

Attentive Home Care Agency, Inc. v Galinkin

2022 NY Slip Op 30110(U)

January 13, 2022

Supreme Court, Kings County

Docket Number: Index No. 505842/2021

Judge: Reginald A. Boddie

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an I.A.S. Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 13th day of January 2022.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

-----X
ATTENTIVE HOME CARE AGENCY, INC.,

Plaintiff,

Index No. 505842/2021

against

Cal. No. 10 MS 1

AMENDED
DECISION AND ORDER

RAISA GALINKIN, JOHN AND JANE DOES 1
THROUGH 100, JOHN DOE CORPORATIONS 1
THROUGH 10, and OTHER JOHN DOE ENTITITES
1 THOUGH 10, all whose true names are unknown,

Defendants.
-----X

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
MS 1	Docs. # 4-54

Upon further review of the foregoing cited papers, it has been determined only defendant Raisa Galinkin moved for relief. Therefore, the decision and order on defendant's motion to dismiss the complaint, pursuant to CPLR 3211(a) (1), (3), (4), (7) and (c), is amended as follows:

Plaintiff, Attentive Home Care Agency, Inc. (Attentive), provides home health aides to clients who require assistance with activities of daily living. Defendant Raisa Galinkin (Galinkin), a home health aide, entered into an employment agreement with Attentive on April 9, 2018. The agreement contained a non-compete clause, which is the subject of this lawsuit.

Galinkin allegedly solicited and encouraged an Attentive client (Client X) to terminate its relationship with Attentive and receive benefits from another home care agency, named herein as the John Doe defendants (collectively the corporate defendants). Attentive further alleged that after Client X ended its relationship with Attentive, Galinkin terminated her employment and began an employment relationship with the corporate defendants. Attentive alleged eleven causes of action against Galinkin, the individual John and Jane Does, and the corporate defendants.

Galinkin moved to dismiss the complaint, pursuant to CPLR 3211 (a) (1) [a defense founded upon documentary evidence], (a) (3) [lack of legal capacity to sue], (a) (4) [another action pending], (a) (7) [failure to state a cause of action], and CPLR 3211 (c) to convert the motion to one for summary judgment. Defendant contended each cause of action should be dismissed because they are conclusory and lack factual specificity. Defendant also contended the non-compete clause is unreasonable and unenforceable as a matter of law and public policy. Defendant argued Attentive is an unscrupulous business who used such non-compete and non-solicit agreements to prevent their abused employees from leaving them.

Defendant also argued the non-compete restricts her from providing services to every prospective client for two years following the end of her employment, resulting in the loss of her livelihood. She argued the covenant is unnecessary since she does not provide special, unique, or extraordinary services, is not in possession of trade secrets or confidential business information, and Attentive's client list is public information as the phone numbers of elderly people are available in the White Pages. Defendant further argued the covenant is injurious to the public since it prevents elderly people from choosing to whom they entrust their health and wellbeing. Plaintiff opposed the motion on the grounds the complaint was properly pleaded and asserted viable causes of action.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading must be afforded a liberal construction and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Qureshi v Vital Transp., Inc.*, 173 AD3d 1076, 1077 [2d Dept 2019]). “The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach” (*Dee v Rakower*, 112 AD3d 204, 208-209 [2d Dept 2013]). Here, Attentive alleged Galinkin breached section 3 of the non-compete agreement by soliciting an existing client away from plaintiff to another health care agency while still employed by plaintiff, causing plaintiff damages. Assuming such allegations are true, Attentive sufficiently alleged facts to sustain its breach of contract claim against Galinkin (see *Dee*, 112 AD3d at 208-209).

To constitute documentary evidence, the evidence must be “unambiguous, authentic, and undeniable” (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]). A motion to dismiss, pursuant to CPLR 3211 (a) (1), on the ground the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law (see *Mawere v Landau*, 130 AD3d 986, 987 [2d Dept 2015] [internal quotation marks omitted]). Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211 (a) (1) (see *id.*). Here, defendant proffered several exhibits which do not constitute documentary evidence for the purposes of a motion to dismiss, including the

affidavit of patient, Klara Ryabukhina (*see* CPLR 3211 [a] [1]; *see Granada Condominium III Assn.*, 78 AD3d at 997).

Defendant also proffered the parties' April 9, 2018, employment agreement and argued for dismissal, pursuant to CPLR 3211 (a) (1), on the grounds the non-compete clause was unreasonable and therefore unenforceable. Negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness (*see BDO Seidman v Hirshberg*, 93 NY2d 382, 389 [1999]). "[T]he application of the test of reasonableness of employee restrictive covenants focuses on the particular facts and circumstances giving context to the agreement" (*BDO Seidman*, 93 NY2d at 390). "In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" (*see id.*, citing *Reed, Roberts Assocs. v Strauman*, 40 NY2d 303, 307 [1976]).

Section 3 of the non-compete agreement provided that during Galinkin's employment, and for one year following the termination thereof, she would not, on her own behalf or on behalf of any other person or entity, directly or indirectly:

- a. solicit, invite, advise or encourage any employee, client, customer or patient of the Company, or any of its subsidiaries or affiliates, or any of their officers, directors, employees, agents, successors or assigns (collectively, the "Company Group") to terminate their relationship with the Company Group; or
- b. hire any employee or prospective employee, or take on or provide services to any current or prospective client, customer or patient served by the Company Group that either (x) you had contact with, provided services to, were aware of, managed or supervised at any time during your employment or (y) was an employee, client, customer or patient of the Company Group at any time during the two-year period preceding your termination of employment. However, nothing in this paragraph is intended to prohibit you from engaging in general solicitations and advertisements that are not specifically directed at the Company Group's employees, clients, customers or patients.

Defendant argued the non-compete agreement restricted her from providing services to every prospective client for two years following the end of defendant's employment, resulting in the loss of her livelihood. However, a close reading of the agreement indicates otherwise. The subject provision prohibits Galinkin, for a period of one year, from providing services only to clients to whom she provided services while at Attentive. In essence, she was not barred from working as a home health aide to any other client nor barred from working in the City of New York immediately after the end of her employment with Attentive. Therefore, contrary to defendant's contention, the non-compete agreement did not place any temporal or geographic restriction on Galinkin's ability to earn a living as a home health aide (*see Rifkinson-Mann v Kasoff*, 226 AD2d 517, 518 [2d Dept 1996]).

Further, an employer has a legitimate interest, as Attentive alleged here, in seeking to protect against misappropriation of its trade secrets or confidential customer lists (*see Arthur J. Gallagher & Co. v Marchese*, 96 AD3d 791, 792 [2d Dept 2012]). With respect to harm to the public, a restraint is said to be harmful if it seriously impinges on the availability of a service or causes any significant dislocation in the market or creates a monopoly in those services (*see BDO Seidman*, 93 NY2d at 393). Defendant argued this covenant prevents the elderly from choosing their care providers. However, defendant's argument, without more, is insufficient to establish this prong of the test (*see BDO Seidman*, 93 NY2d at 393).

Moreover, the non-compete provision is not unduly burdensome on Galinkin as it only restricted her from servicing Attentive's clients for one year and permitted her to provide services to other clients not connected with Attentive (*see Long Is. Minimally Invasive Surgery, P.C. v St. John's Episcopal Hosp.*, 164 AD3d 575, 577 [2d Dept 2018]). Therefore, defendant has failed to refute Attentive's allegations Galinkin breached an enforceable agreement (*see*

Mawere, 130 AD3d at 987). Accordingly, defendant's motion to dismiss based on documentary evidence is denied.

Defendant also sought dismissal of Attentive's claim for misappropriation of confidential information. "To establish a cause of action based on misappropriation of confidential information, the plaintiff must show that the defendant solicited the plaintiff's customers where the customer list was a trade secret, or where the defendant engaged in wrongful conduct, such as physically taking or copying files or using confidential information" (*Baldeo v Majeed*, 150 AD3d 942, 944 [2d Dept 2017] [internal quotation marks omitted]). "A trade secret includes any compilation of information which provides the company with an opportunity to obtain an advantage over competitors who do not know or use it" (*Photonics Indus. Intl., Inc. v Xiaojie Zhao*, 185 AD3d 1064, 1067 [2d Dept 2020]). Customer information is considered a trade secret where the plaintiff employer takes measures to keep its customer lists confidential, or the information was not generally known outside of its business (*see Tri-Star Light. Corp. v Goldstein*, 151 AD3d 1102, 1106 [2d Dept 2017]).

Here, Attentive alleged its client lists constituted confidential information, which gives it a competitive edge and is not readily available to the public and its competitors. Attentive also alleged it had taken measures to maintain the secrecy of that information, including having all employees sign the non-compete agreement. Attentive pled facts to demonstrate its customer lists are a trade secret (*see Tri-Star Light. Corp.*, 151 AD3d at 1106). Attentive further alleged Galinkin solicited its customers using its client lists. Therefore, Attentive sufficiently alleged a claim for misappropriation of confidential information against Galinkin (*see Baldeo*, 150 AD3d at 944). Accordingly, defendant's motion to dismiss that claim is denied.

Defendant also moved to dismiss Attentive's cause of action for unjust enrichment.

“To state a claim for unjust enrichment, a plaintiff must allege that: (1) the [defendant] was enriched, (2) at [plaintiff’s] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered” (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 26 [1st Dept 2015]). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (*see Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]). Such a claim is duplicative of a breach of contract claim where “both causes of action seek damages for events arising from the same subject matter that is governed by an enforceable contract” (*Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002]).

Here, Attentive alleged Galinkin breached the subject non-compete agreement and damages resulted. Attentive further alleged in its unjust enrichment claim, as a result of that breach, defendant was enriched at its expense and that it is against equity and good conscience to permit the defendant to retain what it sought to recover. Attentive’s unjust enrichment claim against Galinkin duplicates its claim for breach of contract against her and is therefore dismissed (*see Bettan*, 296 AD2d at 470).

Defendant also moved to dismiss the cause of action for unfair competition. “To establish a cause of action for relief based on unfair competition, a plaintiff must demonstrate that the defendant wrongfully diverted the plaintiff’s business to itself” (*Baldeo*, 150 AD3d at 944). Here, Attentive alleged, while still in its employ, Galinkin entered into direct competition with Attentive, by among other actions, diverting Client X to the John and Jane Does and the corporate defendants. Attentive further alleged Galinkin then left her employment with Attentive to take a position with the corporate defendants. Attentive has sufficiently alleged an unfair

competition claim against Galinkin (*Baldeo*, 150 AD3d at 944). Accordingly, defendant's motion to dismiss that claim is denied.

Defendant also sought dismissal of plaintiff's claim for tortious interference with plaintiff's contractual relation with Client X. "The elements of tortious interference with a contract are: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Hersh v Cohen*, 131 AD3d 1117, 1119 [2d Dept 2015]). Here, Attentive alleged it had an agreement with Client X to provide home care services, Galinkin was aware of that agreement, Galinkin intentionally induced Client X to breach that agreement, and damages resulted. Attentive alleged sufficient facts to maintain its claim for tortious interference with contractual relations against Galinkin (*see id.*). Accordingly, defendant's motion to dismiss that claim is denied.

Defendant also sought dismissal of the plaintiff's conversion claim. "To establish a cause of action to recover damages for conversion, [the] plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" (*McKinnon Doxsee Agency, Inc. v Gallina*, 187 AD3d 733, 738 [2d Dept 2020]). A defendant who exercises unauthorized dominion over a thing deprives the plaintiff of any access to it (*see id.*).

In *McKinnon Doxsee Agency, Inc.*, plaintiff commenced an action against its former insurance agents for, amongst other things, conversion when they left its agency to join another (187 AD3d at 738). Plaintiff alleged the defendants electronically copied information from its books of business, including customer contact information and information regarding the

customers' insurance policies (*id.*). In dismissing the conversion claim, the court determined that plaintiff failed to demonstrate that the defendants exercised control over the client information that they copied to the exclusion of the plaintiffs, as the plaintiffs still had access to this information which had not been deleted (*id.*). Here too, although Attentive alleged a possessory interest in all information concerning its client lists, it failed to allege that it had been excluded from access to that information. Therefore, Attentive failed to plead sufficient facts to establish a viable claim for conversion (*see McKinnon Daxsee Agency, Inc.*, 187 AD3d at 738). Accordingly, defendant's motion to dismiss that claim is granted.

Defendant also sought dismissal of plaintiff's claim for breach of the duty of loyalty against Galinkin. "[A]n employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties" (*30 FPS Productions, Inc. v Livolsi*, 68 AD3d 1101, 1102 [2d Dept 2009], quoting *Wallack Frgt. Lines, Inc. v Next Day Express, Inc.*, 273 AD2d 462, 463 [2d Dept 2000]). "An employee may create a competing business prior to leaving [her or] his employer without breaching any fiduciary duty unless [she or] he makes improper use of the employer's time, facilities or proprietary secrets in doing so" (*Is. Sports Physical Therapy v Burns*, 84 AD3d 878, 878 [2d Dept 2011]). However, where a claim for breach of fiduciary duty, as here, is duplicative of the breach of contract claim and seeks essentially identical damages, the breach of fiduciary duty claim must be dismissed (*see Pacella v Town of Newburgh Volunteer Ambulance Corps, Inc.*, 164 AD3d 809, 814 [2d Dept 2018]). Accordingly, defendant's motion to dismiss this claim is granted.

Defendant also sought dismissal of the claim for negligent misrepresentation against Galinkin because the allegations are conclusory and fail to give notice of the transactions intended to be proved. "A claim alleging negligent misrepresentation requires the party asserting

the claim to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the other party to impart correct information; (2) that the information was incorrect; and (3) reasonable reliance on the information” (*Michael Davis Constr., Inc. v 129 Parsonage Lane, LLC*, 194 AD3d 805, 808 [2d Dept 2021]). “[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified” (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). “For example, [p]rofessionals, such as lawyers and engineers, by virtue of their training and expertise, may have special relationships of confidence and trust with their clients. . .” (*Murphy v Kuhn*, 90 NY2d 266, 269 [1997] [internal quotation marks omitted]). Generally, an employer-employee relationship does not give rise to any fiduciary duty of loyalty and trust (*see Schenkman v New York Coll. of Health Professionals*, 29 AD3d 671, 672 [2d Dept 2006]; *Rather v CBS Corp.*, 68 AD3d 49, 55 [1st Dept 2009]). However, employees who come into possession of the employer’s trade secrets or confidential information owe a limited fiduciary duty of loyalty and trust with regard to those trade secrets and confidential information (*see Restatement of Employment Law* § 8.01 [a]; *Bender Ins. Agency, Inc. v Treiber Ins. Agency, Inc.*, 283 AD2d 448, 450 [2d Dept 2001]; *Royal Carbo Corp. v Flameguard, Inc.*, 229 AD2d 430 [2d Dept 1996]).

Here, there are no allegations Galinkin possessed any unique or specialized expertise. Rather, Attentive alleged Galinkin, as its agent, had a fiduciary duty to provide correct information to Attentive. Attentive further alleged Galinkin violated that duty by failing to disclose she was helping a competing business while remaining its agent and having access to its confidential and proprietary information and trade secrets. Attentive alleged it reasonably relied

on Galinkin's misrepresentations and omissions by continuing to grant her access to its proprietary and confidential information. Affording Attentive the benefit of all inferences, as the court must on a motion to dismiss, Attentive pled sufficient facts to sustain its claim for negligent misrepresentation against Galinkin (*see Michael Davis Constr., Inc.*, 194 AD3d at 808). Accordingly, defendants' motion to dismiss this claim is denied.

Defendant also sought dismissal of Attentive's claim for breach of the covenant of good faith and fair dealing against Galinkin. Here, the cause of action alleging breach of the implied covenant of good faith and fair dealing is duplicative of the cause of action alleging breach of contract as both are based on the same set of facts and seek nearly identical damages (*see Barker v Time Warner Cable, Inc.*, 83 AD3d 750, 752 [2d Dept 2011]). Accordingly, defendant's motion to dismiss this claim is granted.

Defendant also sought dismissal of Attentive's claim for prima facie tort. "The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal" (*Diorio v Ossining Union Free School Dist.*, 96 AD3d 710, 712 [2d Dept 2012]). The fact that the complaining party suffered specific and measurable loss requiring special damages is an essential element of a prima facie tort cause of action (*see Diorio*, 96 AD3d at 712). "Additionally, central to a cause of action alleging prima facie tort is that the complained-of-conduct was motivated solely by malice or 'disinterested malevolence'" (*id.*).

Here, Attentive alleged defendant intentionally caused it harm by her actions. However, Attentive failed to plead any allegations that defendant's intent was motivated solely by malice or disinterested malevolence (*see Diorio*, 96 AD3d at 712). Moreover, Attentive failed to plead

any facts the alleged harm resulted in special damages. Accordingly, Attentive's prima facie tort claim is dismissed.

Defendant also moved to dismiss Attentive's cause of action for attorneys' fees. Attentive asserted a separate cause of action for attorneys' fees and costs sustained in enforcing the agreement. A plaintiff may not maintain a separate cause of action for attorneys' fees, which are only recoverable as an element of contract damages if a breach of the contract is proven (*see Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 217 [1st Dept 2006]). Moreover, claims for attorneys' fees arising from the same facts and seeking the same damages are duplicative (*see Burke v Crosson*, 85 NY2d 10, 17 [1995]; *Vermont Mut. Ins. Co. v McCabe & Mack, LLP*, 105 AD3d 837, 839 [2d Dept 2013]). Here, Attentive requested attorneys' fees as an item of damages in each of its causes of action premised on the alleged breach of the non-compete agreement. Attentive also asserted a separate cause of action for attorney fees based on the same alleged breach. The latter claim is duplicative as it is based on the same facts and seeks the same damages (*see id.*). Accordingly, defendant's motion to dismiss Attentive's cause of action for attorneys' fees is granted.

Defendant also sought dismissal pursuant to CPLR 3211 (a) (3) [lack of standing] and (4) [another action pending]. However, defendant proffered no argument in support of dismissal. Therefore, the court need not address dismissal pursuant to CPLR 3211 (a) (3), (4).

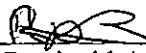
Defendant also moved pursuant to CPLR 3211 (c) to convert this motion into one for summary judgment. CPLR 3211 (c) requires that if a court intends to treat a CPLR 3211 motion as one for summary judgment under CPLR 3212, it must give the parties notice of its intention to do so (*see Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 258 [2d Dept 2012]). Such notice may be overlooked in certain circumstances when (1) CPLR 3211 (c) treatment is specifically

requested by all parties (*see Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]), or is at least requested by the same party that is aggrieved by the summary judgment determination, (2) a dispute involves no questions of fact, but only issues of law argued by all parties (*see Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]), and (3) the respective submissions of both parties demonstrate that they are laying bare their proof and deliberately charting a summary judgment course (*see Sokol v Leader*, 74 AD3d 1180, 1183 [2010]; *Hopper v McCollum*, 65 AD3d 669, 670 [2009]).

Here, none of the aforementioned circumstances are applicable. Defendant was the only party to request that this motion be treated as a summary judgment motion. Further, this dispute involves questions of fact as to whether defendant breached an enforceable agreement (*see Greenwich Mills Co., Inc. v Barrie House Coffee Co., Inc.*, 91 AD2d 398, 402 [2d Dept 1983]). Moreover, Attentive's opposition to the instant motion indicated its expectation that issues of fact related to its causes of action will be "explored during discovery." Its submissions do not demonstrate that it is laying bare its proof and deliberately charting a summary judgment course (*see Sokol*, 74 AD3d at 1183). Therefore, the circumstances that would allow a court to treat a motion as one for summary judgment are not presented here (*see id.*). Accordingly, defendant's request is denied.

The motion is granted to the extent Attentive's claims for unjust enrichment, conversion, breach of the duty of loyalty, breach of covenant of good faith and fair dealing, prima facie tort, and attorneys' fees are dismissed.

ENTER:


Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.