

Advanced Aerofoil Techs. AG v Missionpoint Capital Partners LLC
2015 NY Slip Op 30651(U)
April 17, 2015
Supreme Court, New York County
Docket Number: 650109/14
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COM. DIV. PART 3

-----X
ADVANCED AEROFOIL TECHNOLOGIES AG,

Plaintiff,

-against-

MISSIONPOINT CAPITAL PARTNERS LLC,

Defendant.
-----X

Index No. 650109/14
Motion Date: 1/7/15
Motion Seq. No.: 003

BRANSTEN, J.:

This action comes before the Court on defendant MissionPoint Capital Partners LLC’s (“MissionPoint”) motion to dismiss plaintiff Advanced Aerofoil Technologies AG’s (“AAT”) complaint pursuant to CPLR 3211(a)(1) and (7). AAT opposes. For the reasons that follow, MissionPoint’s motion is granted in part and denied in part.

I. Background¹

In this action, plaintiff AAT, a Swiss corporation, alleges that MissionPoint, a Connecticut investment firm, breached a September 29, 2009 “Non-Disclosure Agreement” (the “NDA”) and both wrongfully used and disclosed AAT’s confidential and proprietary information, intellectual property, technology and business plan “to certain of its investors.” These investors then utilized that information to form a competing business, non-party Flowcastings, GmbH (“Flowcastings”). (Compl. ¶ 1.)

¹ The allegations discussed herein are drawn from the complaint unless otherwise noted.

A. *The NDA and the Formation of Flowcastings*

The NDA was executed in connection with the sale of AAT, then owned by MissionPoint Capital Fund I, L.P., to an affiliate of Ritchie Capital Management, L.L.C. (“Ritchie”). MissionPoint, Ritchie and AAT each are parties to the NDA. After the NDA was executed, an affiliate of Ritchie acquired “substantially all of the equity interests of AAT” from MissionPoint in early December 2009. (Compl. ¶ 23.) The parties do not dispute that MissionPoint retained a 1.8% interest in AAT until September 2011, when it was acquired by Ritchie. *See* Def. Ex. 8: AAT’s Statement of Claim ¶ 15.²

The complaint alleges that AAT developed a confidential five-year business plan to:

expand from a manufacturer of hot gas path investment castings using ‘equiaxed’ or randomly oriented grain structures into the highly specialized directionally solidified and single crystal market (‘DS/SX’) for the aerospace and industrial gas turbine industries (the ‘Strategic Plan’).

(Compl. ¶¶ 2, 25.) By acquiring AAT, Ritchie allegedly gained access to AAT’s “unique Strategic Plan and business model, which provided AAT with a competitive advantage over its competitors and others seeking to gain entry into the lucrative aerospace market for DS/SX products.” *Id.* ¶ 23.

In spring 2010, MissionPoint, through one of its senior officers and directors, Daniel Abbasi, purportedly conveyed AAT’s confidential and proprietary information to at least two

² “Def. Ex.” refers to the exhibits attached to the moving affirmation of Joseph A. Schwartz dated February 14, 2014.

of MissionPoint's investors, the Grantham Foundation and the Children's Investment Fund (collectively, the "MissionPoint Investors"). Abbasi purportedly did so in order to enable the MissionPoint Investors to participate in the acquisition of AAT's assets and business, including the Strategic Plan, in direct violation of the NDA. (Compl. ¶ 3.) MissionPoint also allegedly disclosed to the MissionPoint Investors "AAT's confidential contracts, client accounts and budgets, individual client cost data, specialized research on clients, client proposals, marketing analysis and individual client proposals, marketing analysis and individual client cost data." *Id.* ¶ 25. According to plaintiff, this disclosure violated the NDA's prohibition against disclosing confidential information to any third parties without the disclosing party's prior written consent.

The complaint further alleges that MissionPoint assisted the MissionPoint Investors with the formation and development of Flowcastings:

Specifically, MissionPoint utilized AAT's contacts and proprietary information to support and develop Flowcasting's operations including, without limitation: (i) securing investors for Flowcastings; (ii) registering Flowcastings' website; (iii) designing its corporate log; (iv) designing its manufacturing facility; (v) securing a building site in Nuremburg, Germany; (vi) soliciting and hiring management and key employees; (vii) procuring equipment for Flowcastings; (viii) recruiting AAT's customers for Flowcastings; (ix) downloading AAT's proprietary testing data and files; and (x) destroying AAT's computer records and electronic files.

Id. ¶ 26. In addition, MissionPoint is alleged to have solicited and encouraged "Talos Capital, a private equity investment firm solely owned and funded by the Children's

Investment Fund, to invest in Flowcastings.” *Id.* ¶ 28. As of January 2013, Talos Capital owned 31.5% of the shares of Flowcastings. *Id.*

Between February and September 2011, MissionPoint solicited for hire at least eight of AAT’s key officers, directors and employees and convinced them to terminate their employment with AAT and become employees of Flowcastings, allegedly in violation of the two-year non-solicitation provisions of section 10 of the NDA. (Compl. ¶¶ 5, 21, 26, 29.) These employees are Herve Flutto, Peter Konrad, Charles Byrd, Thomas Todaro, Bernd Leonhardt, Fabian Korb, Mark Tarby and Anthony Chalder. *Id.* ¶ 30.

By early fall 2011, Abbasi “and others at MissionPoint were working exclusively for the benefit of Flowcastings and/or the MissionPoint Investors, all the while poaching AAT of its clients, employees and intellectual property.” (Compl. ¶ 27.) Through the alleged breach of the NDA, “Flowcastings has been able to seize control of AAT’s business model and Strategic Plan, as well as AAT’s key employees and senior leadership.” *Id.* at 31.

B. *Related Proceedings*

On November 4, 2011, AAT sued Todaro, Chalder, Tarby, Advanced Engineering Technologies, Inc. (“AET”),³ Flowcastings, Konrad, Flutto, Abbasi, Korb, Byrd and Leonhardt in Illinois federal court alleging certain federal and state claims arising out of their defection and formation of Flowcastings. *See* Def. Ex. 2. The defendants moved to dismiss

³ AAT alleged that AET was incorporated and owned by Todaro. (Def. Ex. 4 ¶ 9.)

based on lack of personal jurisdiction and on the ground that the claims were barred by a September 2, 2011 “Confidential Termination Agreement” between AAT, Todaro, Byrd, AET, and non-parties Dennis M. Pfister⁴ and Jay Menton. *See* Def. Ex. 3 at 1-2; *see also* Def. Ex. 8-A. In this agreement, the parties agreed to release each other from any and all claims, both known and unknown, arising before its effective date. *See* Def. Ex. 3 at 5. The Confidential Termination Agreement also contained a covenant not to sue and provided that any dispute concerning the agreement would be resolved by binding arbitration in New York. *Id.* The Illinois action was dismissed on November 30, 2011 for lack of personal jurisdiction. *Id.* at 17.

On December 23, 2011, AAT filed suit against the same defendants in the Southern District of New York, alleging that the defendants conspired to steal AAT’s confidential and proprietary information and technology during their employment with AAT and used that information to form Flowcastings. *See* Def. Ex. 4. The New York federal action was dismissed by District Judge Andrew L. Carter, Jr. on January 13, 2013 for lack of federal subject matter jurisdiction. *See* Def. Ex. 7 at 14-15.

In September 2012, AAT commenced an arbitration proceeding against Byrd, AET, Chalder, Tarby, Byrd and Pfister before the International Centre For Dispute Resolution, seeking an arbitration award that the September 2, 2011 Confidential Termination Agreement

⁴ Pfister was AAT’s chairman.

was procured by fraud and the release contained in that document is unenforceable. *See* Def.

Ex. 8 at 1-2. AAT alleged the following in the arbitration:

All of the Respondents are former executive managers of AAT. Beginning in early 2011 and culminating with the execution of the [Confidential Termination] Agreement on September 2, 2011, Respondents planned and executed a scheme to defraud AAT by theft of AAT's resources and technologies and diversion of its customers to start a direct competitor (Flowcastings, GmbH), which Respondents then joined through a series of staggered resignations from AAT. Respondents' scheme has resulted in a significant and material monetary loss to AAT's business.

Id. at ¶ 4, 2.

After a seven-day hearing, the arbitrator issued a Partial Final Award, in which he upheld the enforceability of the Confidential Termination Agreement, concluding that it was not procured by fraud. *See* Def. Ex. 9 at 30. In so ruling, the arbitrator found that AAT failed to prove that the respondents took any confidential information from AAT or that Flowcastings is a competitor of AAT. *Id.* at 27-29. In his Final Award dated July 16, 2013, the arbitrator also awarded the respondents over \$300,000 in attorneys' fees and costs for having to defend the arbitration and the two federal court lawsuits. *See* Def. Ex. 10.

In October 2013, AAT filed a petition in this court to vacate the arbitration awards, which was then removed to federal court. (Def. Ex. 13.) On April 16, 2014, the district court granted the respondents' motion to dismiss the petition and to confirm the arbitration awards.

AAT appealed that decision to the Second Circuit Court of Appeals, which affirmed Judge Sweet's decision on December 19, 2014.

In addition, AAT sent a letter, dated March 28, 2012, to MissionPoint, advising MissionPoint of the filing of the two federal lawsuits and additional criminal complaints in Switzerland and Germany and seeking its cooperation in discovery. In this letter, AAT wrote the following:

(i) For at least a portion of the period of time during which the alleged wrongdoing occurred, Messrs. Byrd and Abbasi were Directors of MissionPoint. Taking into account MissionPoint's continuing contingent interest in AAT, the alleged wrongful actions of Messrs. Byrd and Abbasi have adversely affected the interests of, and most likely breached their fiduciary duties to, MissionPoint and its investors.

(ii) Flowcastings directly competes with AAT. Even if the actions of the defendants were not actionable (which we believe they are), we think that MissionPoint and its investors would expect that members of the MissionPoint investment team would not launch a new business venture designed to compete directly with a MissionPoint investment.

(Def. Ex.14 at 2). MissionPoint offers this letter as conclusive evidence that, given MissionPoint's continued financial interest in AAT, it had no possible incentive to harm the company.

II. Discussion

This lawsuit was commenced on January 14, 2014. The complaint alleges two causes of action for breach of the NDA and breach of the covenant of good faith and fair dealing.

MissionPoint moves to dismiss the complaint on the following grounds: (1) the complaint consists of bare legal conclusions and factual claims that are inherently incredible and contradicted by documentary evidence; (2) AAT is estopped by the arbitration awards from claiming that any of its confidential information was stolen or that Flowcastings is a competitor; and (3) the alleged conduct of MissionPoint is not prohibited by the NDA.

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 plaintiff and the plaintiff 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)(1) provides for dismissal where "a defense is founded upon documentary evidence" if the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fortis Fin. Servs. v. Fimat Futures USA*, 290 A.D.2d 383, 383 (1st Dep't 2002).

“[A]ffidavits that do no more than assert the inaccuracy of plaintiffs’ allegations . . . may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint . . . and do not otherwise conclusively establish a defense to the asserted claims as a matter of law.” *Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc., Inc.*, 120 A.D.3d 431, 432-433 (1st Dep’t 2014); *see also Solomons v. Douglas Elliman LLC*, 94 A.D.3d 468, 469-470 (1st Dep’t 2012); *Tsimerman v Janoff*, 40 A.D.3d 242, 242 (1st Dep’t 2007).

A. *Documentary Evidence*

MissionPoint’s motion to dismiss the complaint based on documentary evidence is denied. Contrary to MissionPoint’s assertions, the fact that AAT did not name MissionPoint as a defendant in the prior federal litigations and the arbitration it commenced against its former employees does not conclusively demonstrate that MissionPoint had nothing to do with the alleged misappropriation of AAT’s business secrets or the formation of Flowcastings.

In addition, MissionPoint offers an affidavit from Abbasi sworn to on February 11, 2014. (Def. Ex. 15.) In this affidavit, Abbasi avers that he was employed at MissionCapital until July 31, 2011, and that he became president of Flowcastings on October 1, 2011. Abbasi further avers that, while he was employed at MissionPoint, he

was never instructed by anyone at MissionPoint to disclose, and he never disclosed to any person, any confidential information about AAT; he was never instructed by anyone at MissionPoint to solicit, and he did not solicit, anyone to work at Flowcastings; he was not instructed by anyone at MissionPoint to attempt, and he did not attempt, to persuade any AAT customer to leave AAT for Flowcastings; MissionPoint had nothing to do with the formation of Flowcastings; and he never had any communications of any kind with anyone else at MissionPoint on any of these topics. The affidavit of Abbasi would be competent evidence on a motion for summary judgment and persuasive, if unchallenged. However, this affidavit does “no more than assert the inaccuracy of plaintiffs’ allegations” and does not “resolve all factual issues as a matter of law.” *Fortis Fin. Servs.*, 290 A.D.2d at 383; *Amsterdam Hospitality Group, LLC*, 120 A.D.3d at 432-433. Accordingly, the affidavit does not provide a basis for dismissing the complaint pursuant to CPLR 3211(a)(1) or (a)(7).

AAT’s March 28, 2012 letter to MissionPoint, suggesting that Byrd and Abbasi may have breached their fiduciary duties to MissionPoint, likewise does not conclusively dispose of AAT’s breach of contract claims. Of course, AAT will have to establish just the opposite – that it was MissionPoint, acting on behalf of itself and/or for the benefit of its investors, that was behind the mass departure of AAT’s employees and the formation of Flowcastings.

B. *Collateral Estoppel*

MissionPoint's second argument in support of dismissal of the complaint is that AAT is collaterally estopped by the arbitrator's factual findings from claiming theft of its confidential information or competition from Flowcastings. AAT, on the other hand, contends that collateral estoppel is inapplicable because MissionPoint was not a party to the arbitration and because the issue of whether MissionPoint breached the NDA was not raised in that proceeding.

"The doctrine of collateral estoppel precludes a party from relitigating 'an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point.'" *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985), quoting *Gilberg v. Barbieri*, 53 N.Y.2d 285, 291 (1981). "Preclusion applies to 'issues that were actually litigated, squarely addressed and specifically decided.'" *Liddle, Robinson & Shoemaker v. Shoemaker*, 309 A.D.2d 688, 691 (1st Dep't 2003), quoting *Ross v. Medical Liab. Mut. Ins. Co.*, 75 N.Y.2d 825, 826 (1990). Collateral estoppel principles are equally applicable to arbitration awards as they are to adjudications in judicial proceedings. *Matter of American Ins. Co.*, 43 N.Y.2d 184, 189–190 (1977); *Feinberg v. Boros*, 99 A.D.3d 219, 226 (1st Dep't 2012).

As the Court of Appeals explained, "the efficient utilization of the judicial system is served by preclusion of relitigation of issues as to which a litigant has had a full and

fair opportunity for resolution, irrespective of the identity of his particular opponent.”

Koch v. Consolidated Edison Co. of N.Y., 62 N.Y.2d 548, 557 (1984). The focus is on the party against whom issue preclusion is sought and whether that party had a full and fair opportunity to contest the issue in the first case. Notably, AAT does not argue to this court, and did not argue either to the district court or the Second Circuit, that it lacked a full and fair opportunity to litigate these issues. AAT’s challenge to the arbitration awards was limited to the award of attorneys’ fees and costs. *See* ECF Doc. No. 27-31.

In the arbitration, AAT’s fraudulent inducement claim was based on allegations that the “Respondents planned and executed a scheme to defraud AAT by theft of AAT’s resources and technologies and diversion of its customers to start a direct competitor (Flowcastings, GmbH).” (Def. Ex. 8 ¶ 4) (AAT’s Arbitration Statement of Claim). More specifically, AAT claimed in the arbitration, as it does in this lawsuit, that it had “a multifaceted plan to expand its operations into the lucrative DS/SX market.” *Id.* ¶ 20. The former employees were accused of the same misconduct for which AAT seeks to blame MissionPoint, namely that they:

(xi) recruited AAT’s customers for Flowcastings; (xii) downloaded AAT’s proprietary testing data and files; (xiii) destroyed AAT computer records and files; and (xiv) directed moles to secretly remain employed with AAT in order to ensure Respondents could continue to have access to AAT’s resources and technology.

Id. ¶ 5; *compare with* Compl. ¶ 26.

After considering the evidence, the arbitrator ruled that “[t]here was no credible evidence to conclude that Respondents used AAT’s time, trade secrets, or facilities in any material way.” (Def. Ex. 9 ¶ 4.35.) The arbitrator also found that “AAT did not establish with legally sufficient evidence, that Flowcastings and AAT are competing enterprises”; and that “AAT had neither valuable confidential information nor intellectual property that Respondents might use for Flowcastings to gain a competitive advantage in its different product market.” *Id.* ¶¶ 4.35-4.37. Thus, there is no question that these two factual issues were material issues in the arbitration that were squarely addressed and decided adversely to AAT. Accordingly, they may not be relitigated in this action.

MissionPoint argues that the application of collateral estoppel requires dismissal of the entire complaint. However, AAT’s breach of contract claims are not limited to the disclosure of AAT’s confidential information, allegedly a violation of section 2 of the NDA, or the acquisition of assets or business of AAT, a section 8 violation. AAT also is claiming that MissionPoint breached section 10 of the NDA and the covenant of good fair and fair dealing by soliciting at least eight of AAT’s key officers, directors and employees to leave AAT – neither of which was not litigated in the arbitration. Therefore, collateral estoppel does not apply to these two claims.

C. *NDA Prohibits the Alleged Violations of the Non-Solicitation and Non-Disclosure Provisions*

Section 10 of the NDA, entitled “Non-Solicitation,” states in pertinent part:

For the two-year period following the date of this agreement, no Party nor any [of] its Representatives shall, directly or indirectly, knowingly solicit for hire or engagement, or knowingly hire or engage, any individual who is now or was during the six months prior to such proposed solicitation, hire or engagement, engaged or employed by any of the other Parties or any of its Affiliates; . . .”

(Compl. Ex. A § 10.)

MissionPoint argues that the obvious intent of this non-solicitation provision was to prevent Ritchie from soliciting employees of MissionPoint and vice versa, and was not intended to prevent MissionPoint from soliciting AAT employees to work for someone other than MissionPoint. Accordingly, MissionPoint contends that its solicitation of AAT employees did not breach the NDA. However, the word “Party” is a defined term in the first paragraph of the NDA, and specifically includes AAT. Thus, the plain language of the NDA prevents MissionPoint from directly or “indirectly” soliciting for hire AAT’s employees. Whether MissionPoint was involved in the mass defection of AAT employees is a question of fact that cannot be resolved on this motion.

Likewise, MissionPoint’s alleged disclosure of confidential information to MissionPoint Investors violated the non-disclosure provisions of the NDA. Section 2(a) of the NDA provides that MissionPoint as the recipient of AAT’s “Confidential

Information” agreed not to reveal that “Confidential Information” to any third party without AAT’s prior written consent. While MissionPoint argues that the information it disclosed did not fall under the definition of “Confidential Information” provided in Section 1(a) of the NDA, this argument is factual in nature. Section 1(a) defines “Confidential Information” as “all materials and information about [AAT] ... which is non-public, confidential and/or proprietary in nature...” Whether the information disclosed to MissionPoint was not, in fact, confidential or non-public cannot be resolved as a matter of law on this motion through MissionPoint’s assertion in its brief that it already was privy to the information disclosed.

III. Conclusion

The Court has considered defendant’s remaining arguments and considers them without merit.

Accordingly, it is


ORDERED that defendant’s motion to dismiss the complaint is granted to the extent that plaintiff is collaterally estopped by the arbitrator’s ruling from claiming that any of its confidential information was misappropriated and that Flowcastings, GmbH is a direct competitor of the plaintiff, and the motion is denied in all other respects and it is further

ORDERED that defendant shall serve and file an answer to the complaint within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference Room 442, 60 Centre Street, on June 23, 2015 at 10 a.m.

Dated: New York, New York
April 17, 2015

ENTER:


Hon. Eileen Bransten, J.S.C.