

U.S. RE Cos., Inc. v Newhouse
2017 NY Slip Op 32772(U)
January 19, 2017
Supreme Court, New York County
Docket Number: 451505/2016
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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U.S. RE COMPANIES, INC.,

Plaintiff,

-against-

Index No. 451505/2016

BRITT NEWHOUSE, GUY CARPENTER & COMPANY,
and SCOTT BISHOP,

Defendants.

-----X
DEBRA A. JAMES, J.:

Defendants Britt Newhouse (Newhouse), Guy Carpenter & Company, LLC (Guy Carpenter) and Scott Bishop (Bishop) move for an order, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a claim.

In this action, plaintiff U.S. RE Companies, Inc. asserts various breach of contract and tort claims against defendants Guy Carpenter, the potential purchaser and a competitor of plaintiff; Britt Newhouse, Guy Carpenter's principal and a long time friend of Tal Piccione, plaintiff's principal; and Scott Bishop, plaintiff's former senior vice president and Guy Carpenter's new employee.

CONCLUSION

The court shall grant defendants' motion to dismiss to the extent that the third (breach of covenant of good faith), fourth (misappropriation of trade secrets), fifth, seventh and eighth (tortious interference), ninth (unjust enrichment), and tenth (fraud) causes of action shall be dismissed.

BACKGROUND

Plaintiff is in the business of brokering the sale of reinsurance policies.

Plaintiff's Chairman and CEO is Tal Piccione (Piccione).

Defendant Guy Carpenter is in the same business, and defendant Newhouse is the chairman and a member of Guy Carpenter's board of managers.

Piccione and Newhouse worked together years ago at Guy Carpenter, and were friends.

On June 10, 2013, Bishop accepted the position of senior vice president of plaintiff, and executed a confidentiality, non-competition and non-solicitation agreement, providing that he would not disclose information pertaining to plaintiff's customers and client base, and would not entice away its clients, or intentionally interfere with plaintiff's relationships with any persons engaged with plaintiff, during his employ and for a year thereafter.

As of 2014, Bishop managed accounts and brokered sales of reinsurance policies to plaintiff's most profitable clients, including Union Mutual).

In August 2014, Newhouse, on behalf of Guy Carpenter, contacted Piccione seeking to acquire plaintiff's assets, including its renewal rights for reinsurance policies. On August 8, 2014, plaintiff and Guy Carpenter executed a non-disclosure

agreement in which Guy Carpenter agreed that it "shall not use any such confidential and proprietary information for any purpose other than in furtherance of the Acquisition". On October 1, 2014, Guy Carpenter sent plaintiff a term sheet for the acquisition.

On November 14, 2014, plaintiff provided Guy Carpenter with confidential and proprietary information about plaintiff's business, including its client list, customer base, and annual revenues, and, specifically, information about the Union Mutual policy account, which was generating about \$797,000.00 in revenue for plaintiff. Upon being informed by plaintiff about the potential sale, Bishop discussed the deal with Newhouse.

On April 28, 2015, Union Mutual advised plaintiff that it was terminating its relationship with plaintiff.

On May 1, 2015, Bishop resigned his position with plaintiff, and accepted the position of senior vice president of Guy Carpenter.

Union Mutual then placed its business with Guy Carpenter, and Bishop manages Union's account there. Plaintiff alleges, upon information and belief, that Bishop contacted and solicited plaintiff's other clients and customers, and that Newhouse contacted plaintiff's employees, to induce them to work for Guy Carpenter.

At the same time that it was pursuing the sale to Guy

Carpenter, plaintiff was engaged in negotiations to sell its reinsurance brokerage assets to Cooper Gay Swett & Crawford (Cooper Gay) for the same price of \$12 million. When Cooper Gay discovered that Union Mutual had terminated its relationship with plaintiff, it advised plaintiff that it was no longer interested in buying plaintiff's assets.

Plaintiff commenced this action asserting eleven (11) causes of action: breach of contract against Bishop; breach of contract against Guy Carpenter; breach of the covenant of good faith; misappropriation of trade secrets; tortious interference with contractual relations; theft of corporate opportunity against Bishop; tortious interference with prospective business advantage; tortious interference with prospective economic relations against Guy Carpenter and Newhouse; unjust enrichment; fraud; and injunctive relief against Guy Carpenter and Bishop.

Defendants move to dismiss the entire complaint on the ground that it fails to state a claim.

DISCUSSION

Contract Claims

To state a claim for breach of contract, plaintiff must plead the existence of a contract, the plaintiff's performance, the defendant's breach, and damages (see Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., 139 AD3d 515, 515 [1st Dept 2016]; Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept

2010])).

In its first cause of action, plaintiff alleges that it entered into a confidentiality, non-competition and non-solicitation agreement with defendant Bishop that contained provisions regarding proprietary information, including client information, and setting forth Bishop's obligation to keep such information confidential and to use it only for plaintiff's purposes. Plaintiff alleges that it performed its obligations under the agreement, but that Bishop materially breached the agreement by soliciting plaintiff's clients, such as Union Mutual, and employees in order to induce them to terminate their relationship with plaintiff, and that plaintiff suffered damages by its loss of its clients, and of various deals to purchase its assets. Such allegations provide Bishop sufficient notice of the transactions intended to be proven at trial and the claims asserted, and sufficiently state a breach of contract claim (see Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445, 445-446 [1st Dept 2016] [breach of confidentiality agreement claim survives motion to dismiss]).

Similarly, the second cause of action alleges that plaintiff entered into a written non-disclosure agreement with Guy Carpenter that contained provisions regarding confidential and proprietary information, including information about plaintiff's business operations and strategies, clients and personnel, and

the details of the parties' deal and Guy Carpenter's obligation to keep such information confidential, and use it only for purposes in furtherance of the parties' deal. Plaintiff further alleges that it fulfilled its obligations under the agreement by disclosing its confidential information to Guy Carpenter, and that Guy Carpenter breached by inducing plaintiff's employee, defendant Bishop, and plaintiff's client, Union Mutual, to terminate its relationship with plaintiff, and to work for, and with, Guy Carpenter. Plaintiff asserts that it suffered damages through the loss of this major client and key personnel. This sufficiently states a breach of the non-disclosure agreement, and gives Guy Carpenter sufficient notice of the transactions intended to be proved at trial (see Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d at 446).

The third cause of action for breach of the covenant of good faith and fair dealing, however, is not cognizable. The claim, as against Bishop and Guy Carpenter, duplicates the first and second causes of action for breach of contract, as the claims all arise from the same facts, and seek the same damages (Moshan v PMB, LLC, 141 AD3d 496, 497 [1st Dept 2016]; Salomon v Citigroup Inc., 123 AD3d 517, 518 [1st Dept 2014]; Logan Advisors, LLC v Patriarch Partners, LLC, 63 AD3d 440, 443 [1st Dept 2009]).

Such third cause of action as against defendant Newhouse fails on the ground that there was no privity between Newhouse

individually and plaintiff, so there cannot be any covenant of good faith and fair dealing, which is implied from a contractual relationship (see Clervil v Bellevue, 77 AD3d 697, 698 [2d Dept 2010]; Four Winds of Saratoga v Blue Cross & Blue Shield of Cent. N.Y., 241 AD2d 906, 907 [3d Dept 1997]; Schwartzco Enterprises LLC v TMH Mgt., LLC, 60 F Supp 3d 331, 364 [ED NY 2014]; see also Kopelowitz & Co., Inc. v Mann, 83 AD3d 793, 797 [2d Dept 2011]; Pacific Carleton Dev. Corp. v 752 Pac., LLC, 62 AD3d 677, 678 [2d Dept 2009]).

Misappropriation of Trade Secrets

To establish a claim for misappropriation of trade secrets (the fourth cause of action), the plaintiff must show that (1) it possesses a trade secret, and (2) the defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means, and (3) the plaintiff was damaged (Doubleclick, Inc. v Henderson, 1997 WL 731413, *3, 1997 NY Misc Lexis 577, * 9 [Sup Ct, NY County 1997]). New York courts have adopted the trade secret definition set forth in the Restatement of Torts § 757, comment b, as "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" (*id.*; see Ashland Mgt. Inc. v Janien, 82 NY2d 395, 407 [1993]; U.S. Reins. Corp. v Humphreys, 205 AD2d 187, 191 [1st Dept 1994]).

The factors considered in evaluating claims of trade secrecy include:

“(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others”

(Restatement of Torts § 757, comment b [1939]). Where a plaintiff seeks trade secret protection for confidential customer lists, it must allege, among other things, that the customer lists were not readily ascertainable from sources outside its business, and that to secure them, plaintiff expended considerable time and money (Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp., 42 NY2d 496, 499 [1977]; Leo Silfen, Inc. v Cream, 29 NY2d 387, 392 [1972]; see 1 Model Mgt., LLC v Kavoussi, 82 AD3d 502, 503 [1st Dept 2011]; Poller v BioScrip, Inc., 974 F Supp 2d 204, 215-216 [SD NY 2013]).

Plaintiff's allegations in its fourth cause of action lack any of the details required to state a trade secrets claim. Plaintiff fails to allege that its customer lists were not readily ascertainable from outside sources, or to detail the efforts it expended in creating the lists, the extent to which they were known by its employees, or the manner in which it

guarded the secrecy of the lists, and rather makes wholly conclusory assertions. So too its allegations about its annual revenues and business models lack any detail. Nor does it allege that defendants used plaintiff's trade secrets in breach of an agreement. For such reasons, this cause of action cannot be sustained.

Tortious Interference Claims

To plead a claim for tortious interference with a contract (the fifth cause of action), the plaintiff must allege (1) the existence of a valid contract with a third party; (2) about which defendant had knowledge; (3) the defendant's intentional procurement of the third party's breach of that contract, without justification; and (4) damages (MVB Collision, Inc. v Allstate Ins. Co., 129 AD3d 1041, 1043 [2d Dept 2015]; see NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d 614, 620-621 [1996]). The fifth cause of action must be dismissed because plaintiff fails to allege that there was a breach of any contract with Union Mutual.

A claim for tortious interference with a prospective business relationship (i.e., an economic advantage) (the seventh and eighth causes of action), requires the plaintiff to allege: "(1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant's intentional interference with the relationship; (3) that the defendant acted

by the use of wrongful means or with the sole purpose of malice; and (4) resulting injury to the business relationship" (534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 542 [1st Dept 2011]; see NBT Bancorp v Fleet/Torstar Fin. Group, 87 NY2d at 621). "Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract" (Carvel Corp. v Noonan, 3 NY3d 182, 191 [2004] [internal quotation marks and citation omitted]; Arnon Ltd. (IOM) v Beierwaltes, 125 AD3d 453, 453 [1st Dept 2015]).

In the seventh cause of action, plaintiff alleges that it expected to consummate a sale of its assets to Cooper Gay, defendants knew of that intent to sell, and "intentionally interfered" with it. These conclusory allegations fail to set forth the required elements, particularly regarding the element of wrongful means, which plaintiff completely failed to plead.

Similarly, in the eighth cause of action, plaintiff fails to allege that defendants Guy Carpenter and Newhouse used wrongful means, beyond persuasion alone, to interfere with the plaintiff's relationships with clients, such as Union Mutual, or that their motive was solely to harm the plaintiff as opposed to advancing their own economic interests (see Carvel Corp. v Noonan, 3 NY3d

at 191; Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 191 [1980]; Sustainable PTE Ltd. v Peak Venture Partners LLC, 2017 NY Slip Op 04063, * 1 [1st Dept 2017]; Habitat, Ltd. v Art of the Muse, Inc., 81 AD3d 594, 595 [2d Dept 2011]).

This court, even on a motion to dismiss, is not required to accept plaintiff's conclusory allegations, particularly allegations, such as those asserted here, characterizing another party's state of mind as "intentional, malicious and without justification", without specifying any facts; see Global Packaging Servs., LLC v Global Printing and Packaging, 248 F Supp 3d 487, 494 [SD NY 2017]). Accordingly, the fifth, seventh and eighth causes of action are unsustainable.

Theft of Corporate Opportunity

To plead a claim for diversion or theft of a corporate opportunity (the sixth cause of action), the plaintiff must show that the corporate officer, or others who occupy a fiduciary position in relation to a corporation, "without consent, divert[ed] and exploit[ed] for their own benefit an opportunity that should be deemed an asset of the corporation" (Bankers Trust Co. v Bernstein, 169 AD2d 400, 401 [1st Dept 1991]). A corporation is entitled to a corporate officer's undivided loyalty (Owen v Hamilton, 44 AD3d 452, 454 [1st Dept 2007]).

Here, plaintiff sufficiently alleges that Bishop, a senior vice president, diverted plaintiff's former client, Union Mutual,

an asset of the company, for his own benefit by taking the client with him to his new employer, and in violation of his duty of loyalty to plaintiff. Such claims are sufficient to withstand the motion to dismiss at this early stage of the litigation.

Unjust Enrichment

An unjust enrichment claim (the ninth cause of action) is based on the assertion that the defendant has obtained a benefit which in "equity and good conscience" should be paid to the plaintiff (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). Unjust enrichment, however,

"is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled"

(Corsello v Verizon New York, Inc., 18 NY3d 777, 790 [2012]). It is not available where the plaintiff is simply restating a conventional contract or tort claim (id.; see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388-389 [1987]).

Similarly, where the parties have entered into a contract that governs the dispute, a party may not recover in unjust enrichment (IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 142

[2009] [unjust enrichment invokes an "obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned"]; Cox v NAP Constr. Co., Inc., 10 NY3d 592, 607 [2008]). Here, the non-disclosure agreement with Guy Carpenter, and the confidentiality, non-competition and non-solicitation agreement with Bishop, govern the parties' dispute, and, thus, plaintiff's claim for unjust enrichment is dismissed.

Fraud

To assert a fraud claim (the tenth cause of action), the plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (Mandarin Trading Ltd. v Wildenstein, 16 NY3d at 178 [internal quotation marks and citation omitted]). In addition, pursuant to CPLR 3016 (b) "where a cause of action is based in fraud, 'the circumstances constituting the wrong shall be stated in detail'" (*id.*, quoting CPLR 3016 [b]), "including specific dates and items" (Creмоса Foods Co., LLC v Amella, 130 AD3d 559, 559 [2d Dept 2015]). The amended complaint completely fails to allege any dates or details of any of the alleged misrepresentations made to it specifically by any of the defendants, as required by

CPLR 3016 (b) (*id.* at 560; see Lee Dodge, Inc. v Sovereign Bank, N.A., 148 AD3d 1007, 1008 [2d Dept 2017]). This claim is not sufficiently pled.

Injunction

Injunctive relief (the eleventh "cause of action") is a remedy that depends upon the merits of a substantive claim (see Weinreb v 37 Apts. Corp., 97 AD3d 54, 58 [1st Dept 2012]). It is permissible to seek an injunction where the plaintiff has a substantive claim against the defendant (*id.*). Plaintiff's claims for breach of Bishop's confidentiality, non-competition and non-solicitation agreement, and Guy Carpenter's non-disclosure agreement, may provide plaintiff with a basis to seek such relief, and while the relief does not constitute a separate cause of action per se, this court will not dismiss the "claim".

ORDER

Accordingly, it is

ORDERED that the motion to dismiss of defendants is granted to the extent that the third through fifth, and the seventh through tenth causes of action are dismissed, and the motion is otherwise denied; and it is further

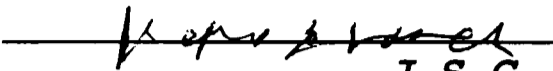
ORDERED that defendants shall serve an answer to the amended complaint in accordance with CPLR 3211(f); and it is further

ORDERED that counsel are directed to appear for a preliminary conference in IAS Part 59, Room 331, 60 Centre

Street, on February 27, 2018, at 9:30 AM.

Dated: January 19, 2017

ENTER:


J.S.C.
DEBRA A. JAMES