

Ray Smith & Assoc., Inc. v Dodds
2016 NY Slip Op 32837(U)
May 31, 2016
Supreme Court, Suffolk County
Docket Number: 602648/2015
Judge: James Hudson
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Short Form Order

PUBLISH

Supreme Court of the County of Suffolk
State of New York - Part XLVI

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

X-----X
RAY SMITH & ASSOCIATES, INC.,

Plaintiff,

-against-

JACKSON DODDS, JACKSON DODDS & COMPANY, INC., THOR GINSBERG and "JOHN DOES 1-10," said names being fictitious and intended to refer to other Individuals and/or entities that are unknown to Plaintiff at this time and that may be liable to Plaintiff herein,

Defendants.

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INDEX NO.:602648/2015

SEQ. NO.:002-Mot D

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Upon the following e-filed papers numbered 62 to 75 read on this motion to Dismiss the Complaint; Notice of Motion/Order to Show Cause and supporting papers 62-64; Notice of Cross Motion and supporting papers 6; Answering Affidavits and supporting papers 66, 68, 75; Replying Affidavits and supporting papers 70-73; Other 9; and upon due deliberation; it is,

ORDERED that Plaintiff's motion (002) seeking leave to amend the complaint is granted to the extent that the proposed additional facts and the first through eleventh, thirteenth and fourteenth causes of action shall be added to the complaint; and it is further

ORDERED that Plaintiff is directed to serve and e-file the supplemental summons and amended complaint within 20 (twenty days) of this Order's entry; and it is further

ORDERED that Defendants are directed to answer the amended complaint within 20 (twenty days) of service of a copy of this Order's notice of entry with the amended complaint; and it is further

ORDERED that the parties are directed to appear in IAS Part XLVI for a preliminary conference at The New York State Supreme Court, One Court Street, Riverhead, NY, on **Wednesday, August 24, 2016 at 9:30 a.m.**

In this breach of contract action, Plaintiff alleges that Defendants Mr. Jackson Dodds and Jackson Dodds & Company, Inc. breached a written stipulation of settlement by continuing to compete with Plaintiff's landscaping business. Plaintiff also alleges that Defendant Mr. Thor Ginsberg breached an employment agreement and employee handbook wherein he agreed not to compete or take customers away from Plaintiff's business within two years of terminating from his employment with Plaintiff. Plaintiff employed Defendant Dodds for a period of 15 (fifteen) years as the vice president of the company from 1995 through 2011. Subsequently, Mr. Dodds resigned, received a buy-out of his stock in Plaintiff's company, and started a business of his own. Mr. Dodds executed a non-compete and confidentiality agreement. Defendant Mr. Ginsberg was an employee of Plaintiff from March 2011 through August 2014. The record reveals that Plaintiff trained Mr. Ginsberg to perform his job as a lawn care applicator, and to obtain the necessary certification. Mr. Ginsberg also executed a non-compete and confidentiality agreement.

Shortly after Mr. Ginsberg resigned from Plaintiff's employ, Defendant Mr. Dodds hired Mr. Ginsberg as a salesman. On April 12, 2012, Plaintiff commenced an action against the Dodds Defendants for unfair competition and breach of the employment agreement. The parties settled before trial. On January 9, 2014, Plaintiff sued the Dodds Defendants again for the same violations that were previously alleged in the prior action. Upon learning that the Dodds Defendants hired Mr. Ginsberg and that Defendants utilized Plaintiff's confidential information to gain Plaintiff's customers, the instant action was commenced on March 17, 2015.

The complaint contains eight causes of action: 1) breach of the non-compete agreement against Mr. Ginsberg; 2) breach of the employee handbook against Mr. Ginsberg; 3) breach of the implied covenant of good faith and fair dealing against Ginsberg; 4) tortious interference with prospective contractual relations against Ginsberg; 5) tortious interference with prospective contractual relations against the Dodds Defendants; 6) unfair business practice against all Defendants; 7) constructive trust against the Dodds Defendants; 8) unjust enrichment against all Defendants. Defendants' answer asserts general denials and one affirmative defense: that the complaint fails to state a cause of action.

Plaintiff now moves for leave to amend the complaint. In its proposed amended complaint, Plaintiff alleges new facts and seven additional causes of action, as follows: fraudulent inducement against the Dodds Defendants; accounting against the Dodds

Defendants; breach of a settlement agreement against the Dodds Defendants; injunction against Mr. Ginsberg; unfair competition against all Defendants; conversion against all Defendants; and misappropriation of trade secrets against all Defendants.

In opposition, the Dodds Defendants affirm by counsel that the new allegations in the amended complaint were known to Plaintiff at the time the action was originally filed. In addition Plaintiff had full knowledge of Dodds' wrongdoing prior to the commencement of this action. Thus there is no reasonable excuse for adding the allegations at this point in time, especially since discovery is practically complete. Defendant Ginsberg also opposes the motion and echoes Dodds' contentions.

It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise (CPLR 3025 [b]; *Thomas Crimmins Contracting Co. v. New York*, 74 N.Y.2d 166, 544 N.Y.S.2d 580 [1989]); *McCaskey, Davies & Associates, Inc. v. New York City Health & Hospitals Corp.*, 59 N.Y.2d 755, 463 N.Y.S.2d 434 [1983]). However, leave to amend will be denied where the proposed pleading is palpably insufficient as a matter of law (*Bankers Trust Co. v. Cusumano*, 177 A.D.2d 450, 576 N.Y.S.2d 546 [1st Dept. 1991]; *Bencivenga & Co., CPAs, P.C. v. Phyfe*, 210 A.D.2d 22, 619 N.Y.S.2d 33 [1st Dept. 1994]).

The decision whether to grant such leave is within the court's sound discretion, to be determined on a case-by-case basis (*Mayers v. D'Agostino*, 58 N.Y.2d 696, 458 N.Y.S.2d 904 [1982]); *Pellegrino v. New York Transit Authority*, 177 A.D.2d 554, 576 N.Y.S.2d 154 [2d Dept. 1991]). In exercising its discretion, the Court will consider whether there has been a gross delay in asserting the amendment.

With regard to the purported delay, inasmuch as the parties are still conducting discovery, it is not unusual for a Plaintiff to amend the pleadings upon learning new facts after depositions are conducted. Therefore, the Court, in its discretion, finds that the delay in pleading the new causes of action and new allegations was not excessive under the circumstances presented. In any event, Defendants have failed to demonstrate surprise or prejudice. In reviewing the new causes of action, the court finds that the allegations set forth in the first (fraudulent inducement against the Dodds Defendants), third (accounting against the Dodds Defendants), fourth (breach of settlement agreement against the Dodds Defendants), fifth (injunction against Ginsberg), and fourteenth (conversion against all Defendants) causes of action sufficiently state a cause of action.

Turning to the remaining causes of action, the gravamen of a claim of unfair competition is the bad faith misappropriation of a commercial advantage belonging to another by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets (see *Allied Maintenance Corp. v. Allied Mech.*

Trades, Inc., 42 N.Y.2d 538, 541-543, 399 N.Y.S.2d 628 [1977]; *Comprehensive Community Dev. Corp. v. Lehach*, 223 A.D.2d 399, 636 N.Y.S.2d 755 [1st Dept. 1996]; *Advanced Magnification Instruments, Ltd. v. Minuteman Optical Corp.*, 135 A.D.2d 889, 891, 522 N.Y.S.2d 287 [3rd Dept. 1987]).

Turning to the allegation that Defendants misappropriated trade secrets, a trade secret is “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 Mgt. Inc. v. Janien*, 82 N.Y.2d 395, 407, 604 N.Y.S.2d 912 (1993). **Restatement (Third) of Unfair Competition** § 39 defines a trade secret as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”

Applying these principles, the Court finds that the complaint fails to allege the essential elements of unfair competition. In addition, the allegations that Defendants misappropriated trade secrets is duplicative of the breach of contract causes of action. Moreover, the complaint fails to allege what secrets were taken other than client lists, which presumably Defendants knew about since each Defendant was closely involved in Plaintiff’s business for a number of years (see *Precision Concepts, Inc. v. Bonsanti*, 172 A.D.2d 737, 569 N.Y.S.2d 124 [2d Dept. 1991]). Therefore, the Court finds, in its discretion, that the proposed twelfth and fifteenth causes of action are palpably insufficient as a matter of law.

Accordingly, the motion seeking leave to amend the complaint is granted to the extent that leave is granted to add the additional facts and proposed first through eleventh, thirteenth, and fourteenth causes of action. Plaintiff is directed to serve and e-file the amended complaint upon the deletion of the twelfth and fifteenth causes of action.

The foregoing constitutes the decision and Order of the Court.

DATED: MAY 31, 2016
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.