

<b>Quadlogic Controls Corp. v Swarztrauber</b>
2019 NY Slip Op 32378(U)
August 8, 2019
Supreme Court, New York County
Docket Number: 150427/2018
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 150427/2018

QUADLOGIC CONTROLS CORPORATION,

MOTION DATE 04/24/2019

Plaintiff,

MOTION SEQ. NO. 004

- v -

SAYRE SWARZTRAUBER,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for DISMISS

Motion to dismiss the amended complaint, pursuant to CPLR 3211 (a) (7), by Defendant Sayre Swarztrauber is granted in part and denied in part for the reasons stated herein and in the oral argument record of April 24, 2019.

BACKGROUND

Plaintiff Quadlogic Controls Corporation is a New York corporation, located in Long Island City, that is in the business of developing, manufacturing, and selling electric meters and related products, and provides ancillary services associated with the meters. Defendant was the Chairman and Chief Executive Officer (collectively, "CEO") of Plaintiff from 1982 to 2017.

According to the amended complaint, on February 23, 2017, Plaintiff entered into a Master License Agreement (the "MLA") with non-party Pounce Electronics, S.A., de C.V. ("Pounce") - an electric metering provider in Mexico and Latin America - which apparently Defendant executed as Plaintiff's then-CEO. (Am. Compl. ¶¶ 9-11.) According to Plaintiff, in exchange for royalties, the MLA licenses to Pounce the use of certain of Plaintiff's intellectual property, including but not limited to patents, trademarks, software, system specifications, and know-how belonging to Plaintiff as pertains to electric meters and electric metering systems (the "Licensed IP").

As a condition of the MLA, Pounce agreed to the following section 3.2:

"During the License Term and the five (5) year period following the first to occur of the termination of the License Term and the termination of this Agreement (i) Pounce and its Affiliates shall not license, sublicense, transfer or otherwise grant a Person not authorized by Paragraph 3.1 any rights to use the Licensed

Property anywhere in the world, or engage any third party to manufacture the Licensed Products, including the Meters and Metering Systems; (ii) Pounce and its Affiliates shall not sell or transfer the Licensed Products to any Person outside of the Territory' or for distribution, use or resale outside of the Territory; and (iii) Pounce and its Affiliates shall not manufacture, market, sell or distribute in the Territory or anywhere in Central and South America or the islands of the Caribbean Sea any metering systems that measure the use of electricity other than the Licensed Products, or that are similar to or would directly or indirectly compete with the Licensed Products, except under another written agreement with Quadlogic.”

(Am. Compl. ¶ 10.)

Plaintiff alleges that Defendant left its employment as Plaintiff’s CEO in August 2017 and began working as Pounce’s Chief Technology Officer (“CTO”) in December 2017. Plaintiff alleges that prior to his departure, Defendant caused Plaintiff to pay him a \$90,000 bonus which he knew the Board of Directors had not authorized. In addition, Plaintiff alleges that, prior to his departure, Defendant was “required” to turn over to Plaintiff “the intellectual property he developed and possessed on behalf of the company, including but not limited to software, firmware, source code, object code, and to have assembled and left this information in a manner and format so as to allow Quadlogic to make use of such intellectual property to continue to develop, market, sell, and service its meters and metering systems.” (Am. Compl. ¶ 25.) Plaintiff alleges that Defendant did not do this prior to his departure and that he continues to refuse to do so.

In the amended complaint, Plaintiff alleges, on information and belief, that Defendant has taken and has been using its proprietary information and property to develop electric metering systems at Pounce that will compete in the Latin American market with Plaintiff’s products in violation of the MLA.

On supplemental briefing on this motion, Plaintiff submitted a deposition transcript of Defendant testifying pursuant to a judgment collection subpoena in a separate action—wherein Plaintiff sued Pounce in federal court and obtained a default judgment. In said deposition, Defendant stated that during his time at Pounce, he worked on developing a metering product similar to “the G-34 meter” which Quadlogic alleges, in the instant matter, constitutes a competing product that would violate section 3.2 (iii) of the MLA. (Swarztrauber EBT at 17:09-19:22.) Plaintiff asserted, in its supplemental papers, that Defendant facilitated Pounce’s breach of the MLA by enabling Pounce “to stop making royalty payments to Quadlogic on account of contracts that were already completed, since Pounce was no longer looking to Quadlogic to provide the technology necessary for the G-34 project, and Pounce no longer perceived that it required Quadlogic’s help or support, since that was being supplied by Swarztrauber.” (Supp. Affirm in Opp. ¶ 22.) In his supplemental opposition papers, Defendant argues that the work that was being done by Pounce on the G-34 meters—and any other work being done—fully

complied with the MLA in that Pounce was using the very intellectual property and software from Plaintiff that it paid royalties to license.

Based on the aforesaid factual allegations, the amended complaint alleges the following six causes of action for which Plaintiff seeks monetary damages: i) tortious interference with contract for assisting Pounce in selling electrical meters without paying royalties to Plaintiff; ii) breach of fiduciary duty for disclosing Plaintiff's trade secrets and intellectual property to Pounce; iii) breach of fiduciary duty for causing Plaintiff to pay him a \$90,000 bonus without the board of directors' knowledge or consent; iv) breach of fiduciary duty for not turning over information necessary to access Plaintiff's intellectual property, prior to Defendant's departure; v) unjust enrichment; and vi) unfair competition for misappropriating Plaintiff's intellectual property for the benefit of Pounce.<sup>1</sup>

This Court will discuss the motion to dismiss with regard to each of the six causes of action in turn.

## DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].) Furthermore, a court "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." (*Leon v Martinez*, 84 NY2d 83, 88 [1994].)

### I. Tortious Interference with the MLA

The elements of a cause of action for tortious interference with a contract are "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]; see also *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *Burrows v Combs*, 25 AD3d 370, 373 [1st Dept], lv denied 7 NY3d 704 [2006].) The complaint must include factual allegations

<sup>1</sup> The Court notes that the amended complaint originally also sought injunctive relief. However, that requested relief was withdrawn by Plaintiff at oral argument, given that Defendant no longer works at Pounce. (Oral Argument Tr. at 48:24-49:01.)

concerning how the contract was breached and how the defendant induced the breach, and these allegations may not be “speculative and conclusory.” (*Money Garden Corp. v CMC Mkts. (US) LLC*, 44 AD3d 551, 551 [1st Dept 2007]; *31 Cornelia Props. Corp. v Lemma*, 136 AD3d 584, 585 [1st Dept 2016]; see also *Chestnut Hill Partners, LLC v Van Raalte*, 45 AD3d 434, 435 [1st Dept 2007].)

In sum and substance, Plaintiff asserts that Defendant knew of Plaintiff’s contract with Pounce—since he executed the contract as Plaintiff’s CEO—and then went to work for Plaintiff’s licensee Pounce on the latter’s G-34 metering system effectively cutting out Plaintiff from royalties in breach of the MLA. Although Pounce may not yet have successfully sold a G-34 meter, Plaintiff alleges that Pounce was “paying Quadlogic for the development. So, if Quadlogic had successfully developed this meter to its conclusion, it would have gotten ‘X’ dollars whatever it is. If it had been successfully sold to the Mexican utility, it would have been multiples of that.” (Oral Arg. Tr. at 22:19-25.) This Court finds that the aforesaid sufficiently alleges a cause of action for tortious interference with the MLA.

In addition, Defendant’s argument that this cause of action must be dismissed because Plaintiff was acting within the scope of his employment as CTO of Pounce is misplaced. The cases Defendant relies on for that proposition involved claims of tortious interference with employment contacts against co-employee defendants who, in sum and substance, were alleged to have complained about the plaintiff in the scope their employment. (See Oral Arg. Tr. at 5:07-6:25, citing *Tsadik v Beth Israel Med. Ctr.*, 13 Misc 3d 359, 365 [Sup Ct, NY County 2006].) This Court similarly rejects the argument that the instant tortious interference claim is essentially an alter ego liability claim in disguise for Pounce’s breach of contract. (See *id.*)

Accordingly, the motion to dismiss the first cause of action for tortious interference with the MLA is denied.

## **II. Breach of Fiduciary Duty for Disclosing Plaintiff’s Propriety Intellectual Property and Trade Secrets to Pounce**

“To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct.” (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011].) “[D]amage is an essential element [and] the claim is not enforceable until damages are sustained.” (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009].) Pursuant to CPLR 3016 (b), a cause of action for breach of fiduciary duty must be pled with requisite particularity. (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011].)

Defendant argues that Plaintiff fails to supply any factual detail to its claim that he disclosed Plaintiff’s trade secrets or proprietary information, and that this allegation is made solely on “information and belief.” Defendant argues that as such this cause of action, here, is not pled with sufficient particularity pursuant to CPLR 3016 (b).

Plaintiff opposes arguing Defendant misstates the law and that a cause of action for breach of fiduciary duty is sufficiently pled so long as the defendant is provided with sufficient information to inform him of the substance of the claims, and that it has long been the rule that CPLR 3016's pleading standards should not "be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting the complained of action." (Memo in Opp. at 2.)

While this Court finds that Plaintiff has set forth sufficient factual allegations to satisfy its claim for tortious interference against Defendant, it finds that the instant allegations are insufficient to satisfy the heightened pleading standard, under CPLR 3016 (b), that Defendant breached a fiduciary duty to Plaintiff by supplying proprietary IP and / or trade secrets to Pounce. It bears noting that while Defendant may have tortuously interfered with the MLA by knowingly assisting Pounce in cutting Plaintiff out of royalties it was entitled to, this does not mean Defendant necessarily used Plaintiff's IP or trade secrets to do so. Plaintiff contends, in sum and substance, that Defendant must have done so, otherwise why would Pounce hire Plaintiff. That is not enough to plead a breach of fiduciary duty, and it ignores an obvious answer: Pounce hired Defendant for his talent. Plaintiff has not set forth factual allegations as to what information Defendant purportedly disclosed to Pounce relating to the G-34 Meter and when the information was purportedly disclosed. The absence of these allegations deprives Defendant of sufficient information to apprise him of his alleged wrongdoing. (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010].)

Accordingly, the motion to dismiss the second cause of action for breach of fiduciary duty is granted.

### **III. Breach of Fiduciary Duty for Improperly Taking \$90,000 Bonus**

The amended complaint alleges that "[d]uring the spring of 2017, prior to his departure as CEO of Quadlogic, Swarztrauber, without authorization or entitlement to do so, caused Quadlogic to pay him a bonus of approximately \$90,000." (Am. Compl. ¶ 23.) It further alleges that "Swarztrauber knew that the Board of Directors had not authorized his taking of the bonus at the time and in the manner in which he took it." (Id. ¶ 24.)

This sufficiently states a claim for a breach of fiduciary duty. It states when the bonus was paid, states that Defendant was, at that time, Plaintiff's CEO and therefore was in a fiduciary relationship with Plaintiff, and further states the purported wrongful conduct that the bonus was without the board's knowledge and consent and the damages suffered. Defendant can, of course, obtain additional information through the discovery process to defend the claim by, for example, identifying his bonuses in prior years and bonuses to other officers. However, for the purposes of the motion, Plaintiff has adequately set forth a cause of action for breach of fiduciary duty on its claim relating to the \$90,000 bonus with sufficient particularity.

Accordingly, the motion to dismiss the third cause of action for breach of fiduciary duty is denied.

#### IV. Breach of Fiduciary Duty for Failing to Properly Provide Access to Plaintiff's IP

According to the amended complaint, “Swarztrauber was the Chairman and CEO of Quadlogic, and as such he owed the company a fiduciary duty, including but not limited to the duty to turn over to the company, prior to his departure, all of Quadlogic’s intellectual property that he developed on its behalf in a manner and form so as to enable Quadlogic to make use of its property.” (Am. Compl. ¶ 66.) The amended complaint alleges that Defendant has violated this fiduciary duty by failing to “turn over to Quadlogic the information necessary to allow it to use its intellectual property in furtherance of its electric metering business.” (Id. ¶ 67.)

In the instant cause of action, Plaintiff alleges that, prior to his departure, Defendant had a fiduciary duty to perform certain work to render usable to Plaintiff certain products and intellectual property that he helped develop, and that he apparently had a duty to perform said work after he left Plaintiff’s employment. There is no allegation of an overt act by Defendant to make the aforesaid property unusable prior to Defendant’s departure. Plaintiff cites to no precedent for the proposition that one can breach a fiduciary duty by not, in sum and substance, ensuring that one’s departure from employment is painless for the employer. That is because there is no such duty.

Accordingly, the motion to dismiss the fourth cause of action for breach of fiduciary duty is granted.

#### V. Fifth Cause of Action for Unjust Enrichment

The branch of the instant motion seeking to dismiss the fifth cause of action was granted during the oral argument, on this motion, for the reasons stated on the record. (Oral Arg. Tr. at 26:08-27:15.)

#### VI. Sixth Cause of Action for Unfair Competition

To allege a claim for unfair competition, a plaintiff must allege the “defendant acted in bad faith in misappropriating a commercial advantage belonging to plaintiff.” (*Redf Organic Recovery, LLC v Rainbow Disposal Co., Inc.*, 116 AD3d 621, 622 [1st Dept 2014].)

Again, while the amended complaint has sufficiently stated a claim for tortious interference with MLA, the amended complaint fails to state any other potential wrongs that Defendant did to assist in breaching the MLA. Although the amended complaint speculates that Defendant illegally shared its IP and proprietary information with Pounce, there is no specific factual allegations as to how and when Defendant did so. Moreover, even giving the amended complaint the most generous reading possible, it would appear that Plaintiff’s unfair competition claim is actually directed at Pounce—not Defendant. (*See generally ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 476 [2007].)

Accordingly, the motion to dismiss the sixth cause of action for unfair competition is granted.

CONCLUSION

ACCORDINGLY, it is hereby

ORDERED that the motion to dismiss the amended complaint, pursuant to CPLR 3211 (a) (7), by Defendant Sayre Swarztrauber is granted in part and denied in part to the extent that second, fourth, fifth, and sixth causes of action are dismissed and the motion is otherwise denied, with costs and disbursements to said Defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Defendant; and it is further

ORDERED that Defendant is to serve upon Plaintiff via NYSCEF, with notice of entry, a copy of the instant memorandum decision and order together a copy of the record of oral argument of April 24, 2019 (the "Oral Argument Transcript"), within twenty (20) days.

The instant memorandum decision and order together with the Oral Argument Transcript shall constitute the decision and order of the Court.

8/8/2019  
DATE

*Robert David Kalish*  
ROBERT DAVID KALISH, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLE ORDER  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE