Freed, Kleinberg, Nussbaum, Festa & Kronberg, Md., LLP v Nastasi
2014 NY Slip Op 30879(U)
April 2, 2014
Sup Ct, Suffolk County
Docket Number: 9166/10
Judge: Thomas F. Whelan

SHORT FORM ORDER

INDEX No. 9166/10

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/14/14
ADJ. DATES 3/7/14
Mot. Seq. # 004 - MotD
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FREED, KLEINBERG, NUSSBAUM, FESTA & KRONBERG, MD., LLP, as Successor in Interest to: FREED, SCHERZ, KLEINBERG, NUSSBAUM & FESTA, MD, LLP,

Plaintiff,

-against-

JENNIFER NASTASI, JASON HALEGOUA, JASON HALEGOUA, MD., PC and XYZ CORP. d/b/a PEDS FIRST PEDIATRICS,

Defendants.

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Upon the following papers numbered 1 to 16 read on this motion by the plaintiff for partial summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ____; Opposing papers: 5-6; Reply papers 7-8; Other 9-10 (Memorandum of Law in opposition); 11-12 (Memorandum of Law in support); 13-14 (Statement of Facts in support); 15-16 (Counterstatement of Facts); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#004) by the plaintiff for partial summary judgment on the issue of the defendants' liability to the plaintiff under the Second and Third causes of action set forth in the complaint is considered under CPLR 3212 and is decided as indicated below.

The plaintiff commenced this action to recover damages from the defendants by reason of their allegedly wrongful conduct in establishing a pediatric medical practice that competes with the plaintiff's practice. The individual defendants were employed by the plaintiff as staff physicians for a period in excess of five years prior to their departures in 2009. The corporate defendant is a competing medical practice established by defendant Halegoua in September of 2009 within six miles of one of the medical offices of the plaintiff. Defendant Nastasi joined Pedin or about February of 2010. Defendant Halegoua was not bound by any restrictive covenant at the time of his departure from

the employ of the plaintiff. Defendant Nastasi was, however, bound by a restrictive covenant against solicitation contained in the Settlement Agreement and Release she executed on January 27, 2010. Therein, defendant Nastasi agreed not to "solicit the Practice's patients or employees or physicians for a period of two years from and after the last date of her employment with the practice, which means only that she will not call them, or write them letters or visit their homes and attempt to pursue them to follow her to her new practice with Dr. Halegoua" (*see* Exhibit 3 attached to the affidavit in opposition of defendant Nastasi).

In the complaint served, four causes of action are advanced. In the First, defendant Nastasi is charged with breaching the terms of a January 27, 2010 Settlement Agreement and Release she executed which included the above quoted restrictive covenant precluding her from soliciting the plaintiff's patients for a two year period following her departure from the plaintiff's employ that was effective as of December 31, 2009 and from disparaging the plaintiff. In the Second cause of action, defendant Halegoua and Nastasi are charged with breaches of the fiduciary duties owed to the plaintiff while they were employed by it. In the Third cause of action all defendants are charged with acts of unfair competition. The Fourth cause of action charges defendant Halegoua and the corporate defendant with interference with the plaintiff's contractual relations. Issue was joined by service of a joint answer by the defendants.

By the instant motion, the plaintiff seeks an award of partial summary judgment on the issue of the defendants' liability with respect to the Second cause of action sounding in breach of fiduciary duties by the individual defendants and its Third cause of action against all defendants which sounds in unfair competition. For the reasons stated below the motion is granted only with respect to defendant Nastasi.

That employees owe fiduciary duties, including duties of loyalty and good faith, to their employer in the performance of their duties is well established (*see* ***Lamdin v Broadway Surface Adv. Corp***., 272 NY 133, 5 NE2d 66 [1936]; ***Qosina Corp. v C & N Packaging, Inc***., 96 AD3d 1032, 948 NYS2d 308 [2d Dept 2012]; ***30 FPS Prod., Inc. v Livolsi***, 68 AD3d 1101, 891 NYS2d 162 [2d Dept 2009]; ***American Map Corp. v Stone***, 264 AD2d 492, 492–493, 694 NYS2d 704 [2d Dept 1999]). Actionable breaches of such duties usually result in a personal gain to the employee and losses to the employer and are generally premised upon conduct by which profits, business opportunities, the raiding of employees and other assets including confidential and proprietary information of the employer are lost or diverted (*see* ***Western Elec. Co. v Brenner***, 41 NY2d 291, 392 NYS2d 409 [1977]; ***Qosina Corp. v C & N Packaging, Inc***., 96 AD3d 1032, *supra*; ***American Map Corp. v Stone***, 264 AD2d 492, *supra*; ***Gomez v Bicknell***, 302 AD2d 107, 756 NYS2d 209 [2d Dept. 2002]; ***W. Bruno Co. v Friedberg***, 21 AD2d 336, 250 NYS2d 187 [1st Dept 1964]). However, once the employment is terminated, the relationship between a former employee and employer does not give rise to a fiduciary relationship as a matter of law (*see* ***FAB Indus. v BNY Fin. Corp***., 252 AD2d 367, 675 NYS2d 77 [1st Dept 1998]).

"A cause of action based on unfair competition may be predicated upon trademark infringement or dilution in violation of General Business Law §§ 360–k and 360– l, or upon the alleged bad faith

misappropriation of a commercial advantage belonging to another 'by exploitation of proprietary information or trade secrets'" (***Out of Box Promotions, LLC v Koschitzki***, 55 AD3d 575, 866 NYS2d 677 [2d Dept 2008]; *quoting* ***Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.***, 20 AD3d 439, 440, 799 NYS2d 24 [2d Dept 2005]; *see* ***Mitzvah Inc. v Power***, 106 AD3d 485, 966 NYS2d 3 [1st Dept 2013]; ***Laro Maintenance Corp. v Culkin***, 267 AD2d 431, 700 NYS2d 490 [2d Dept 1999]). The key to stating the non-statutory, common law claim of unfair competition is that the defendant charged actionable conduct displayed some element of bad faith in misappropriating the plaintiff's labor, skill, expenditures, proprietary information of trade secrets (*see* ***Parekh v Cain***, 96 AD3d 812, 948 NYS2d 72 [2d Dept 2012]; *see also* ***Ahead Realty LLC v India House, Inc.***, 92 AD3d 424, 938 NYS2d 17 [1st Dept 2012; *bad-faith misappropriation of a commercial advantage necessary to state a claim for unfair competition*]).

Appellate case authorities have nevertheless recognized that in the absence of a restrictive covenant not to compete, an employee is free to compete with his or her former employer where remembered information as to specific needs and business habits of particular customers is not confidential or otherwise proprietary in nature (*see* ***Reed, Roberts Assoc. v Strauman***, 40 NY2d 303, 386 NYS2d 667 [1976]; ***Island Sports Physical Therapy v Burns***, 84 AD2d 878, 923 NYS2d 156 [2d Dept 2011]; ***Pearlgreen Corp v Yau Chi Chu***, 8 AD3d 460, 778 NYS2d 516 [2d Dept 2004]; ***Falco v Parry***, 6 AD3d 1138, 775 NYS2d 675 [2d Dept 2004]). Although an employee owes fiduciary duties of good faith and loyalty to an employer, the employee may incorporate a business prior to leaving the employer without breaching any fiduciary duty (*see* ***Island Sports Physical Therapy v Burns***, 84 AD3d 878; *supra*; ***Schneider Leasing Plus v Stallone***, 172 AD2d 739, 569 NYS2d 129 [2d Dept 1991]). The employee may not, however, solicit his or her employer's customers or otherwise compete during the course of his or her employment by the use of the employer's time, facilities or proprietary information (*see* ***30 FPS Prods. Inc. v Livolsi***, 68 AD3d at 1102, *supra*; ***Schneider Leasing Plus v Stallone***, 172 AD2d 739, *supra*; *cf.*, ***A&Z Scientific Corp. v Latmoire***, 265 AD2d 355, 696 NYS2d 495 [2d Dept 1999]). In such cases, it is the employee's misuse of the employer's resources to compete with the employer that is actionable as breach of fiduciary duty (*see* ***Cerciello v Admiral Ins. Brokerage Corp.***, 90 AD3d 967, 936 NYS2d 224 [2d Dept 2011]).

An employee not bound by a restrictive covenant not to compete who has left the employ of a former employer is also free to compete and he or she may solicit the former employer's customers unless it is shown that customer lists or like material belonging to the employer constitute trade secrets or that there was other wrongful conduct including the employment of fraudulent methods or the engagement in a physical taking or copying of the employer's customer lists or files (*see* ***Reed, Roberts Assoc. v Strauman***, 40 NY2d 303 *supra*; ***Island Sports Physical Therapy v Kane***, 84 AD3d 879, *supra*; ***Beverage Mktg., USA Inc. v South Beach Beverage Company Co., Inc.*** 58 AD3d 657, *supra*). Knowledge of the intricacies of a business operation does not necessarily constitute a trade secret and, absent any wrongdoing, it cannot be said that a former employee "should be prohibited from utilizing his knowledge and talents in this area" (***Reed, Roberts Assoc. v Strauman***, 40 NY2d 303, 309, *supra*; *see also* ***Buhler v Michael P. Maloney Consulting, Inc.***, 299 AD2d 190, 749 NYS2d 867 [1st Dept 2002]). Information that is garnered by the defendant's casual memory and knowledge does not

constitute actionable wrongdoing (*see* ***Leo Silfen, Inc. v Cream***, 29 NY2d 387, 328 NYS2d 423 [1972]; ***Levine v Bochner***, 132 AD3d 532, 517 NYS2d 270 [2d Dept 1987]). Where the information at issue is public knowledge or could be acquired easily and duplicated, it is not a trade secret (*see* ***Starlight Limousine Serv. Inc. v. Cucinella***, 275 AD2d 704, 713 NYS2d 195 [2d Dept 2000]).

That which constitutes a trade secret has been defined as a formula, pattern, device or compilation of information which is used in one's business and which gives the owner an opportunity to obtain an advantage over competitors who do not know or use it (*see* ***Ashland Mgt. Inc. v Janien***, 82 NY2d 395, 407, 604 NYS2d 912 [1993]; *see also* Restatement of Torts § 757, comment [b]). A trade secret may thus consist of a customer list and related information provided that such list gives the owner an opportunity to obtain an advantage over competitors who do not know or use it *(see* ***Laro Maintenance Corp. v Culkin***, 267 AD2d 431, *supra*). An essential requisite to legal protection against misappropriation of such a formula, process, device or compilation of information is the element of secrecy. Secrecy has been defined in accordance with the § 757 Restatement of Torts as: (1) substantial exclusivity of knowledge of the formula, process, device or compilation of information; and (2) the employment of precautionary measures to preserve such exclusive knowledge by limiting legitimate access by others (*see* ***Delta Filter Corp. v Morin***, 108 AD2d 991, 485 NYS2d 143 [3d Dept 1985]).

Covenants restricting a professional, and in particular a physician, from competing with a former employer or associate are common and generally acceptable (*see* ***North Shore Hematology/Oncology v Zervos***, 278 AD2d 201, 211, 717 NYS2d 250 [2d Dept 2000]). They will be enforced if they are reasonably limited in time, geographic area, and scope; necessary to protect the employer's interests; not harmful to the public; and not unduly burdensome (*see* ***Battenkill Veterinary Equine P.C. v Cangelosi***, 1 AD3d 856, 857, 768 NYS2d 504 [2d Dept 2003]). In the enforcement of restrictive covenants among professionals, great weight is given to the interests of the employer in restricting competition within a confined geographic area. The rationale therefor is that professionals are deemed to provide unique or extraordinary services (*see* ***BDO Seidman v Hirshbert***, 93 NY2d 382, 389, 690 NYS2d 854 [1999]). In fact, the interests of the employer have enjoyed solicitous consideration by the courts when the restrictive covenant is in an employment agreement between doctors (*see* ***Karpinski v Ingrasci***, 320 NYS2d 1 [1971]; ***Gelder Med. Group v Webber***, 41 NY2d 680, 394 NYS2d 867 [1977]; ***Albany Med. Coll. v Loble***, 296 AD2d 701, 745 NYS2d 250 [3d Dept 2002]; ***North Shore Hematology/Oncology v Zervos***, 278 AD2d 210, *supra*).

First considered is the plaintiff's demand for an award of partial summary judgment against defendant Halegoua with respect to his liability under the Second cause of action advanced in the complaint. Therein, such defendant is charged with a breach of fiduciary duties owing to the plaintiff at the time of his employ (*see* Complaint p. 9, ¶¶ 48-50). In its moving papers, the plaintiff contends that because defendant Halegoua admitted in his deposition testimony that he copied into his blackberry and other electronic devices, patient names, addresses and telephone numbers while in the employ of the plaintiff and thereafter used that information to solicit the plaintiff's patients/clients, Dr. Halegoua is liable to the plaintiff for breaching his fiduciary duties.

The court finds, however, that questions of fact exist whether that conduct constituted a breach of such defendant's duties of loyalty and fidelity. The record is replete with evidence that Dr. Halegoua's purpose in copying such information, which was generally limited to names and phone numbers supplied by patients' and/or parents, was to use it to provide continuing care to Dr. Halegoua's patients and that it was used for those purposes while Dr. Halegoua was employed by the plaintiff (*see* Halegoua's deposition testimony pp. 22-23). In addition, there is evidence that the plaintiff and its members were aware of Dr. Halegoua's possession and use of such information during his employ and that such conduct was never countermanded (*see id.*, at pp. 37-39). Since the compilation of this information was not wrongful at the time it was garnered by defendant Halegoua and was unchallenged by the plaintiff and its members, it cannot be said that as a matter of law this conduct constituted a breach of fiduciary duties owing to the plaintiff. While the plaintiff further alleges that defendant Halegoua disparaged the practice and solicited the Practice's clients for the benefit of himself and his competing company Peds First (*see* Complaint p. 9, ¶50), no proof that any of such conduct occurred while Dr. Halegoua was employed by the plaintiff and thus bound by fiduciary duties owing to it. In any event, the plaintiff failed to establish the solicitation letters issued by defendant Halegoua after he left the plaintiff's employ, which the plaintiff characterizes as disparaging, constituted a breach of fiduciary duties. Under theses circumstances, the court finds that the plaintiff is not entitled to an award of partial summary judgment on the issue of defendant Halegoua's liability under the Second cause of action which sounds in breach of fiduciary duties.

Also denied are those portions of the plaintiff's motion wherein it seeks an award of partial summary judgment as to the liability of defendants, Halegoua and Peds First, under the Third cause of action sounding in unfair competition. As indicated above, defendant Halegoua was not bound by any restrictive covenant at the time of his departure from the plaintiff's employ. While he admitted he used the patient information he had electronically copied during his employ to solicit the plaintiff's patients/clients, that conduct occurred after his employment terminated (*see* Halegoua's deposition testimony pp.34-35). While the patient/client contact information is no doubt confidential under federal statutes such as HIPAA, questions of fact regarding whether such information in the hands of Dr. Halegoua was confidential, proprietary and/or a trade secret. The record contains evidence that Dr. Halegoua obtained much of such information from the patient/client themselves and not from any guarded or secured files maintained by the plaintiff. Issues of fact thus exist as to whether there was substantial exclusivity of knowledge of the patient/client names, telephone numbers and other contact information and whether the plaintiff employed sufficient precautionary measures to preserve such exclusive knowledge by limiting legitimate access thereto.

The motion is, however, granted with respect to defendant Nastasi. The moving papers established, prima facie, that defendant Nastasi breached her fiduciary duties of loyalty and fidelity by copying patient/client information while in the employ of the plaintiff and by using such information to solicit those patient/clients to aid her post-employment new business venture (*see* ***Cerciello v Admiral Ins. Brokerage Corp***., 90 AD3d 967, *supra* [*an employee's misuse of the employer's resources to compete with the employer is actionable as breach of fiduciary duty*]). The deposition testimony of Dr. Nastasi reveals that she knowingly and intentionally collected patient information during her employment for purposes of soliciting the plaintiff's patients/clients once she left the

plaintiff's employ and became employed in her new business venture at Peds First (*see* Nastasi's deposition testimony at pp. 15-16; 17-29; 38; 83-84; 89-90). There is also evidence that she shared such information with her new business associate and her husband and that he assisted defendant Nastasi in formulating mailing lists and other computerized compilations of patient/client contact information. Defendant Nastasi further testified that she used these lists and compilations to, among other things, solicit the plaintiff's patients by mail in February of 2010.

In contrast to the plaintiff's case against defendant Halegoua, there is sufficient unrebutted proof in the record that defendant Nastasi displayed the requisite element of bad faith and engaged in a wrongful copying of the plaintiff's patient contact information which she garnered from the plaintiff's patient/client files while employed by it. As a result, the wrongful taking of such information, which was portable and available to defendant Nastasi for personal business and other pecuniary uses to which she availed herself, constituted a misappropriation of the plaintiff's confidential, propriety information and/or trade secrets so as to constitute a breach of fiduciary duties and actionable conduct under common law theories of unfair competition (*see* ***Mitzvah Inc. v Power***, 106 AD3d 485 ***Parekh v Cain***, 96 AD3d 812, *supra; **Laro Maintenance Corp. v Culkin***, 267 AD2d 431, *supra*). Upon its review of the record, the court finds that no genuine questions of fact exists with respect to the liability of defendant Nastasi to the plaintiff under the Second and Third causes of action advanced in the complaint.

In view of the foregoing, the instant motion (#004) by the plaintiff for partial summary judgment on the issue of the defendants' liability to the plaintiff under the Second and Third causes of action is denied with respect to defendant Halegoua but is granted with respect to defendant Nastasi. An immediate trial on the issue of the plaintiff's damages with respect to these claims as contemplated by CPLR 3212 (e) shall abide the trial or sooner resolution of all of the claims that were left unaffected by the terms of this order.

DATED: 4/2/14

THOMAS F. WHELAN, J.S.C.