

Creative Circle, LLC v Norelle-Bortone
2019 NY Slip Op 34004(U)
August 26, 2019
Supreme Court, New York County
Docket Number: 655673/2018
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

CREATIVE CIRCLE, LLC,

Plaintiff,

-against-

SUSAN NORELLE-BORTONE and 24 SEVEN, LLC,

Defendants.

X

DECISION AND ORDER
Index No.: 655673/2018

Motion Sequence No.: 001

X

O. PETER SHERWOOD, J.:

Under motion seq. 001 defendants seek to dismiss the complaint pursuant to CPLR 3211 (a)(1), (5), and (7). For the following reasons, the motion shall be granted in part and otherwise denied.

I. BACKGROUND

As this is a motion to dismiss the facts are taken from the complaint, unless otherwise indicated.

Plaintiff Creative Circle, LLC (“CC”) is a staffing agency that focuses on placing creative professionals. Defendant Susan Nortelle-Bortone (“Bortone”) was formerly employed by CC as a Lead Account Executive. Defendant 24 Seven is a direct competitor of plaintiff.

CC was owned by Morgan Stanley Capital Partners (“MSCP”) until June 5, 2015 when it was purchased by On Assignment, Inc. (“ASGN”) for \$600,000. MSCP had access to CC’s confidential information, knew all of its key employees, and was aware that most CC employees are party to a Confidentiality, Non-Solicitation, and Non-Competition Agreement. The purchase agreement between MSCP and ASGN also contained a non-solicitation provision prohibiting MSCP from interfering with CC’s relationships with its customers and clients for a period that expired on June 5, 2018. On October 16, 2016, MSCP announced its investment in CC’s competitor 24 Seven. MSCP then sought to replicate CC’s business model with 24 Seven, in the interest of ultimately replicating the profit it made with CC. MSCP proceeded to direct 24 Seven to “go after” CC’s employees.

Defendant Bortone worked for CC for twelve years, from 2006 to 2018. She started as a Recruiter at CC with no prior industry experience, but advanced through successively senior positions as Account Executive, Senior Account Executive and Lead Account Executive, as results

of CC's extensive formal and informal training. CC also gave her financial support in the form of paying for networking events and client entertainment. Ultimately, she became "second in command to the Sales Manager in the New York City Office." Her responsibilities as an Account Executive included "generating revenue and sales by bringing in new clients, growing relationships with existing clients, obtaining job orders from clients for candidate placement, negotiating pay rates with clients, obtaining contracts with clients and addressing client service issues." As she took on senior and lead roles, she also gained management and training responsibilities. As a person in a senior position at CC, Bortone had access to a password-protected, confidential database, containing cultivated information regarding clients and potential clients.

Bortone initially signed an at-will employment agreement. On April 8, 2009, she signed a new employment agreement that contained confidentiality, non-competition, and non-solicitation provisions. On June 20, 2015, she entered into a new Confidentiality, Non-Solicitation and Non-Competition Agreement (the "Agreement") with CC, following ASGN's acquisition of the company, in exchange for a grant of restricted stock units. Section 1.0 of the Agreement outlines the types of Confidential Information that Bortone agreed not to use or disclose during or after her employment. Pursuant to section 2.2, she agreed not to work for any competitor within a 50 mile radius of any CC office where she had previously worked for a period of twelve months. Section 2.3 contains the non-solicitation provisions. Pursuant to section 4.2 of the agreement, Bortone "acknowledged that the restrictions contained therein would not prevent her from earning a living, and were reasonable and necessary to protect Creative Circle's legitimate interests, good will and customer relationships."

On July 2, 2018, Bortone submitted a resignation letter to CC, disclosing that she would be joining 24 Seven in a training role, promising not to share confidential information or solicit CC contacts, and requesting that CC otherwise waive her obligations under the Agreement (complaint, exhibit B). CC responded with cease and desist letters dated July 6, 2018 to Bortone and 24 Seven (complaint, exhibits B and C). Despite CC's warnings that it would enforce the Agreement, Bortone commenced her employment with 24 Seven on or about July 18, 2018.

Not only has 24 Seven poached Bortone, but it "has been engaged in a prolific and deliberate attempt to raid" CC's most successful employees and put CC out of business. For example, 24 Seven has actively recruited Melissa Sanchez, Senior Vice President of Operations,

as well as Emily Webber, Regional Director of Operations for Creative Circle's Great Lakes Region. Because MSCP previously owned CC, 24 Seven knows who the most valuable employees are. 24 Seven recruiters have sent hundreds of email communications to these people. 24 Seven is aware of the agreements that CC has in place with its employees and, in fact, requires its own employees to agree to similar terms.

The complaint asserts five causes of action: (i) breach of contract as against Bortone, (ii) unfair competition as against both defendants, (iii) tortious interference with contract as against 24 Seven, (iv) tortious interference with prospective economic relations as against both defendants, and (v) attorney's fees as against Bortone.

II. STANDARD

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2d Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,'" (*id.* at 84-85).

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC Iv Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

III. ARGUMENTS & DISCUSSION

a. Res judicata and collateral estoppel

Defendants first point out that plaintiff previously filed a complaint in federal court asserting eight causes of action, including those asserted here. Plaintiff also sought a temporary restraining order (TRO) and preliminary injunction against Bortone, 24 Seven, and three 24 Seven recruiters. While the TRO was issued, the preliminary injunction was not. In so deciding, the federal court found that Bortone did not take any documents from CC, that her knowledge does not rise to the level of a trade secret, that her role at 24 Seven is internally-facing, that Bortone has no present intention of returning to a sales role, and that "there is nothing wrong with recruiting from competitors, which Creative Circle knows given that it is in the staffing business" (mem at 4-5; Reice aff, exhibit 4 [Transcript]). After defendants moved to dismiss plaintiff's Defend Trade Secrets Act ("DTSA") claim, that claim was withdrawn. The court later dismissed *sua sponte* the remaining claims (Reice aff, exhibit 5 [October 22, 2018 Order]). Those claims reasserted in this action are therefore barred by res judicata and collateral estoppel.

In opposition, plaintiff contends that the claims are not barred by res judicata and collateral estoppel because there was no final judgment on the merits. The proceedings before the federal court consisted of a hearing on a preliminary injunction at the outset, but a decision on a preliminary injunction is not considered a final adjudication on the merits (*see Town of Concord v Duwe*, 4 NY3d 870, 875 [2005]). Defendants misrepresent the nature of the underlying proceedings. Plaintiff, having voluntarily decided to dismiss the DTSA claim that formed the only

basis for federal jurisdiction, voluntarily discontinued the remaining claims in federal court in order to properly bring the case here. For that reason only, the judge dismissed the claims *sua sponte* and without prejudice (opp at 14, citing *Wilson v Phoenix House*, 978 NYS2d 748, 760 [Sup Ct NY County 2013]).

In reply, defendants argue that the judicial records and informal judicial admissions made in another action qualify as documentary evidence that refutes the claims at bar. Bortone's affidavit is also documentary evidence that confirms that she "resigned [her] job at Creative Circle in lesser part, because there was limited opportunity for growth in that organization outside of sales and in greater part because [she] was wrongly passed over for promotion while on maternity leave" (Reice aff, exhibit 3 [Borton aff] ¶7).

Res judicata, or claim preclusion, may be invoked to estop a party, or one who is in privity with the party, from relitigating a previously litigated action" (NYPRAC-TORTS § 19:40; *Lopez v. Fenn*, 90 AD3d 569 [1st Dept 2011]). "A judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first" (*Schuykill Fuel Corp. v B. & C. Nieberz Realty Corp.*, 250 NY 304, 306–307 [1929]).

"Collateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same'" (*Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 349 [1999], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*Parker*, 93 NY2d at 349). Collateral estoppel will only be applied "to matters actually litigated and determined in a prior action" (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 456 [1985] [internal quotation marks omitted] citing Restatement [Second] of Judgements §27).

As plaintiff points out, a decision on a preliminary injunction is not considered a final adjudication on the merits (*see Town of Concord v Duwe*, 4 NY3d 870, 875 [2005] ["mere denial of the motion for a preliminary injunction did not constitute the law of the case or an adjudication on the merits"]; *J.A. Preston Corp. v. Fabrication Enterprises, Inc.*, 68 N.Y.2d 397, 402 [1986]

["The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits."]). The claims, other than the DTSA claim, were dismissed without prejudice for lack of jurisdiction (Reice affirmation, exhibit 5 [October 22, 2018 Order; NYSCEF Doc No. 17]). Those claims were not actually litigated. Also, there has not been a final adjudication of the merits of any of the issues. The complaint may not be dismissed on the basis of res judicata or collateral estoppel.

b. Breach of contract as against Bortone

With respect to the breach of contract claim, defendants argue that plaintiff cannot assert that there is a "protectable interest" justifying enforcement of the Agreement because the federal dismissal order constitutes undeniable proof of defense to breach of contract where the asserted protectable interest is a trade secret or good will (mem at 9). As to damages, the federal court already found that the same theory on damages is controverted by the facts and purely speculative (Reice aff, exhibit 4 [Tr at 54:12-13, 56:12-16]).

In opposition, plaintiff contends that it has alleged sufficient facts to support its breach of contract claim, including a "legitimate protectable interest" justifying enforcement of the restrictive covenants at issue (mem at 15). One of those interests is protection of CC's confidential information, including client identities and derivative information, pricing information, marketing strategies and business plans, all of which have been protected as trade secrets under New York law (*see Webcraft Techs., Inc. v McCaw*, 674 FSupp 1039, 1046-47 [SD NY 1987] [client identities, pricing information]; *Estee Lauder Cos. V Batra*, 430 FSupp2d 158, 175-76 [SD NY 2006] [marketing strategies and business plans]). Another interest is the protection of CC's goodwill with its clients, an essential asset in the staffing industry that is the result of significant investment and cultivation (*see BDO Seidman v Hirschberg*, 93 NY2d 382, 392 [1999]). Third, the employees at issue have unique abilities as a result of training and development, and plaintiff's interest in its investment should be protected (*see Maltby v Harlow Meyer Savage, Inc.*, 633 NYS2d 926, 930 [Sup Ct NY County 1995]; *Ticor Title Ins. Co. v Cohen*, 173 F3d 63 [2d Cir 1999]; *Frantic, LLC v Konfino*, No. 13 Civ. 4516, 2013 US Dist LEXIS 156951, at *6 [SD NY 2013]). Plaintiff does not need to allege with specificity the amount of damages it seeks in order to survive a motion to dismiss (*see Kensington Pub. Corp. v Kable News Co.*, 100 Ad2d 802, 802 [1st Dept 1984]), especially where plaintiff has alleged damage to good will or requested relief other than money damages.

In reply, defendants argue that plaintiff relies on distinguishable cases for the proposition that it has asserted a protectable interest. In *Webcraft*, like here, a sales representative was recruited by a competitor. Unlike this case, the representative provided the competitor with a list of her best-known customers. Moreover, *Webcraft* was a manufacturer of printed materials and the client information was deemed protectable because customers seeking printed materials are not easily identifiable or readily ascertainable and thus the client list qualified as a trade secret. Here, it is uncontested that Bortone did not take any documents or materials. Any company that uses temporary creative staff could be a client of either company, and that information is no secret (reply at 6-7). In *Estee Lauder*, the court found that the defendant possessed trade secrets as someone responsible for developing brand strategies and having knowledge about confidential products. But the staffing industry is very different from the makeup industry, where each company develops new products, chemical formulas and related marketing campaigns that are unquestionably confidential and proprietary (reply at 7-8).

With respect to plaintiff's damages on the breach of contract claim, because Bortone has not and will not use any information from CC for the benefit of 24 Seven as a trainer, it is disingenuous to claim any sort of damages. Damages with respect to any clients that Bortone had no relationship with during her employment are not sustainable as a matter of law (*see Scott, Stackrow & Co., CPAs PC v Skavina*, 9 AD3d 805 [3d Dept 2004]). CC concedes by omission that the assertion that it will be "financially harmed" is speculative and insufficient to support a claim for breach of contract (reply at 9).

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a

contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

In New York, “negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness” (*Reed, Roberts, Assocs., Inc. v Strauman*, 40 NY2d 303, 307 [1976]). The negative covenant must be “reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not unduly burdensome to the employee” (*Reed*, 40 NY2d at 307). Even then, the covenant is only enforceable if it is “necessary to protect the employer from unfair competition which stems from the employee’s use or disclosure of trade secrets or confidential customer lists” (*Howard Sys. Intern., Inc. v IMI Sys. Inc.*, 192 AD2d 371, 373 [1st Dept 1993]).

Defendants primarily challenge whether plaintiff has alleged a protectable interest. Plaintiff alleges that its confidential information, such as its clients lists, is protectable, citing *Webcraft* (674 FSupp at 1046-47) and *Estee Lauder Cos.* (430 FSupp2d at 175-76). *Webcraft* discusses the distinction between protectable and non-protectable client information. Protectable client information has been arduously developed, taking months to years to accomplish. The customers are “not readily ascertainable but only discoverable with great effort, and particularly where the patronage of such customers was secured through the expenditure of considerable time and money” (674 FSupp at 1045). Client lists are not protectable “where the customers are readily ascertainable outside of the employer’s business as prospective users or customers of the employer’s services or products” (*id.*, quoting *Leo Silfen, Inc. v Cream*, 29 NY2d 387 [1972]). Examples include consumers of milk (*see Abdallah v Crandall*, 273 AD 131 [3d Dept 1948]) and industrial and commercial users of building maintenance supplies (*see Silfen*, 29 NY2d 387 at 389).

Here, the plaintiff alleges that “[t]he success of a staffing company is directly dependent upon the good will and relationships it builds with its clients and with the candidates it places with clients. These relationships are cultivated over years and Creative Circle’s employees are the key to building and maintaining these relationships and good will” (complaint ¶ 40). Plaintiff also alleges that

“[o]ver the years and at significant expense, Creative Circle has cultivated enduring relationships with its clients. By virtue of her job duties, Bortone was provided access to confidential information about Creative Circle’s clients and prospective clients, and their staffing needs. Creative Circle maintains a password-protected

database that contains competitively sensitive information about those clients and prospective clients, such as: the identity and contact information for their key decision-makers and actual buyers of Creative Circle's services; client preferences; a history of the previous needs (job orders) fulfilled by Creative Circle; the identities, resumes, portfolios, desired salaries and contact information of the job-seekers that have been placed there; pricing information and information about current and projected staffing needs; and a history of sales calls, client visits and correspondence with those clients. None of this information is publicly available or easily ascertainable, and would be extremely valuable in the hands of a competitor"

(complaint ¶ 41). Given the benefit of every inference as CPLR 3211(a)(1) requires, plaintiff has pled an interest that is potentially protectable, and the claim for breach of contract may not be dismissed. To the extent defendants seek to have this claim dismissed on the basis of the documentary evidence, the findings of the federal court may qualify as documentary evidence but that evidence does not "utterly refute" plaintiff's claims as that court did not consider the breach of contract claims addressed here.

c. Unfair competition as against both defendants

Plaintiff argues that the claims for unfair competition and tortious interference are duplicative of the breach of contract claims because they are premised on Bortone's alleged breach of the Agreement (mem at 10). The "underlying allegations are 'merely a restatement, albeit in slightly different language, of the 'implied' contractual obligations asserted in the cause of action for breach of contract" (*Orange County Choppers, Inc. v Oloes Enters, Inc.*, 497 FSupp 2d 541, 558 [SD NY 2007]).

The unfair competition and tortious interference claims should also be dismissed because they are premised on the theory that there was something unlawful about Bortone's recruitment and essentially constitute impermissible "employee raiding claims" (mem at 11). In New York, raiding claims are only actionable where dishonest means were used, or the overarching scheme was designed solely to produce damage to a competitor (*see Lockheed Martin Corp. v Atlas Commerce Inc.*, 283 Ad2d 801, 803-04 [3d Dept 2001]; *Headquarters Buick-Nissan v Michael Oldsmobile*, 149 AD2d 302, 304 [1st Dept 1989]). Here, the complaint alleges that 24 Seven acted, at least in part, to gain a business advantage and benefit itself. Plaintiff does not allege that 24 Seven used dishonest means or acted "solely to produce damage" and seeks to avoid proving those elements by framing the claims as torts (mem at 12).

That this is an employee raiding claim is evident in that plaintiff has failed to state a claim for unfair competition. To state a claim for unfair competition, plaintiff must allege “bad faith misappropriation of a commercial advantage or property which belonged exclusively to it”, as well as special damages and a confidential relationship (*see Bongo Apparel, Inc v Iconix Brand Group, Inc.*, 18 Misc3d 1108[A], 2008 WL 41341, at *13 [Sup Ct NY County 2008]; *Private One of N.Y., LLC v IMRL Sales & Svce., Inc.*, 21 Misc3d 1106[A], 2008 WL 4482406, at *12 [Sup Ct Kings County 2008]). Plaintiff’s theory is that 24 Seven is using its confidential information to target and recruit its employees. Plaintiff does not allege that there has been a violation of a confidential relationship or agreement not to compete between CC and 24 Seven.

In opposition, plaintiff contends that the unfair competition claim has been sufficiently pled and it is untrue that a cause of action for “employee raiding” is not allowed (*Bronx-Lebanon Hosp. Ctr. v Wiznia*, 726 NYS2d 847 [1st Dept 2001]; *Metito (Overseas) Ltd. v General Electric Company*, No. 05-Civ-0478, 2009 WL 399221, at *14 [SD NY 2009]; *Duane Jones v Burke*, 306 NY 172 [1954]; *B-S Indus. Controls, Inc. v Bums Bros. Controls, Inc.*, 681 NYS2d 897 [3d Dept 1998]). 24 Seven brought “employee raiding” claims itself in 2017 in this court (Adams aff, exhibit 25). The allegations go far beyond regular recruiting practices (*see complaint ¶¶ 68-76*).

In reply, defendants argue that plaintiff actually admits that 24 Seven was motivated by economic gain, which is permissible *see (Advanced Global tech, LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 316 [1st Dept 2007]). Plaintiff has not established that “dishonest means [were] employed or the solicitation is part of a scheme designed solely to produce damage” and the claim must be dismissed. Nor has plaintiff established that 24 Seven exploited proprietary information or trade secrets.

Courts have interpreted the tort of unfair competition as embracing two theories: (1) “palming off, that is the sale of one’s goods or services, as though they were the goods or services of the plaintiff” and (2) “misappropriation, which ‘usually concerns the taking and use of the plaintiff’s property to compete against the plaintiff’s use of the same property’” (*Men Women NY Model Mgmt., Inc. v Ford Models, Inc.*, 32 Misc 3d 1236[A], 938 NYS2d 228 [Sup Ct 2011], citing *ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 478 [2007]). Any claim for unfair competition must “allege bad faith misappropriation of commercial advantage [or property] which belonged exclusively to plaintiff” (*LoPresti v. Massachusetts Mut. Life Ins. Co.*, 30 AD3d 474 [2d Dept 2006]; *Bongo Apparel, Inc. v. Iconix Brand Grp., Inc.*, 856 NYS2d 22 [Sup Ct NY County 2008]).

“In addition, a defendant must allege special damages...and there must also be a confidential relationship between the parties or a valid agreement to refrain from unfairly competing” (*Private One of New York, LLC v. JMRL Sales & Serv., Inc.*, 873 NYS2d 236 [Sup Ct NY County 2008]).

Here, the claims are not duplicative or precluded as “employee raiding” claims, but plaintiff has failed to state a misappropriation claim as against either Bortone or 24 Seven. Plaintiff alleges that “24 Seven has improperly gained access to [Creative Circle’s] Confidential Information through Bortone... 24 Seven and the Recruiters have engaged in unfair competition by actively and maliciously targeting and raiding Creative Circle’s employees, in an effort to build 24 Seven’s own business off the back of Creative Circle, divert business, customers, candidates and employees away from Creative Circle and deliberately harm the business of Creative Circle” (complaint ¶¶ 86, 88). With respect to Bortone, plaintiff alleges that she possesses confidential information, but not that she has misappropriated it in bad faith or used Creative’s confidential information improperly since leaving the company. With respect to 24 Seven, plaintiff has not alleged a confidential relationship between itself and 24 Seven (*see V. Ponte & Sons, Inc. v. Am. Fibers Int’l*, 222 AD2d 271, 271 [1st Dept 1995]; *Private One*, 873 NYS2d at *12).

d. Tortious interference with contract as against 24 Seven

Defendants argue that plaintiff has failed to state a claim for tortious interference with contract because there are no allegations of intentional procurement or but-for causation. As discussed above, the claim is duplicative of the breach of contract claim, and merely a repackaged, invalid “employee raiding claim”.

In opposition, plaintiff argues that the tortious interference with contract claim is not duplicative of the breach of contract claim because, first, the breach of contract claim is asserted against Bortone only, while the tortious interference claim is asserted against 24 Seven only. 24 Seven’s predatory and malicious attempts to steal CC’s employees has nothing to do with the breach of contract claim. Additionally, to the extent Bortone is not really taking a training job, her exploitation of CC’s confidential information and goodwill is also independent grounds for legal action (opp at 21). The tortious interference with contract claim is adequately pled because proof that the new employer was aware of the clause and “assisted or encouraged the [employee] to violate it to its benefit” is all that is needed to establish the claim (*see Barbagallo v Marcum, LLP*, 820 FSupp2d 429, 444-45 [ED NY 2011]; *Lockheed Martin*, 725 NYS2d at 725; *American Para Profl*, 625 NYS2d at 34). There is no dispute that 24 Seven knew about the clause, and despite

receiving a cease and desist letter from CC, 24 Seven sought to induce a breach by offering Bortone and other recruited employees fake training roles (*see* complaint ¶¶ 16[d], 72, 74-76).

In reply, defendants argue that the claim for tortious interference with contract cannot be maintained because the underlying restrictive covenant is not a valid contract (*see Lau v Lazar*, 130 AD3d 413 [1st Dept 2015], citing *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Even if there is a valid agreement, the allegations are conclusory (reply at 9). Plaintiff's opposition merely restates the complaint. As explained in *Jonas v Newedge USA, LLC*, the complaint must be dismissed where it merely speculates in conclusory terms (2008 WL 324815, 2008 NY Slip Op 32168 [Sup Ct NY County 2008]). Here, the complaint merely speculates that 24 Seven induced employees of CC to breach the non-compete provision of their agreement (*see* complaint ¶ 74). The Webber affidavit has the same effect (Adams aff, exhibit 8 [Webber aff]). Plaintiff has not and cannot allege but for causation because it would be untrue (reply at 11). Bortone has submitted sworn testimony and an affidavit that she was motivated to resign in the best interest of her family and because there were limited opportunities for growth at CC (*see* Tr. 50:3-4; Bortone aff ¶ 7).

To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendants' intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]).

In assessing the likelihood of success of the tortious interference claims with respect to the application for preliminary injunction, the federal court found that “[p]laintiff submits 24 Seven has inundated Creative Circle with a barrage of recruiting communications, but there is nothing wrong with recruiting from competitors, which Creative Circle knows given that it is in the staffing business. That 24 Seven has solicited numerous Creative Circle employees is not evidence to support tortious interference with contract because those solicitations have not resulted in any breach” (NYSCEF Doc No. 16 [SD NY Tr] at 60: 15-22). However, the standard here is different. The plaintiff must only meet the pleading standard. The federal court's finding on an application for interim relief does not “utterly refute” the allegations made here.

The court finds that plaintiff has adequately pled all the elements of tortious interference with contract. As discussed above, for the purposes of a motion to dismiss, plaintiff has adequately

pled the existence of an enforceable contract. Assuming the contract is enforceable, plaintiff has also pled actual breach in that Bortone violated the provision prohibiting her from working for a competitor within a defined geographic area for twelve months after leaving CC. Plaintiff has also adequately pled 24 Sevens knowledge of the Agreement, and specifically, the above provision (complaint ¶¶ 94, 95). Plaintiff has also alleged intentional procurement via 24 Seven's assistance or encouragement of the breach (*see Barbagallo*, 820 FSupp2d at 444-45).

Regarding causation, plaintiff has alleged that "24 Seven also advised Creative Circle employees who it solicited that it would 'protect' them from any actions taken by Creative Circle to enforce their Agreements", from which causation may be inferred (complaint ¶ 97). Defendants submit an affidavit from Bortone purporting to disprove causation, which cites reasons other than 24 Seven's encouragement for her leaving CC (NYSCEF Doc No. 15). Bortone states that "I resigned my job at Creative Circle in lesser part, because there was limited opportunity for growth in that organization outside of sales and in greater part because I was wrongly passed-over for a promotion while on maternity leave" (*id.* ¶ 7). Plaintiff, in response, proffers the affidavit of Creative Circle employee Emily Webber (NYSCEF Doc No. 31), stating that she received multiple communications from 24 Seven recruiters, and was encouraged to leave CC by promises that "they had ways to get around the non-compete such as placing me in a training role on a temporary basis" and that "24 Seven was planning to let some of its existing employees go in order to 'make room' for Creative Circle employees and pay them the salaries they would require" (*id.* ¶¶ 7, 14). While the affidavit submitted by plaintiff does not speak to the specific recruitment of Bortone, it does raise questions about the irrefutability of defendants' evidence. In any event, affidavits do not constitute documentary evidence, and the claim may not be dismissed on that basis (*see 25-01 Newkirk Ave., LLC v. Everest Nat. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015]).

Nor is the claim duplicative of the breach of contract claim or an impermissible "employee raiding" claim. As plaintiff notes, the breach of contract claim concerns Bortone's actions, while the tortious interference claim concerns 24 Seven's actions. Defendants' contention that dishonest means or sole intent to damage must be shown to sustain raiding claims taking the form of tortious interference with contract is inaccurate. Only where, unlike here, "the allegations concern at-will employees not bound by covenants not to compete, [docs] plaintiff [have] the high burden of asserting that 'defendant employed wrongful means, such as fraud, misrepresentation or threats to

effect the termination of employment” (*Lockheed Martin Corp. v. Atlas Commerce Inc.*, 283 A.D.2d 801, 803 [3d Dept 2001]).

c. Tortious interference with prospective economic relations as to all defendants

Defendants argue that plaintiff has failed to state a claim for tortious interference with prospective economic relations because it has failed to allege that defendants’ actions were “motivated solely by malice or to inflict injury on Plaintiff by unlawful means rather than by self-interest or other economic conditions” (*Entertainment Ptnrs. Grp. v Davis*, 198 AD2d 63, 64 [1st Dept 1993]). Rather, plaintiff specifically alleges that 24 Seven’s goal was to grow its business. Plaintiff has also failed to allege specific business relationships with which defendants have interfered (*see* complaint ¶ 103; *McGill v Parker*, 170 AD2d 98, 105 [1st Dept 1992]; *Schoettle v Taylor*, 282 Ad2d 441, 441 [1st Dept 2001]).

In opposition, plaintiff argues that the tortious interference with prospective business relations claims is adequately pled because it clearly alleges that defendants acted to harm plaintiff. MSCP’s “directive” to 24 Seven to go after CC’s employees to grow the business is absolute proof of the intent to inflict harm (opp at 27).

In reply, defendants observe that plaintiff has not alleged that 24 Seven interfered with a prospective relationship by “wrongful means... and some degree of economic pressure... or that defendant acted for the sole purpose of harming the plaintiff” (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 292, 299-300 [1st Dept 2009]). Also, plaintiff only argues that 24 Seven interfered with its business relationships with current employees, customers and candidates, and does not point to any prospective business relationship (reply at 13-14).

“The required elements of a cause of action for tortious interference with prospective business relations are as follows: (a) business relations with a third party; (b) the defendant’s interference with those business relations; (c) the defendant act[ed] with the sole purpose of harming the plaintiff or us[ed] wrongful means; and (d) injury to the business relationship” (*Advanced Global Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 779 [Sup Ct. NY County 2007] *affd as mod.*, 44 AD3d 317 [1st Dept 2007]). “[The] plaintiff must demonstrate that the defendant’s interference with its prospective business relations was accomplished by ‘wrongful means’ or that defendant acted for the sole purpose of harming the plaintiff (*see Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300 [1st Dept 1999]). “Wrongful means’ includes

physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required" (*id.* at 300).

The claim for tortious interference with prospective business relations must be dismissed. Plaintiff has failed to identify disruption of business relations with any particular third party. Plaintiff has also not pled that defendants acted by wrongful means, solely to harm the plaintiff. As defendants point out, plaintiff even admits that 24 Seven acted primarily for economic gain. Plaintiff has made no allegations as to Bortone's purpose.

f. Attorney's fees as against Bortone

The claim for attorney's fees is premised upon an indemnity provision in the underlying contract. Because the breach of contract claim survives, so should the claim for attorney's fees.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion to dismiss the complaint is granted to the extent that the claims for unfair competition and tortious interference with prospective business relations as against defendants Susan Norelle-Bortone and 24 Seven, LLC are hereby DISMISSED and otherwise DENIED..

This constitutes the decision and order of the court.

DATED: August 26, 2019

ENTER,


O. PETER SHERWOOD J.S.C.