

Cogint, Inc. v Moraes
2018 NY Slip Op 30247(U)
February 9, 2018
Supreme Court, New York County
Docket Number: 159597/2017
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

 Cogint, Inc. and Fluent, LLC,

Index No.: 159597/2017

Plaintiffs,

- DECISION/ORDER

-against-

Motion Sequence 001

Alberto Moraes,

 Defendant.

PAUL A. GOETZ, J.S.C.:

This action arises from the resignation of Defendant Moraes, the former Vice President of Performance Marketing at Fluent Inc., who left Fluent on October 6, 2017 to join Media.net, a company that is alleged to be in direct competition with Fluent. Defendant Moraes moves pursuant to CPLR 3211(a)(1) and (7) to dismiss all five of the causes of action in the complaint.

In the first cause of action, plaintiffs allege that Moraes breached the non-compete provision in his January 1, 2017 employment contract with Fluent (the “Agreement”), which prohibits Moraes from working for any business anywhere in the world which provides “digital marketing or advertising technology or services to advertisers or publishers” for one year after the termination of his employment (*See* Agreement, p. 1 (whereas clause defining Fluent’s “Business”) and ¶ 7[d], attached as Exh. B to the Affirmation of Harris M. Mufson). Plaintiffs contend that the non-compete provision should be evaluated under the more lenient “sale of business” analysis because it was negotiated simultaneously with plaintiff’s acquisition of Moraes’ former company, Q Interactive. However, unlike the cases cited by plaintiffs, Moraes was never a shareholder of Q Interactive and the acquisition was not contingent on his approval (*See, e.g., Payment Alliance Intern. V. Ferreira*, 530 F.Supp.2d 477, 483 (S.D.N.Y. 2007) (applying sale of business standard where defendant employee was owner of the company

acquired by plaintiff and executed a consent form authorizing the acquisition)). Plaintiffs' argument that the Agreement was ancillary to the sale of the business is further undermined by the fact that the Agreement plaintiffs seeks to enforce was executed six months after the acquisition (*See FTI Consulting Inc. v. Graves*, 2007 WL 2192200 (S.D.N.Y. 2007) (holding that restrictive covenant should be evaluated as traditional employment contract where agreement was negotiated prior to sale as incentive for employee to join new employer and employee had no legal or equitable interest in the company sold)). Accordingly, the Agreement should be construed as an employment contract and evaluated under the "prevailing standard of reasonableness" applicable to employee agreements not to compete (*BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389 (1999)).

Applying this standard, defendant argues that the non-compete provision in the Agreement is unreasonably broad on its face and unnecessary to protect Fluent's legitimate business interests. In general, non-compete provisions in employment agreements will be enforced if reasonably limited and only to the extent necessary to protect the employer's use of trade secrets, confidential customer information or protection from competition by a former employee whose services are unique or extraordinary (*BDO Seidman*, 93 N.Y.2d at 388-89). Although defendant cites to case law where courts have refused to enforce similar industry wide non-compete provisions, these decisions were rendered on motions for a preliminary injunction or for summary judgment, which both require an evidentiary showing (*See Silipos Inc. v. Bickel*, 2006 WL 2265055, at *6 (S.D.N.Y. Aug. 8, 2006) (granting motion to enjoin enforcement of non-compete after evidentiary hearing); *Banner Industries of North East, Inc. v. Wicks*, 71 F.Supp. 3d 284, 303 (N.D.N.Y. 2014) (granting summary judgment motion to dismiss claim for breach of non-compete provision)). By contrast, on a motion to dismiss under CPLR 3211(a)(1)

and (7), the court is limited to examining the complaint (and the proffered documentary evidence under (a)(1)) to determine whether the complaint states a cause of action (*Greystone Funding Corp. v. Kutner*, 121 A.D.3d 581, 583 (1st Dep't 2014)). It is well settled that "in assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts as alleged in the complaint to be true and afford the plaintiff the benefit of every possible inference" (*Id.*). Further, "[w]hether the plaintiff will ultimately be successful in establishing its allegations is not part of the calculus" (*Id.*).

According plaintiffs the benefit of every favorable inference, the allegations in the complaint sufficiently establish that the non-compete is necessary to protect Fluent's legitimate business interests, including the protection of trade secrets and confidential client information. For example, plaintiffs allege that Moraes, as a key employee and Vice President of Performance Marketing at Fluent, "learned the secrets of Fluent's business, including most saliently its successful formula and methods for its co-registration path business model" and "Fluent's push notification business model and operations" (Complaint, ¶¶ 46-48). Given the procedural posture of the motion, this claim withstands dismissal as there is a reasonable view of the pleadings to establish that the non-compete is necessary to protect Fluent's legitimate business interests (*See Greystone Funding Corp. v. Kutner*, 121 A.D.3d 581, 583-84 (1st Dep't 2014) (finding that factual issue existed at pleading stage to preclude dismissal of breach of non-compete claim); *Bender Ins. Agency v. Treiber Ins. Agency*, 283 A.D.2d 448, 449-450 (2d Dep't 2001) (holding that although plaintiff failed to establish entitlement to preliminary injunction, this did not render the non-compete unenforceable as a matter of law and trial court properly denied motion to dismiss claim based on breach of this agreement); *Trans-Continental Credit & Collection Corp. v. Foti*, 270 A.D.2d 250, 251 (2d Dep't 2000) (holding that allegations in complaint established

that restrictive covenants in the agreements were necessary to protect confidential client information)). Likewise, plaintiffs' claim based on breach of the Agreement's confidentiality provision also withstands dismissal.

Plaintiffs also claim that Moraes breached the three-year term provision of the Agreement by terminating his employment at Fluent after only nine months. Defendant argues that although the Agreement was for a three-year term, Moraes' employment at Fluent was at-will. In support of this argument, defendant points to ¶ 5[a][iv] of the Agreement, which provides that the employer may terminate the Agreement or Moraes' employment at any time. However, the Agreement does not provide the employee with a corresponding right to terminate his employment at will and this omission, coupled with the fact that the parties explicitly granted this right to the employer, shows that Moraes did not have the right to terminate his employment without cause (*CNR Healthcare Network v. 86 Lefferts Corp.*, 59 A.D.3d 486, 489 (2d Dep't 2009) (stating that "[a] contract should be read as a whole . . . so as to give full meaning and effect to its material provisions.")). Accordingly, plaintiffs have stated a claim for breach of the Agreement's term provision.

Defendant also argues that plaintiffs' fraud claim is duplicative of its breach of contract claim. Although plaintiffs allege that Moraes schemed with Media.net prior to signing the Agreement and never intended to carry out its terms, this is insufficient to establish a separate fraud claim (*Jeffers v. American Univ. of Antigua*, 125 A.D.3d 440, 442-42 (1st Dep't 2015) (stating that "a mere misrepresentation of intention to perform under the contract is insufficient to allege fraud")). Plaintiffs' breach of fiduciary duty and unjust enrichment claims are similarly duplicative of their breach of contract claims and should be dismissed (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009) (stating that "[w]here the parties

executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded”); *Uni-World Capital L.P. v. Preferred Fragrance, Inc.*, 43 F.Supp.3d 236, 244 (S.D.N.Y. 2014) (stating that “[w]here a fiduciary duty is based upon a comprehensive written contract between the parties, a claim for breach of fiduciary duty is duplicative of a claim for breach of contract and must be dismissed”). Finally, plaintiffs’ allegations that Moraes has misappropriated Fluent’s trade secrets and confidential information in order to build Media.net’s business are sufficient to state a claim for unfair competition (*Beverage Mktg. USA v. South Beach Beverage Co.*, 20 A.D.3d 439, 440 (2d Dep’t 2005) (holding that allegations that defendants exploited proprietary information acquired by employee during his employment with plaintiff are sufficient to state unfair competition claim)).

Accordingly, it is

ORDERED that defendant’s motion is granted with respect to the second, third and fourth causes of action and is otherwise denied; and it is further

ORDERED that defendant shall file an answer to the complaint within thirty days of entry of this order.

Dated: February 9, 2018


HON. PAUL A. GOETTE