

<b>Admarketplace Inc. v Salzman</b>
2014 NY Slip Op 30813(U)
March 28, 2014
Sup Ct, New York County
Docket Number: 651390/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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ADMARKETPLACE INC.,

Index No.: 651390/2013

Plaintiff,

**DECISION & ORDER**

-against-

MICHAEL SALZMAN, VERTICAL SEARCH  
WORKS, INC., & KEVIN CARNEY,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Michael Salzman, Vertical Search Works, Inc. (VSW), and Kevin Carney  
move to dismiss the Second Amended Complaint (the SAC) pursuant to CPLR 3211.

Defendants' motion is granted in part and denied in part for the reasons that follow.

*I. Procedural History*

On April 16, 2013, plaintiff adMarketplace Inc. (AMP) commenced this action to enjoin Salzman, a former employee, from working for VSW, a competitor. Salzman was accused of violating a contractual non-competition agreement, as well as misappropriating trade secrets and other confidential information that he allegedly was using to help VSW poach employees and clients from AMP. AMP moved for preliminary injunctive relief, which was denied. *See* Dkt. 18. AMP filed an amended complaint on April 29, Salzman and VSW answered on May 20, and a discovery scheduled was set in a preliminary conference order dated May 21, 2013. On June 14, 2013, AMP moved, for a second time, for preliminary injunctive relief against Salzman and VSW and, for the first time, against Carney, a newly added defendant who also left AMP to work for VSW. The court denied the motion. *See* Dkt. 44.

AMP filed the SAC on August 15, 2013. It contains eight causes of action: (1) breach of contract against Salzman and Carney for disclosing confidential information; (2) misappropriation of confidential information and trade secrets against Salzman and Carney; (3) breach of contract against Salzman for soliciting AMP's employees; (4) breach of contract against Salzman and Carney for soliciting AMP's clients; (5) breach of fiduciary duty against Salzman and Carney; (6) aiding and abetting breach of fiduciary duty against VSW; (7) tortious interference with contract against VSW; and (8) unfair competition against all defendants.

## *II. Factual Background*

As this is a motion to dismiss, the facts recited are taken from the SAC.

AMP and VSW are search advertising agencies that sell online pay-per-click services. SAC ¶¶ 1, 6. On June 19, 2012, AMP hired Salzman to be its director of sales. ¶ 7. On August 28, 2012, AMP hired Carney to be an account director. ¶ 8. At the commencement of their employment, Salzman and Carney signed written non-disclosure agreements (the NDA), which prohibit them from disclosing "Confidential Information" to competitors. ¶ 9. Confidential Information is defined to include "trade secrets and other confidential and/or proprietary information of [AMP] provided to [employees] in connection with [their] at-will employment [with AMP] ... including ... marketing research ... pricing information ... [lists of] clients or customers of [AMP], including ... past, existing or potential clients and customers." *Id.* Additionally, the NDA prohibits Salzman and Carney from soliciting former AMP employees, customers, or prospective customers after the termination of their employment. ¶¶ 10-11. Salzman's ban on non-solicitation lasts for six months and Carney's for one year. *Id.*

Upon Salzman's termination, discussed below, he also signed a Separation Agreement in which he reaffirmed his confidentiality obligations under the NDA. ¶ 14. AMP claimed they insisted on these confidentiality clauses because, while employed at AMP, Salzman and Carney had access to all of AMP's client information, which was stored in a proprietary, password protected database only accessible by current employees. ¶ 15.

Salzman resigned from AMP on February 25, 2013. ¶ 24. Two days later, on February 27, AMP met with VSW to explore the possibility of working together. ¶ 19. At that meeting, AMP alleged that they realized that VSW was a direct competitor and, therefore, decided against working with it. ¶ 20. Shortly after that meeting, in early March 2013, Salzman began working as a senior vice president of sales at VSW. ¶ 24. After Salzman joined VSW, the complaint alleges he began to solicit AMP's employees. ¶ 27. On March 11, 2013, Salzman sent a text message to Mike Myslinski, a former VSW employee who left to work for AMP, telling him to "come back" to VSW. ¶ 28. On April 2, 2013, Salzman emailed Carney, attaching a VSW employment application, and requested an updated resume "so I can get you the offer in writing." ¶ 29. Salzman is alleged to have caused at least three other employees to leave AMP for VSW. ¶¶ 31-33. Salzman also is alleged to have stolen confidential client data from AMP. The complaint states that Salzman took 55 pages of confidential documents when he resigned. ¶ 42. He also illegally attempted to log into AMP's database after he resigned – from a VSW computer with his old login information. ¶¶ 44-45. AMP traced this attempted login as having occurred on March 12, 2013, at 8:57 am, from the IP address of a VSW computer.<sup>1</sup> *Id.*

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<sup>1</sup> AMP has not asserted a claim under the Computer Fraud and Abuse Act, 18 USC § 1030.

On April 16, 2013, the day this action was commenced, AMP informed all of its employees, including Carney, that VSW was a competitor and directed all employees to sign a revised schedule to the NDA, specifically applying their confidentiality restrictions to VSW. ¶ 23. Carney refused to sign the revised schedule. ¶ 26. On April 18, 2013, at 2:11 pm, AMP's vice present of finance sent Carney an instant message instructing him to sign the revised schedule. ¶ 52. Twenty-five minutes later, at 2:36 pm, Carney created a new excel spreadsheet into which he copied confidential customer data from the AMP database. ¶ 53. Less than an hour later, at 3:26 pm, Carney email another excel file, including eleven worksheets containing virtually all of Carney's client solicitation records while working for AMP, from his AMP email address to his personal gmail address. ¶ 54. On April 22, 2013, Carney resigned from AMP. *Id.* Two days later, on April 24, at 2:25 pm, Carney made four attempts to access AMP's database using his old login credentials from the very same VSW computer that Salzman used on March 12. In May 2013, Salzman and Carney began soliciting AMP's clients to move their business to VSW. ¶¶ 47, 59.

In this action, AMP seeks an order: (1) compelling VSW to terminate AMP's former employees; (2) enjoining defendants from using AMP's confidential information; (3) enjoining defendants from soliciting AMP's clients and employees; and (4) compensating it for the business AMP lost due to defendants' unfair competition.

### *III. Discussion*

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept

2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Since AMP seeks to enforce restrictive covenants, the court must first consider the threshold issue of their enforceability.

It is well settled that “[i]n order to be enforceable, an anticompetitive covenant ancillary to an employment agreement must be reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the public, and not unreasonably burdensome to the employee.” *Crown It Services, Inc. v Koval-Olsen*, 11 AD3d 263, 264 (1st Dept 2004), citing *BDO Seidman v Hirshberg*, 93 NY2d 382 (1999). The Court of Appeals “has limited the cognizable employer interests under the [reasonableness prong] to the protection against misappropriation of the employer’s trade secrets or of confidential customer lists, or protection

from competition by a former employee whose services are unique or extraordinary.” *BDO Seidman*, 93 NY2d at 389. A restriction on a former employee’s ability to work for a competitor is invalid unless the employee’s services were “unique or extraordinary” or if the job is considered a “learned profession” (such as law or accounting). *Id.* at 389-90.

First, it is clear that the NDA’s prohibition of Salzman and Carney working for a competitor is unenforceable. They work in the pay-per-click online marketing industry, which is not a learned profession, and their services are not unique. The law is well settled that agreements barring such employees from working for competitors are unenforceable.

That being said, disclosing confidential information and trade secrets in violation of the NDA and the common law is very much an enforceable breach. The SAC states claims for such breaches since it clearly identifies numerous contractually defined confidential items, such as client information stored on a password protected database. The questions of fact raised as to the confidentiality of alleged misappropriated item are not properly addressed on a motion to dismiss. For instance, the uncertainty over whether the client list on AMP’s website is exhaustive is a matter for discovery. Defendants’ documentary evidence does not utterly refute the allegation that only some of AMP’s client are listed on the website (for marketing purposes), not all of its clients. In any event, confidentiality extends well beyond the identity of the clients to substantial data about such clients that AMP uses to procure continued business.

As for the prohibition on soliciting former employees, this court recently observed that there is scant case law on the enforceability of non-recruitment clauses. *See OTG Mgmt., LLC v Konstantinidis*, 40 Misc3d 617, 621 (Sup Ct, NY County 2013), citing *Renaissance Nutrition, Inc. v Jarrett*, 2012 WL 42171, at \*2 (WDNY 2012) and *Lazer Inc. v Kesselring*, 13 Misc3d 427 (Sup Ct, Monroe County 2005). This court, persuaded by the analysis in *Renaissance Nutrition*

and *Lazer*, upheld a two year non-recruitment clause because such a restriction is “‘inherently more reasonable and less restrictive’ than non-compete clauses” since it does not impact the employee’s ability to procure employment. *Id.*, quoting *Renaissance Nutrition*, 2012 WL 42171, at \*5. Here, the duration of the NDA’s non-recruitment clauses is shorter than in *OTG*.

Additionally, AMP “has a legitimate interest in the protection of client relationships developed at the employer’s expense.” *See Renaissance Nutrition*, 2012 WL 42171, at \*3, citing *BDO Seidman*, 93 NY2d at 392; *Marsh USA Inc. v Karasaki*, 2008 WL 4778239, at \*16 (SDNY 2008). The gravamen of AMP’s allegations is that VSW has been poaching employees from AMP, inducing them to switch companies for greater compensation hoping that bring proprietary information with them. A non-recruitment prohibition directly guts this channel of wrongful competition. This is reasonable and, therefore, enforceable. The extent to which such allegations have merit, of course, is a matter for discovery.

Indeed, the existence of actual monetary damages here is questionable. Though AMP has been in court to argue three motions in this case, it has yet to identify any actual lost business. Though such proof is not required at this juncture, absent lost business, there is little relief to be had by AMP. As explained to the parties on multiple occasions, no one’s employment will be terminated as a result of this case. For AMP to recover from defendants, it must prove a nexus between the alleged violations of the subject restrictive covenants and revenue generated by defendants using confidential information.

The same is true for the tortious interference claim against VSW. “Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third-party’s breach of the contract without justification, actual breach of the contract, and damages resulting

therefrom.” *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996). AMP can prevail on this claim if it can demonstrate VSW’s inducement of NDA breaches. But AMP can only recover against VSW if it can show “damages resulting” from such breaches (i.e. lost business). Likewise, AMP may recover against defendants for unfair competition since stealing confidential client information to compete is illegal. *See Mitzvah Inc. v Power*, 106 AD3d 485, 487 (1st Dept 2013). Though defendants raised myriad questions of fact about the confidentiality of such client information, their attempts to hack into AMP’s client database is more than sufficient on this motion to infer that such information is secret.

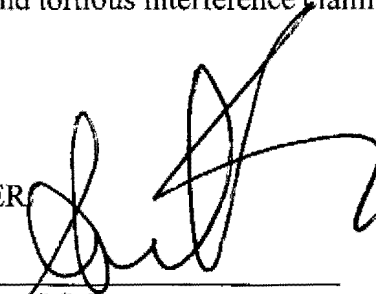
Finally, the claim for breach of fiduciary duty against Salzman and Carney is duplicative. It is well settled that an employee must “exercise the utmost good faith and loyalty in the performance of his duties.” *See CBS Corp. v Dumsday*, 268 AD2d 350, 353 (1st Dept 2000), quoting *Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138 (1936). However, where, as here, the alleged breach of fiduciary duty is no different than the alleged breach of contract, the claims are duplicative. *Kaminsky v FSP Inc.*, 5 AD3d 251, 252 (1st Dept 2004). Since the NDA expressly governs the legitimacy of Salzman and Carney’s disclosure to VSW, a separate claim for breach of fiduciary duty is unnecessary and is dismissed. Similarly, the aiding and abetting breach of fiduciary claim against VSW is duplicative of the tortious interference claim. Again, allegations regarding VSW procuring breaches of the NDA does not require multiple causes of action.

Since court-ordered mediation did not result in a settlement (*see* Dkt. 71), a new discovery schedule will be set at the next status conference, currently scheduled for April 3, 2014 at 10:30 am. Accordingly, it is

ORDERED that the motion by defendants Michael Salzman, Vertical Search Works, Inc. (VSW) and Kevin Carney to dismiss the Second Amended Complaint is granted in part as follows: (1) the breach of contract, misappropriation, and unfair competition claims survive in accordance with this decision, except to the extent that plaintiff adMarketplace Inc. cannot prohibit its employees from working for VSW since such a restrictive covenant is unenforceable; (2) the breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims are dismissed as duplicative of the breach of contract and tortious interference claims; and (3) the motion is otherwise denied.

Dated: March 28, 2014

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J.S.C.