 NY2d 387 [1972]). Moreover, both the Complaint and Strang allege Defendant's expertise, or uniqueness, in the information technoloy field. Within this procedural posture, Defendant failed to demonstrate that the restrictive covenant is not supported by any legitimate interest.

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[2] Such agreement was not submitted on this motion despite the affidavit of Eric Strang's (hereinafter "Strang"), Plaintiff's Vice President for Consulting Services, allegation that it was attached as an exhibit thereto. No such agreement was actually attached.

Defendant similarly failed to demonstrate that the restrictive covenant was rendered unenforceable by Plaintiff's termination of his employment without cause. The complaint alleges that Defendant was terminated "due in part to lack of billable projects." Strang supplemented such allegation by detailing Defendant's "fail[ure] to utilize his standing and contacts in the industry... to introduce [Plaintiff] to potential new clients." Strang further stated that Defendant was not working on billable projects due to his "complete failure to bring any new business to [Plaintiff]." These, along with Strang's other allegations of Defendant's failure to promote Plaintiff, sufficiently alleged that Defendant was terminated for cause. As such, Defendant's reliance on a purported "per se rule: a covenant not to compete is unenforceable when an employee is terminated from employment without cause" is misplaced. Moreover, because no postemployment benefit forfeiture is at issue here, the Court of Appeals caselaw upon which Defendant's "per se rule" is premised is distinguishable. (Post v Merrill Lynch, Pierce, Fenner & Smith, Inc., 48 NY2d 84, 88 [1979][termination of employment without cause renders a postemployment benefit forfeiture unenforceable]; Morris v Schroder Capital Mgt. Intern., 7 NY3d 616 [2006][constructive discharge of employee renders a postemployment benefit forfeiture unenforceable]; *see also* Grassi & Co., CPAs, P.C. v Janover Rubinroit, LLC, 82 AD3d 700, 702 [2d Dept 2011][while stating that the "restrictive covenant and the reimbursement clauses were unenforceable... [b]ecause the plaintiff terminated... [its employee] without cause" the Court analyzed only the reimbursement clause, with no discussion of the restrictive covenant at issue]; Eastman Kodak Co. v Carmosino, 77 AD3d 1434, 1436 [4th Dept 2010][applied no per se rule to analyze the applicability of a restrictive covenant to an employee who was involuntarily terminated]; Scott v Beth Israel Med. Ctr., Inc., 41 AD3d 222 [1st Dept

2007][a postemployment benefit forfeiture case]; Borne Chem. Co., Inc. v Dictrow, 85 AD2d 646 [2d Dept 1981][restrictive covenant "in conjunction with the sale of the employee's business"]; Wise v Transco, Inc., 73 AD2d 1039 [4th Dept 1980][restrictive covenant enforced against an involuntarily discharged employee]). In addition, the Morris v Schroder Capital Mgt. Intern. (at 623 n 2) Court explicitly recognized that Defendant's purported per se rule is inapplicable to Plaintiff's "injunctive relief" cause of action.

Defendant similarly failed to demonstrate his entitlement to dismissal of Plaintiff's breach of duty of loyalty and good faith cause of action or its breach of fiduciary duty cause of action.

"It is settled law that an employee is prohibited from acting in any manner inconsistent with his or her employment and must exercise good faith and loyalty in performing his or her duties... the employee may not use his or her principal's time, facilities or proprietary secrets to build the competing business." (Chemfab Corp. v Integrated Liner Tech. Inc., 263 AD2d 788, 789-90 [3d Dept 1999]; Mega Group v Halton, 290 AD2d 673 [3d Dept 2002]; Goodman v New York Oncology Hematology, P.C., supra).

Again considering the complaint and Strang's allegations in a light most favorable, Plaintiff set forth viable causes of action. As set forth above, Plaintiff alleged that Defendant was working for it, just prior to his termination, to secure a subcontract with Capstone. By the subcontract Plaintiff would have supplied Capstone with certain expertise in the IT field, for Capstone's use in servicing its client Trustmark Companies (hereinafter "Trustmark"). Defendant was the individual employee of Plaintiff who had such expertise and was offering, in part, to implement Plaintiff's LDM trade secret methodology for Capstone's client Trustmark.

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Although Defendant was fully engaged in Plaintiff's efforts to secure such subcontract, the negotiations were, without explanation, delayed and discontinued. Then, soon after the negotiations ended and Defendant was terminated, Defendant took a position with Capstone. Plaintiff alleges that Defendant is now working for Capstone and implementing its LDM methodology with Trustmark. Accepting such assertions as true, Plaintiff sufficiently alleged that Defendant used its time and proprietary secrets, while still an employee of Plaintiff, to divert a commercial opportunity and build a competing business. As such, Plaintiff set forth causes of action sounding in: breach of duty of loyalty and good faith, and breach of fiduciary duty. (Calabrese Bakeries, Inc. v Rockland Bakery, Inc., 102 AD3d 1033, 1038 [3d Dept 2013] [analyzing both causes of action simultaneously as they applied to a corporate employee, without noting the semantic difference]).

Plaintiff's allegations of Defendant's misappropriation of Plaintiff's LDM trade secret for his and Capstone's use in servicing Trustmark, likewise state a cause of action for unfair competition. (Front, Inc. v Khalil, 103 AD3d 481 [1st Dept 2013], lv to appeal granted, 2014 WL 113755 [2014]).

Accordingly, Defendant's motion is denied in its entirety.

This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

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entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 22, 2014
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated December 6, 2013; Affidavit of Paul Douglas Tedder, dated December 3, 2013, with attached Exhibit A.
2. Affirmation of Harold Gordon, dated December 18, 2013, with attached Exhibit A; Affidavit of Eric Strang, dated December 19, 2013.
3. Affidavit of Paul Douglas Tedder, dated December 26, 2013, with attached Exhibits A-B.