

PSKW, LLC v McKesson Specialty Ariz., Inc.

2015 NY Slip Op 30165(U)

January 5, 2015

Supreme Court, New York County

Docket Number: 602921/2007

Judge: Saliann Scarpulla

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39**

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PSKW, LLC, on behalf of itself and as assignee
of Touch Tone Media, Inc.,

Plaintiff,

DECISION and ORDER

- against -

Index No. 602921/2007
Motion Seq. No. 014

McKesson Speciality Arizona, Inc.,

Defendant.

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HON. SALIANN SCARPULLA, J.:

Defendant McKesson Speciality Arizona, Inc. (“McKesson” or “defendant”) moves pursuant to CPLR 4102© for an order to strike plaintiff’s jury demand.

Defendant argues that plaintiff PSKW, LLC, on behalf of itself and as assignee of Touch Tone Media, Inc. (“PSKW” or “plaintiff”) waived its right to a jury trial because it joined equitable claims for unjust enrichment, a constructive trust and a permanent injunction with its legal claims. In opposition, plaintiff argues that it did not waive its

right to a jury trial because the action is one for monetary damages, and the claims for equitable relief are merely incidental to the claims for monetary damages.

Plaintiff commenced this action in 2007, alleging that McKesson violated a non-disclosure agreement between McKesson and Touch Tone, and misappropriated and improperly used PSKW's and Touch Tone Media, Inc.'s ("Touch Tone") trade secrets and confidential information to create a competing pharmaceutical loyalty card program, and as the basis for its own patent application. In its second amended complaint, PSKW asserts causes of action against McKesson for breach of contract, misappropriation, misappropriation of ideas, tortious interference with prospective contractual relations, unfair competition, breach of confidence and unjust enrichment, and seeks imposition of a constructive trust, and permanent injunction. PSKW seeks damages in excess of \$100 million, and also asserts that McKesson's wrongful conduct caused and continues to cause damage to Touch Tone and PSKW, and that such damage has no adequate remedy at law.

McKesson previously moved for summary judgment to dismiss the second amended complaint. In an order dated December 23, 2013, this court (J. Kapnick) granted the motion in part, dismissing the third cause of action for misappropriation of ideas, and severing and continuing all other causes of action.

Discussion

CPLR § 4101 provides that “issues of fact shall be tried by a jury unless a jury trial is waived . . . [in] an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only.” A plaintiff’s joinder of legal and equitable claims arising out of the same transaction amounts to a waiver of the right to a jury trial where the relief sought is “primarily equitable” in nature. *Goshen v. Mutual Life Ins. Co. of New York*, 286 A.D.2d 229, 230 (1st Dep’t 2001); *Whipple v. Trail Properties, Inc.*, 261 A.D.2d 470, 470 (2d Dep’t 1999).

However, where a plaintiff’s claims are primarily legal in nature, and “money damages alone afford a full and complete remedy, the action sounds in law and may be tried by a jury.” *Cadwalader Wickersham & Taft*, 177 A.D.2d 315, 316 (1st Dep’t 1991); *Bressler v. Kalow*, 13 A.D.3d 70, 70 (1st Dep’t 2004). In this instance, the trial court has discretion to “decide the equitable claims while submitting the claims at law to the jury”, or to “submit all claims, equitable and at law, for resolution to a jury.” *Le Bel v. Donovan*, 96 A.D.3d 415, 417 (1st Dep’t 2012).

“A party’s entitlement to demand a jury trial is dependent upon the facts pleaded, not the demand for relief. . . . The critical consideration is whether the facts stated show that the action is equitable or legal in nature. The fact that the complaint demands a money judgment does not necessarily establish that there is a right to a jury trial.” *Kaplan v. Long Island University*, 116 A.D.2d 508, 509 (1st Dep’t 1986).

Plaintiff maintains that despite alleging claims for equitable relief, it is really seeking legal relief, and the equitable claims are merely incidental to the momentary relief sought. As to the claims for unjust enrichment for improper use of the confidential information, and imposition of a constructive trust on all profits obtained by defendant as a result of the alleged misappropriation, unfair competition, breach of confidence and unjust enrichment, I agree with plaintiff that the equitable relief is incidental to the monetary relief sought, and interposing these causes of action does not result in the waiver of a right to a jury trial. *See Greenfield v. Philles Record*, 243 A.D.2d 353 (1st Dep't 1997).

However, plaintiff alleges in its cause of action for a permanent injunction that it “is suffering irreparable injury from defendant’s continuing wrongful use of Touch Tone’s and plaintiff’s Confidential Information, and is entitled to a permanent injunction prohibiting defendant from using any of Touch Tone’s and plaintiff’s Confidential Information.” Any award of monetary damages will only compensate plaintiff for its damages to date. The permanent injunction demand, which seeks to prohibit McKesson from any continued and future use of the allegedly misappropriated information, seeks to stop future use of the information, is a purely equitable remedy, and is central to plaintiff’s complaint. *See Reinhard v Connaught Tower Corp.*, 2011 N.Y. Misc. LEXIS 3714, 2-4 (Sup. Ct. N.Y. Co. July 26, 2011); *Greenfield*, 243 A.D.2d 353 (with inclusion of cause of action for recession seeking ownership of master recordings, “it can no longer

be said that money damages would afford a complete remedy, and its interposition therefore did result in a waiver of the right to a jury”).

At this point, any attempt by plaintiff to distance itself from its demand for a permanent injunction is unavailing. At oral argument before me on September 18, 2014, plaintiff’s counsel stated that plaintiff would take out the future permanent injunction claim to keep in the jury demand. Even if I were to allow plaintiff to abandon its equitable claims now, it would not revive the plaintiff’s right to a trial by jury.

Zimmer-Masiello, Inc. v. Zimmer, Inc., 164 A.D.2d 845, 847 (1st Dep’t 1990) (“Once the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claim(s) will not revive the right to trial by jury”); *Willis Re Inc. v. Hudson*, 29 A.D.3d 489 (1st Dep’t 2006).

Accordingly, defendants’ motion to strike plaintiff’s demand for a jury trial is granted.

In accordance with the foregoing it is hereby

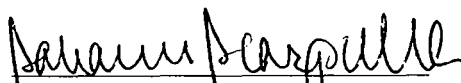
ORDERED that defendant McKesson Speciality Arizona, Inc.’s motion to strike plaintiff PSKW, LLC, on behalf of itself and as assignee of Touch Tone Media, Inc.’s demand for a jury trial pursuant to CPLR § 4102© is granted; and it is further

ORDERED that the parties are to appear before the Court at 60 Centre Street, New York, NY, Room 208, on ~~February 19~~ ^{June 10}, 2015 at 2:00 pm for a final pre-trial conference.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 5, 2015

ENTER:


Saliann Scarpulla, J.S.C.