

Lynch Dev. Assoc., Inc. v Johnson

2021 NY Slip Op 34043(U)

December 30, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 609400/2020

Judge: George Nolan

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Short Form Order

Index No. 609400/2020

SUPREME COURT – STATE OF NEW YORK
PART 55 – SUFFOLK COUNTY

P R E S E N T:

Hon. George Nolan
Justice Supreme Court

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LYNCH DEVELOPMENT ASSOCIATES, INC.,

Plaintiff,

-against-

BARTHOLOMEW W. JOHNSON,

Defendant.

-----x
BARTHOLOMEW W. JOHNSON,

Third-Party Plaintiff,

-against-

KEVIN LYNCH,

Third-Party Defendant.
-----x

Mot. Seq. No. 002 – MG
Orig. Return Date: 07/28/2021
Mot. Submit Date: 09/30/2021

**PLAINTIFF AND THIRD-PARTY
DEFENDANT’S ATTORNEY**

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Upon the e-filed documents numbered 65 through 80, 82 through 101, and upon due deliberation and consideration by the Court of the foregoing papers, it is hereby

ORDERED that the motion of plaintiff Lynch Development Associates, Inc. and third-party defendant Kevin Lynch, for an order pursuant to CPLR 3212 granting plaintiff and third-party defendant summary judgment dismissing all counterclaims of defendant Bartholomew W. Johnson and dismissing Johnson’s third-party complaint, is granted.

The plaintiff, Lynch Development Associates, Inc. (“LDA”) is engaged in the business of managing capital and conducting fund-raising campaigns for religious institutions. LDA hired defendant/third-party plaintiff Bartholomew W. Johnson (“Johnson”) in 2015. In March, 2016 Johnson signed an agreement by which he agreed that for a twelve month period after he ceased employment with LDA, he would not, “[i]n any capacity, whether alone, or as a shareholder, partner, officer, director, employee or consultant, otherwise in any way participate in or become associated with, any entity, that is engaged in, or intends to engage in, fund-raising activities for religious institutions in the United States, provided, however that this sub-section does not prohibit direct employment by religious institutions” (paragraph 1 of Non-Competition/Non-Solicitation Agreement).

By a letter dated April 15, 2020, LDA advised Johnson that he was being “temporarily furloughed.” After being furloughed, Johnson was hired by Chaminade High School on a part-time basis to work on its fund-raising program. On May 23, 2020, LDA notified Johnson that he should return to work on June 1, 2020. By a letter dated May 26, 2020, Johnson advised LDA that he would not be returning to work at LDA.

By a letter dated June 29, 2020, LDA’s President, Kevin Lynch (“Lynch”), advised Johnson that he had learned that Johnson was working as a consultant for LDA’s former client, Chaminade High School. In this letter, Lynch stated, in part, “I would like to provide an opportunity for you to provide a response within three business days as to your present work relationship with Chaminade High School. If you have been provided full-time employment by Chaminade High School, this is not a violation of your agreement. Yet, if you have engaged as a consultant, this will be in direct violation of your agreement.” Johnson’s counsel responded to Lynch by a letter dated July 6, 2020. Counsel’s response did not clarify Johnson’s business relationship with Chaminade but did advise Lynch, “If you truly believe you have a valid claim against my client, make it. My firm welcomes the opportunity to collect our fees from you.”

Lynch also sent a letter via email to Brother Thomas J. Cleary at Chaminade High School on July 16, 2020, advising Brother Cleary of LDA’s non-compete agreement with Johnson. Lynch wrote in part, “I was hoping you would be able to clarify for me if Mr. Johnson is either a full-time or part-time current employee of Chaminade High School or if he is working with you as a consultant.” Brother Cleary responded by email the same day but declined to provide such clarification to Lynch stating in part, “I don’t want to get in the middle of whatever this is.”

LDA initiated this action by filing a summons and complaint on July 22, 2020, claiming that Johnson breached the non-compete agreement. The plaintiff’s complaint sought specific performance of the non-compete agreement and attorney’s fees. It also appears that in and around July 20, 2020, Johnson began speaking with Holy Cross High School regarding his potential employment with that institution. In an affidavit attached to Johnson’s opposition papers, Michael R. Truesdall, the President of Holy Cross High School, states that he received an email from Lynch on August 7, 2020 advising him of LDA’s non-compete agreement with Johnson. Truesdall avers that he interpreted the email to mean that “Lynch intended Conboy (Michael Conboy, Holy Cross’ Vice-President for Advancement) and me to believe that the non-compete agreement barred Johnson from any and all work with Holy Cross.”

In his answer, dated August 24, 2020, Johnson denied that the non-compete agreement was enforceable. Johnson also asserted seven counterclaims: for tortious interference with a business relationship and lost business opportunity with Chaminade High School; negligent infliction of emotional distress; intentional infliction of emotional distress; abuse of process; malicious prosecution; frivolous lawsuit; and breach of contract/lost wages. Johnson also commenced a third-party action against Lynch, which contained causes of action for tortious interference with a business relationship, intentional infliction of emotional distress, abuse of process and malicious prosecution.

Johnson moved by Order to Show Cause on September 16, 2020 for an order granting Johnson a preliminary injunction enjoining LDA from taking any legal action against Johnson for accepting employment with Holy Cross High School and permitting Johnson to accept the employment offer of Holy Cross. Counsel for LDA filed a letter via NYSCEF on September 17, 2020, advising the court and presumably Johnson's counsel that the non-compete agreement did not bar Johnson from accepting employment with Holy Cross. At a court conference conducted on January 27, 2021, Johnson's counsel advised the court that Johnson had started working for Holy Cross in December 2020. Counsel for LDA reiterated that LDA had no objection to this employment. By an order dated February 4, 2021, the court denied those branches of Johnson's motion relating to his employment with Holy Cross as moot.

LDA and Lynch now move for an order pursuant to CPLR 3212 granting plaintiff and third-party defendant summary judgment and dismissing all counterclaims in the main action and dismissing the third-party complaint.

Defendant Johnson failed to oppose the branches of the plaintiff and third-party defendant's motion which was for summary judgment dismissing the causes of action for negligent infliction of emotional distress, malicious prosecution, frivolous lawsuit and breach of contract/lost wages and therefore those claims are deemed abandoned (*see Genovese v. Gambino*, 309 AD2d 832, 766 NYS2d 213 [2d Dept 2003]).

The defendants remaining counterclaims for abuse of process, intentional infliction of emotional distress and tortious interference with a business relationship are also dismissed.

"Abuse of process has three essential elements: 1) regularly issued process, either civil or criminal, 2) intent to do harm without excuse or justification, and 3) use of process in a perverted manner to obtain a collateral objective" (*Etienne v. Hochman*, 83 AD3d 888, 920 NYS2d 717 [2d Dept 2011]). Here, the only process issued by plaintiff was a summons and complaint. Johnson's cause of action for abuse of process fails "because the institution of a civil action by summons and complaint is not legally considered process capable of being abused" (*Curiano v. Suozzi*, 63 NY2d 113, 116, 480 NYS2d 466 [1984]; *Hoppenstein v. Zemek*, 62 AD2d 979, 403 NYS2d 542 [2d Dept 1978]).

"The elements of intentional infliction of emotional distress are: 1) extreme and outrageous conduct; 2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; 3) causation, and 4) severe emotional distress" (*Petkowicz v. Dutchess County Dept. Of Community and Family Services*, 137 AD3d 990, 27 NYS3d 264 [2d Dept 2016]). The complained of conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community" (*Howell v. New York Post Co.*, 81 NY2d 115, 121, 596 NYS2d 350 [1993]). Even if one accepts as true all the allegations made by defendant Johnson in his complaint and affidavit, the conduct of LDA and Lynch was not so extreme or outrageous so as to satisfy the first element of intentional infliction of emotional distress.

To set forth a cause of action sounding in tortious interference with business relations, "a plaintiff must show that the defendant interfered with the plaintiff's business relationships either

with the sole purpose of harming the plaintiff or by means that were unlawful or improper” (*Out of the Box Promotions, LLC v. Koschitzki*, 55 AD3d 575, 866 NYS2d 677 [2d Dept 2008]).


Johnson argues that the non-compete agreement he signed was unenforceable but even if Johnson is correct in that assessment, Johnson has failed to show that the above described efforts of LDA and Lynch to enforce the non-compete agreement “were motivated solely by malice or intended to inflict injury by unlawful means” (*Tri-Star Lighting Corp. v. Goldstein*, 151 AD3d 1102, 1106, 58 NYS3d 448 [2d Dept 2017]); *Kenneth H. Brown & Co., Inc. v. Dutchess Works One-Stop Empl. & Training Ctr.*, 73 AD3d 984, 985, 904 NYS2d 75 [2d Dept 2010]; also see *Smith v. Meridian Tech., Inc.*, 86 AD3d 557, 927 NYS2d 141 [2d Dept 2011] [summary judgment granted dismissing plaintiff’s cause of action for interference with prospective contractual relations where plaintiff’s former employer, Meridian, advised plaintiff’s new employer, Multidyne, that plaintiff’s employment with Multidyne violated a non-competition provision of plaintiff’s employment agreement with Meridian]).

Based on the foregoing, the motion for summary judgment is granted, the defendant’s counterclaims in the main action are dismissed and the third-party action is dismissed.

The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: December 30, 2021
Riverhead, NY



HON. GEORGE NOLAN, J.S.C.

___ FINAL DISPOSITION

X NON-FINAL DISPOSITION