

XL Diamonds LLC v Rosen

2020 NY Slip Op 34050(U)

December 2, 2020

Supreme Court, New York County

Docket Number: 656102/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

XL DIAMONDS LLC,

Plaintiff,

- v -

CHARLES ROSEN, E.M.DIAM., INC.

Defendant.

-----X

INDEX NO. 656102/2019

MOTION DATE 12/02/2020,

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 66, 67, 68, 69, 74, 76

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 63, 64, 65, 70, 71, 72, 73, 75, 77

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, and for the reasons set forth below, (i) Charles Rosen's motion (mtn. seq. no. 004) and (ii) E.M. Diam., Inc.'s (**EM Diamonds**) motion (mtn. Seq. no. 005) for leave to reargue their prior motions are denied. The court neither overlooked or misapprehended the relevant facts, nor misapplied a controlling principle of law (*William P. Paul Equip. Corn. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). The causes of action for breach of the confidentiality agreement and for misappropriation of trade secrets have different elements and the plaintiff failed to adequately allege damages stemming from the alleged breach of the confidentiality agreement, accordingly, the cause of action for breach of the confidentiality agreement was dismissed *without prejudice*.

I. The Facts Relevant to the Motions

Familiarity with the facts and procedural history are presumed. Briefly, XL Diamonds LLC (**XL Diamonds**) brought this action against Mr. Rosen and EM Diamonds for breach of a non-compete agreement, breach of a confidentiality agreement, tortious interference with the non-compete and confidentiality agreements, and misappropriation of trade secrets. XL Diamonds alleges that Mr. Rosen worked for EM Diamonds, took a job at XL Diamonds, a direct competitor, and after only three and a half weeks, returned to work at EM Diamonds, taking XL Diamonds' trade secrets with him. XL Diamonds alleges that Mr. Rosen conspired with EM Diamonds for Mr. Rosen to work for XL Diamonds under false pretenses, and that he received training from XL Diamonds' staff, had full access to its proprietary computer, sales, and pricing systems, and obtained its vendor and customer lists, which they are now using to solicit XL Diamonds' customers.

Mr. Rosen and EM Diamonds moved to dismiss the complaint (Mtn Seq. No. 002 and 003) in its entirety pursuant to CPLR § 3211(a)(1) and (7). By decision and order, dated July 13, 2020 (the **Prior Decision**), the court granted EM Diamonds and Mr. Rosen's motions in part dismissing the first (breach of non-compete agreement), second (breach of confidentiality agreement), and third (tortious interference) causes of action, but denied the motions with respect to the fourth cause of action (misappropriation of trade secrets).

II. Discussion

To succeed on a motion for reargument, a party must demonstrate that the court either (1) overlooked or misapprehended the relevant facts, or (2) misapplied a controlling principle of law (*William P. Paul Equip. Corn. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Reargument is not

intended “to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted” (*Haque v Daddazio*, 84 AD3d 940, 242 [2d Dept 2011]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

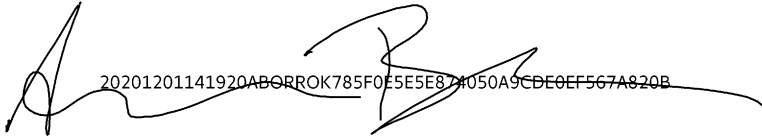
Mr. Rosen and EM Diamonds argue that the Prior Decision is “internally inconsistent” because the court dismissed the cause of action for breach of the confidentiality agreement but sustained the cause of action for misappropriation of trade secrets. The argument fails.

As the court discussed in the Prior Decision, the cause of action for breach of the confidentiality agreement has different elements than the cause of action for misappropriation of trade secrets. , Damages are an essential element of a cause of action for breach of contract (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [“The elements of such a claim include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.”]). The cause of action for breach of the confidentiality agreement failed because the plaintiff failed to allege any damages flowing from the alleged breach and the plaintiff’s theory of damages, *i.e.*, that “damages have occurred and irreparable harm is transpiring,” was too vague and speculative to support the claim (NYSCEF Doc. No. 61 at 6). Accordingly, the cause of action for breach of the confidentiality agreement was dismissed ***without prejudice*** to provide the plaintiff the opportunity to replead if the plaintiff could properly allege damages.

Damages, however, are not an element of a cause of action for misappropriation of trade secrets (*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 452 [2018] [“A plaintiff claiming

misappropriation of a trade secret must prove: (1) it possessed a trade secret, and (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means”] [internal quotation marks and citation omitted]). In the Prior Decision, the court held that XL Diamonds had sufficiently alleged that Mr. Rosen and EM Diamonds were using its trade secrets, including its proprietary customer lists, which were obtained through improper means— namely, corporate espionage (NYSCEF Doc. No. 61 at 8). Accordingly, the court did not dismiss the cause of action for misappropriation of trade secrets.

Stated differently, Mr. Rosen and EM Diamonds fail to raise any facts that the court overlooked or law that the court misapprehended. Accordingly, Mr. Rosen and EM Diamonds’ motions for reargument are denied.

<u>12/02/2020</u> DATE	 <small>20201201141920ABORROK785F0E5E5E87A050A9CDE0EF567A820B</small> ANDREW BORROK, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:		<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE