Darcher LLC v Dhar
2014 NY Slip Op 32975(U)
November 17, 2014
Supreme Court, New York County
Docket Number: 652435/2014
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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DARCHER LLC and PHOENIX DIGITAL MEDIA LLC,

Plaintiffs,

-against-

SHALIN DHAR, ARYEH CARNI, WASHINGTON PUBLISHING HOUSE LLC, d/b/a ADSIDUOUS MEDIA, DEKASOFT, INC. and IDEAQUIRK ADVERTISING PRIVATE LIMITED,

Defendants.

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Index No. 652435/2014
Motion Date: 9/24/2014
Motion Seq. No. 002

BRANSTEN, J.

This action involves Plaintiffs Darcher LLC ("Darcher") and Phoenix Digital Media LLC's former employees and their purported misappropriation and dissemination of trade secrets to Plaintiffs' former clients. Presently before the Court is Defendant Washington Publishing House LLC d/b/a Adsiduous's ("Adsiduous") motion to dismiss.[1] Adsiduous seeks dismissal, arguing that the Court lacks personal jurisdiction over it and that the causes of action asserted by Plaintiffs fail to state a claim. Plaintiffs oppose. For the reasons that follow, Adsiduous's motion to dismiss is denied.

[1] The instant motion to dismiss was brought as a cross-motion to Plaintiffs' request for preliminary injunction. The preliminary injunction motion was resolved separately by order. Accordingly, in this decision, the Court will address only Washington's cross-motion to dismiss.

I. Background[2]

Plaintiff Darcher is an internet advertising company, incorporated in Delaware with an office in Manhattan. *See* Compl. ¶¶ 1-3. Darcher's founder and CEO, Deepen Shah, is likewise the founder and CEO of Plaintiff Phoenix Digital Media LLC, which also is in the business of internet advertising. *Id.* ¶ 6.

Starting in early 2010, Shah worked on the development of internet advertising processes for Darcher. *Id.* ¶ 49. These efforts resulted in two proprietary protocols – labeled by Plaintiff as the content domain and the ad resale protocols. *Id.* ¶¶ 51, 71. The content domain protocol combined publicly-available software to create internet websites, attract customers to those sites, and then sell advertising on the same sites. *Id.* ¶ 52. As alleged in the Complaint, Darcher's "unique, proprietary" protocol for combining this publicly available information "creates a valuable, competitive advantage" and "is a well-guarded secret." *Id.* ¶¶ 62-63. Through the ad resale protocol, Darcher acted as a broker of internet advertisements, using the proprietary protocol to execute purchases and sales at high speeds and in large quantities. *Id.* ¶¶ 72-74.

[2] The facts cited in this section are drawn from the Complaint, unless otherwise noted.

Defendants Carni and Dhar were, until recently, Darcher employees.[3] *Id.* ¶¶ 13, 25. The Complaint alleges that Carni and Dhar each worked under Shah's supervision to implement the content domain and ad resale protocols. *Id.* ¶¶ 67, 68, 83, 84.

In or around April 2014, Carni and Dhar allegedly began transferring Darcher's proprietary trade secrets regarding the protocols to Defendants Adsiduous and its affiliate, Defendant IdeaQuirk. *Id.* ¶¶ 100-01. Plaintiffs' Complaint references emails allegedly sent by Carni and Dhar to officers of Adsiduous and IdeaQuirk from May 14, 2014 through July 16, 2014. *Id.* ¶¶ 103-26. In these emails, Carni and Dhar purportedly discuss and disclose Darcher's proprietary business practices. For example, Plaintiffs cite to a July 9, 2014 email from Carni to Adsiduous and IdeaQuirk in which Carni purportedly disclosed Darcher's "sweeper domain list" for its ad resale protocol, which is allegedly one of the protocol's "key proprietary components." *Id.* ¶¶ 120-121.

Plaintiffs allege that the sharing and misappropriation of Darcher's proprietary information caused Darcher substantial damage, as demonstrated by Darcher's lost stature in rankings performed by AppNexus, an internet advertising trading platform. *Id.*

[3] Carni and Dhar each signed employment agreements containing confidentiality, non-disclosure, and non-competition provisions. *See* Affidavit of Deepen Shah Ex. 9 & 10. These agreements, while not relevant to the instant motion, are the basis for the breach of restrictive covenant claims asserted against Carni and Dhar in the Complaint.

¶ 131. Since April 2014, Plaintiffs contend that Adsiduous's ranking on AppNexus has climbed, while Darcher's has fallen. *Id.* ¶ 132.

On August 8, 2014, Plaintiffs commenced the instant action, asserting misappropriation of trade secrets, unfair competition, and tortious interference with contract against all Defendants, including Defendant Washington, as well as breach of contract and breach of loyalty claims against Carni and Dhar.

II. Discussion

Defendant Washington now seeks dismissal of the three claims asserted against it. Washington contends that this Court lacks personal jurisdiction, since it is a Washington corporation that maintains no presence, office, or personnel in New York. In addition, Washington contends that the Complaint fails to state a cause of action.

A. Motion to Dismiss Standard

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within

any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

CPLR 3211(a)(8) governs a motion to dismiss for lack of personal jurisdiction. A party opposing a CPLR 3211(a)(8) motion to dismiss "need only demonstrate that facts may exist whereby to defeat the motion. It need not be demonstrated that they do exist." *Peterson v. Spartan Indus.*, 33 N.Y. 2d 463, 466 (1974) (quotations omitted); CPLR 3211(d). Further, the Court must view the jurisdictional allegations in a light most favorable to Plaintiffs, the parties seeking to establish jurisdiction. *See Ed Moore Adver. Agency, Inc. v. I.H.R., Inc.*, 114 A.D.2d 484, 486 (2d Dep't 1985).

A. *Personal Jurisdiction*

Washington first attacks the Complaint, arguing that this Court lacks personal jurisdiction, since none of the actions alleged by Plaintiffs give rise to jurisdiction over non-domiciliary Washington under CPLR 302(a). Accordingly, as a threshold inquiry, this Court first must establish that it has personal jurisdiction over Washington. *See Copp v. Ramirez*, 62 A.D.3d 23, 26 (1st Dep't 2009) (stating that, as a threshold issue, defendants who are not New York residents "cannot be subject to personal jurisdiction in

New York unless plaintiffs prove that New York's long-arm statute confers jurisdiction over them by reason of their contacts within the state").

Pursuant to New York's long-arm statute, a court may exercise personal jurisdiction "over any non-domiciliary ... who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or 3. commits a tortious act without the state causing injury to person or property within the state ..." *See* CPLR 302(a)(1), (2), & (3). Washington challenges jurisdiction under CPLR 302(a)(1) and (2).

Washington's principal argument is that jurisdiction is lacking, since the Complaint fails to allege any acts arising from services or goods provided by Washington Publishing in New York. However, Washington's argument ignores the Complaint's allegations that Dahr and Carni, while working in New York County in Darcher's office, acted as Washington's agents in misappropriating Darcher's proprietary information. *See* Compl. ¶¶ 11, 23, 127; *see also id.* ¶ 111-26; Shah Aff. ¶ 49. Such allegations have been held sufficient to state a basis for jurisdiction under CPLR 302(a)(1).

The First Department's recent decision in *Front, Inc. v. Khalil*, 103 A.D.3d 481, 482 (1st Dep't 2013) is on point. In *Front*, defendant Eckersley O'Callaghan ("EOC") was a structural design firm from the United Kingdom. One of plaintiff's employees,

defendant Philip Khalil, worked with EOC "to use plaintiff's confidential and proprietary information to divert work for Apple Inc., including a project for the Apple Store on Broadway in Manhattan, from plaintiff to Khalil and EOC." *Id.* On these facts, the Court deemed plaintiff's allegations "sufficient to establish that the UK defendants transacted business in New York, through Khalil as their agent, and therefore to invoke jurisdiction over them pursuant to CPLR 302(a)(1)." *Id.* Likewise, the same facts were "sufficient to establish that the UK defendants engaged in tortious conduct in New York, again acting through Khalil as their agent, and therefore to invoke jurisdiction pursuant to CPLR 302(a)(2)." *Id.* For the same reasons, personal jurisdiction exists over Washington under Section 302(a)(1) and (a)(2), as Dhar and Carni are alleged to have acted as Washington's agents in committing the alleged misappropriation in Manhattan. Accordingly, Washington's CPLR 3211(a)(8) motion is denied.

B. *Tortious Interference with Contract*

To state a tortious interference with contract claim, Plaintiffs must plead "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*, 88 N.Y.2d 413, 424 (1996).

Defendant first argues that the Complaint's allegation, based on information and belief, that "Washington Publishing … knew of the agreements" is insufficient to satisfy the knowledge element of the claim. (Compl. ¶ 171.) However, Plaintiffs' pleading put Defendant on notice of the facts of the claim. This is not summary judgment, where submission of sworn statements "upon information and belief" would be without probative value. *See Anderson v. Livonia, Avon & Lakeville R.R. Corp.*, 300 A.D.2d 1134, 1134 (4th Dep't 2002).

Moreover, this is not a claim falling under the heightened pleading standard of CPLR 3016(b), which states that "[w]here an action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances of the wrong shall be stated in detail." Courts routinely dismiss, *inter alia*, fraud, breach of fiduciary duty, and punitive damages claims as insufficient where supported by allegations asserted "upon information and belief" for failure to "disclose the sources of its information and belief," citing to CPLR 3016(b). *See Belco Petroleum Corp. v. AIG Oil Rig, Inc.*, 164 A.D.2d 583, 599 (1st Dep't 1991) ("We think it incumbent on Belco, at the pleading stage, to disclose the sources of its information and belief and otherwise come forward with whatever evidence it has of the alleged pattern and practice…" regarding its punitive damages claim); *Wall Street Transcript Corp. v. Ziff Commc'ns Co.*, 225 A.D.2d 322, 322 (1st Dep't 1996) ("Plaintiff failed to state a

cause of action against defendants for inducing its attorneys to breach their fiduciary duty, as the pleading did not state in detail the circumstances constituting the wrong, as required by CPLR 3016(b). We also note that all the allegations concerning the inducement of that breach are pleaded 'upon information and belief,' without disclosing the source of information that forms the basis of that belief."); *DDJ Mgmt., LLC v. Rhone Grp. L.L.C.*, 78 A.D.3d 442, 443 (1st Dep't 2010) ("CPLR 3016(b) imposes a more stringent standard of pleading than the generally applicable notice of transaction rule of CPLR 3013. Moreover, where allegations of fraud are based on information and belief, the source of such information must be revealed.").

However, Plaintiffs' tortious interference claim does not fall under CPLR 3016. Instead, the elements of a tortious interference claim need only satisfy the notice pleading requirement of CPLR 3013. *See New Dimension Solutions, Inc. v. Spearhead Sys. Consultants, (US) Ltd.*, 28 A.D.3d 260, 260 (1st Dep't 2006). Here the allegation that Washington knew of Carni and Dhar's employment agreements sufficiently apprises Washington of the facts that Plaintiffs intend to prove regarding this material element of a tortious interference claim.

Defendant next argues that Plaintiffs cannot plead the third element of a tortious interference claim – that Washington intentionally procured the breach without justification. In particular, Washington contends that the "economic interest" defense

bars Plaintiff's claim. Under the "economic interest" defense, a defendant to a contract interference claim may argue "that it acted to protect its own legal or financial stake in the breaching party's business." *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). Here, Washington makes no claim to any kind of stake in Plaintiffs' business, let alone a legal or financial stake. Instead, Washington asserts that it would have been justified in using Plaintiffs' purportedly proprietary systems, since use of the protocols "creates a valuable competitive advantage" for Washington as Plaintiffs' competitor. (Def.'s Moving Br. at 6.)

As explained by the Court of Appeals in *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007), "mere status as plaintiff's competitor is not a legal or financial stake in the breaching party's business that permits defendant's inducement of a breach of contract." Accordingly, the "economic interest" defense is inapplicable to the facts of this case and does not provide a basis upon which to dismiss Plaintiffs' claim.

C. *Misappropriation of Trade Secrets and Unfair Competition*

Defendant Washington next seeks dismissal of Plaintiffs' claims for misappropriation of trade secrets and unfair competition. Washington argues that both

claims fail for the same reasons: (1) the information purportedly misappropriated was not a "trade secret" and (2) Washington is not alleged to have acted in bad faith.

The elements of the two claims are similar but distinct. A claim of unfair competition requires more than a showing of "commercial unfairness." *See Ruder & Finn v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 671 (1981). New York law has long recognized two theories of common-law unfair competition: "palming off," which is not at issue here, and misappropriation. *ITC Ltd. v. Punchgini, Inc.*, 9 N.Y.3d 467, 476 (2007). "An unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property." *Id.* at 478.

To establish misappropriation of trade secrets, Plaintiffs must allege that they "(1) possessed a trade secret; and (2) that Defendants are using such trade secret in breach a duty of loyalty or as a result of discovery by improper means." *1-800 Postcards, Inc. v. AD Die Cutting & Finishing Inc.*, 28 Misc 3d 1216(A), at *2 (Sup. Ct. N.Y. Cnty. 2010).

1. Trade Secret

Washington first argues that Plaintiffs' purported failure to allege the existence of a "trade secret" dooms both their misappropriation and unfair competition claims.

Notwithstanding Washington's contention, the existence of a "trade secret" is not a prerequisite to an unfair competition claim. Instead, to state such a claim "a plaintiff must demonstrate that it had compiled information used in its business that provided an opportunity to obtain a competitive advantage and that a competitor misappropriated it." *Edelman v. Starwood Capital Grp, LLC*, 2008 WL 2713489, at *3 (Sup. Ct. N.Y. Cnty. Jun. 27, 2008), *aff'd* 70 A.D.3d 246 (1st Dep't 2009). While a trade secret is an example of the type of misappropriated property that could give rise to an unfair competition claim, the existence of a trade secret is not an essential element of the claim.

Nevertheless, the information as issue here is akin to a trade secret and therefore satisfies the trade secret requirement of the misappropriation claim, as well as the requisite unfair competition pleading that defendant took information that plaintiff compiled in its business that provided a competitive advantage. In considering the existence of a trade secret, the Court of Appeals has applied the following definition: "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Ashland Mgmt. v. Janien*, 82 N.Y.2d 395, 407 (1993).

Defendant claims that the information at issue is "publicly available, open source," selectively citing to Plaintiffs' Complaint. According to Defendant, since the information is in the public domain, the content at issue cannot be a trade secret. Plaintiffs, however,

do not plead that Darcher's protocols are publicly available; instead, the Complaint alleges that "Shah developed for Darcher a unique, proprietary protocol for combining these [publicly-available] programs." Compl. ¶ 59; *see also* Affidavit of Deepen Shah ¶ 17.[4] Thus, while the information used to create the protocols may be available publicly, the Complaint alleges that the protocols themselves are proprietary. *See Integrated Cash Management Serv., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 174 (2d Cir. 1990) ("[A] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret."); *see also Invesco Institutional (N.A.), Inc. v. Deutsche Inv. Mgmt. Am., Inc.*, 2009 WL 6442871, at *6 (Sup. Ct. N.Y. Cnty. Sept. 29, 2009) (Kapnick, J.). Accordingly, for the purpose of this motion to dismiss, Plaintiffs have pleaded the "trade secret" and protectable information elements of their misappropriation and unfair competition claims respectively.

[4] "CPLR 3211 allows plaintiff to submit affidavits" in response to a motion to dismiss. *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 635 (1976). Accordingly, the Affidavit of Deepen Shah is cited herein.

2. Bad Faith

Next, Washington argues that Plaintiffs' Complaint fails to allege that Washington acted in bad faith and that the misappropriation and unfair competition claims therefore must be dismissed. Review of the Complaint, however, belies Washington's claim.

Misappropriation of a trade secret requires a pleading that Defendant Washington use such trade secret in breach of a duty of loyalty or as a result of discovery by improper means. Here, Plaintiffs allege that Defendants "have jointly and severally acquired and are using or are planning to use Darcher's and Phoenix's trades [sic] secrets in violation of the obligations of Dhar and Carni under their agreements with Darcher and in violation of their duties of loyalty to their former principal and employer, Darcher." (Compl. ¶ 134.) Further, Shah avers that Dhar and Carni surreptitiously transferred Darcher's proprietary trade secrets to Washington using Darcher's own computers, beginning in or about April 2014. *See* Shah Aff. ¶ 47. This pleading is sufficient to state that Washington used Plaintiffs' trade secrets and that the information at issue was accessed as a result of discovery by improper means.

To plead an unfair competition claim, Plaintiffs must allege "the bad faith misappropriation of a commercial advantage which belonged exclusively to [them]." *LoPresti v. Mass. Mut. Life Ins. Co.*, 30 A.D.3d 474, 476 (2d Dep't 2006); *see also Ahead Realty, LLC v. India House, Inc.*, 92 A.D.3d 424, 425 (1st Dep't 2012) (same). Plaintiffs

make this pleading. Shah avers that Washington worked with Dhar and Carni to acquire Darcher's ad resale protocol, sweeper list, and yield management tool. *See* Shah Aff. ¶¶ 56-58. Shah also avers that Dhar and Carni disclosed Darcher's content domain protocol. *Id.* ¶ 54. Moreover, the Complaint lists a series of emails exchanged between Carni, Dhar and Washington, in which this information is purportedly conveyed. *See also* Compl. ¶¶ 100-126. Accordingly, for the purpose of this motion, Plaintiffs have alleged that Washington misappropriated its proprietary information in bad faith.

III. Conclusion

For the foregoing reasons, it is

ORDERED that Defendant Washington Publishing House LLC's motion to dismiss is denied; and it is further

ORDERED that Defendant Washington Publishing House LLC is directed to serve an answer to the Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on January 6, 2015.

Dated: New York, New York
November 17, 2014

ENTER

Hon. Eileen Bransten, J.S.C.