At Last Sportswear, Inc. v Fishman
2014 NY Slip Op 33267(U)
December 8, 2014
Supreme Court, New York County
Docket Number: 652176/2014
Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

AT LAST SPORTSWEAR, INC., Plaintiff, -against- LAURIE FISHMAN, ERLYN IKEDA, MARK LAVENDER and XYZ Co., Defendants.	Index No. 652176/2014 DECISION AND ORDER Motion Sequences Nos. 001 and 002

MELVIN L. SCHWEITZER, J.:

Defendants Erlyn Ikeda (Ikeda) and Mark Lavender (Lavender) each moves for an order, pursuant to CPLR 3211(a)(7), to dismiss Plaintiff At Last Sportswear, Inc.'s (At Last) complaint. The complaint includes eight causes of action, including: Trademark Infringement; Breach of Employment Agreement; Unfair Competition; Unjust Enrichment; Intentional Interference With Contractual Relations; Intentional Interference With Prospective Business Relations; Conversion; and Breach of the Duty of Loyalty. Ikeda is named as a defendant in all eight causes of action. Lavender is named as a defendant in all but Breach of Employment Agreement and Breach of the Duty of Loyalty.

Plaintiff's Claims

At Last claims in the complaint that Ikeda and defendant Laurie Fishman worked as at-will employees, Fishman as a sweater sales account executive, and Ikeda as a designer in the sweater division. They both had access to "valuable proprietary and confidential property belonging to At Last, including, but not limited to, At Last's pricing information, patterns, designs, financial and marketing information, lists of suppliers, customers, operating systems

and procedures, and At Last's company operations." ¶10. Fishman signed a Confidentiality and Non-Disclosure Agreement, and a Code of Ethics. Fishman and Ikeda acknowledged receiving At Last's Employee Manual, which Ikeda submitted in support of her motion. The manual explicitly provides that its contents are guidelines only and do not create an employment contract.

Lavender, while employed by another apparel design, sourcing and marketing company, approached Fishman and Ikeda with a business proposal to start a new apparel company using proprietary information and customer contacts they had obtained through their work, to compete with At Last. "Upon information and belief" they planned the new business during business hours. Fishman and Ikeda quit At Last in 2014, then "upon information and belief": started the new business with Lavender, which is directly competing; utilized confidential contacts to benefit the new business to the detriment of At Last; and solicited business from At Last customers including, but not limited to, Macy's and Dress Barn. ¶¶12-17.

Discussion

When determining if a complaint may be dismissed for failing to state a cause of action pursuant to CPLR 3211(a)(7), "the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff's favor." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 (1st Dept 2006) (citations omitted). The motion "must be denied if from the pleading's four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Id.* (citations omitted). However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003).

For the following reasons, the Court dismisses: as to all defendants the causes of action for Trademark Infringement, Unjust Enrichment, Conversion, Intentional Interference With Contractual Relations, and Intentional Interference With Prospective Business Relations; and as to Ikeda the claim for Breach of Employment Agreement. The claim for Unfair Competition against all defendants, and the claim for Breach of the Duty of Loyalty against Fishman and Ikeda remain.

At Last does not oppose dismissal of the claim for Trademark Infringement, which must be dismissed in any event because there are no allegations that At Last has a trademark. The claim for Unjust Enrichment is duplicative of the claim for Breach of Employment Agreement, and there are no allegations or reasonable inferences that At Last conferred a benefit on defendants for which it reasonably expects compensation. *See PKO Television, Ltd. v Time Life Films, Inc.*, 169 AD2d 582 (1st Dept 1991). The claim for Conversion is also duplicative of the claim for Breach of the Employment Agreement, as well as the claim for Unjust Enrichment. *See Suntrust Bank v Wasserman*, 2013 NY Misc LEXIS 3642 (New York Sup. Ct. 2013), citing *Nakamura v Fujii*, 253 AD2d 387 (1st dept 1998).

The claim for Intentional Interference With Contractual Relations is deficient because there are no allegations establishing the existence of valid and enforceable contracts with third parties that plaintiff breached, or that defendants procured the breach. *See Joan Hansen & Co., Inc. v Everlast World's Boxing*, 296 AD2d 103 (1st Dept 2002). The claim for Intentional Interference With Prospective Business Relations is equally deficient without allegations identifying third parties with whom At Last was prevented from doing business, or the wrongful acts employed by defendants to interfere with the prospective relationships. *See Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 (1st Dept 1999). The claim for Breach of

Employment Agreement is dismissed as to Ikeda. The only agreement At Last claims Ikeda breached is the Employee Handbook, which by its terms is not a binding contract. The two agreements Fishman allegedly signed do not apply to Ikeda.

At Last sufficiently alleges a claim for Unfair Competition. Misappropriation and improper use of another's trade secrets is sufficient to constitute a claim for unfair competition. *See Synergy Advanced Pharm., Inc. v Capebio, LLC*, 2013 NY Misc LEXIS 2060 (New York Sup Ct 2013). Such a claim can be brought by an employer against a former employee in the absence of a restrictive covenant. *See Louis Capital Markets, L.P. v REFCO Group Ltd., LLC*, 9 Misc3d 283, 289 (New York Sup Ct 2005), citing *CBS Corp. v Dumsday*, 268 AD2d 350, 353 (1st Dept 2000). The claim for Breach of the Duty of Loyalty also remains. *Id.* at 353 (claim sufficiently stated where plaintiff alleged that "defendants, while in its employ, planned, and later formed, a competing corporation that obtained [. . .] contract using confidential information").

Accordingly, it is hereby

ORDERED that defendants Ikeda's and Lavender's motions to dismiss are GRANTED in part and the First, Fourth, Fifth, Sixth and Eighth Causes of Action are dismissed as to all defendants; and it is further

ORDERED that the Second Cause of Action is dismissed as to defendant Ikeda only, and remains as to defendant Fishman; and it is further

ORDERED that defendants' request that the Court treat the motion as one for summary judgment is denied; and it is further

ORDERED that defendants' alternative request to replead is denied without prejudice; and it is further

ORDERED that the complaint is severed and shall continue; and it is further

ORDERED that plaintiff shall file and serve an amended complaint with the dismissed claims deleted, which defendants shall answer within twenty days of service.

Dated: December 8, 2014

ENTER:

MELVIN L. SCHWEITZER J.S.C.