

<b>Amberstone Bus. Enters. Inc. v Botton</b>
2022 NY Slip Op 30477(U)
February 9, 2022
Supreme Court, Kings County
Docket Number: Index No. 517540/2020
Judge: Lillian Wan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 17

-----X  
AMBERSTONE BUSINESS ENTERPRISES INC.,

Plaintiffs,

Index No.: 517540/2020

Motion Seq. No: 04

-against-

NELLY BOTTON and FRANTZ PAUL,

**DECISION AND ORDER**

Defendants.

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the defendant’s motion to dismiss.

The following e-filed documents, listed by NYSCEF document number (Motion 04) 35-49 were read on this motion by the defendant to dismiss.

The defendant, Nelly Botton, moves to dismiss the plaintiff’s amended complaint, pursuant to CPLR § 3211 (a)(7). The amended complaint asserts six causes of action: misappropriation of trade secrets; civil conspiracy; conversion; permanent injunctive relief; unfair competition; and tortious interference with a business relationship. In support of the motion the defendant submits the amended complaint and a copy of the stipulation withdrawing the defendant’s initial motion to dismiss pending the filing of the amended complaint. After oral argument, and upon careful consideration of the parties’ submissions, the motion is decided as set forth below.

Plaintiff, Amberstone Business Enterprises, Inc. (Amberstone), is a tax preparation and filing business, which is the successor to John Turis Enterprises, Inc. (Turis). According to the plaintiff, Turis had been in the business of preparing taxes for individuals for more than three decades. In February of 2020, Turis sold its business to plaintiff Amberstone, along with all of its assets, including Turis’ client list. The plaintiff alleges that Turis’ business and its success were based on the customers for whom it provided annual tax preparation and filing. The client list contained the names of individuals and businesses that plaintiff claims allowed the business to be successful for more than three decades.

The plaintiff maintains that the client list is secured and password protected, containing information that is not readily available to the public or its competitors. Specifically, each client’s name, phone number, email address, social security numbers and the co-filer’s information was securely contained within list. It was a private client list, which contained information for 7,065 clients, which was not readily public. The plaintiff claims that prior to the

2019 tax filing season, the business filed an average of 4,216 tax returns per year, however in the 2019 tax filing year, the plaintiff only filed 2,748 returns.

The defendant, Ms. Botton, was an employee of Turis for over 20 years until she voluntarily terminated her employment with Turis in or about October of 2019. The plaintiff contends that, upon information and belief, Botton planned to take the client list to begin her own tax preparation agency, and that she left Turis without any individual clients of her own. The plaintiff further claims that Botton took the client list and contacted all the clients for whom she had previously prepared taxes, and communicated with them in order to solicit their business away from Turis. The plaintiff alleges that the solicitations were made to any Turis client with whom she had previously had contact with from the client list.

The plaintiff claims that defendant, Frantz Paul, was terminated from his employment with the plaintiff on or about July 21, 2020, for allegedly stealing funds from the plaintiff in the form of unearned wages which were paid to Paul and other employees. Prior to his termination, the plaintiff contends that Paul assisted Botton in her new business by obtaining documents and information concerning the Turis/Amberstone clients, and providing them to Botton.

In considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a 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 favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018) (internal quotation marks omitted); *see also TMCC, Inc. v Jennifer Convertibles, Inc.*, 176 AD3d 1135 (2d Dept 2019). The Court may consider evidentiary material submitted by the movant in support of a motion to dismiss for failure to state a cause of action. However, where a party offers evidentiary proof on a motion to dismiss a complaint for failure to state a cause of action, the focus of the inquiry turns from whether the complaint states a cause of action rather than whether the plaintiff actually has one. *See Louzon v Gentry Apts., Inc.*, 191 AD3d 776 (2d Dept 2021); *Bonavita v Government Empls. Ins. Co.*, 185 AD3d 892 (2d Dept 2020). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that a material fact, as claimed by the pleader to be one, is not a fact at all, and unless it can be said that no significant dispute exists regarding it. *See Matter of Valderrama*, 184 AD3d 650 (2d Dept 2020); *MJK Bldg. Corp. v Fayland Realty, Inc.*, 181 AD3d 860 (2d Dept 2020).

The plaintiff’s first cause of action is based on allegations of misappropriation of trade secrets. The elements of a cause of action to recover damages for misappropriation of trade secrets are: (1) possession of a trade secret; and (2) use of that trade secret by the defendant “in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means.” *See Schroeder v Pinterest, Inc.*, 133 AD3d 12, 27 (1<sup>st</sup> Dept 2015), quoting *North*

*Atlantic Instruments, Inc. v Haber*, 188 F3d 38 (2d Cir 1999) (internal quotation marks omitted). “An essential prerequisite to legal protection against the misappropriation of a trade secret is the element of secrecy.” *Atmospherics, Ltd. v Hansen*, 269 AD2d 343, 343 (2d Dept 2000); *see also Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392 (1972). “Generally, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services of products, trade secret protection will not attach and courts will not enjoin the employee from soliciting his employer's customers.” *See Leo Silfen, Inc. v Cream*, 29 NY2d at 392.

The Court of Appeals has found that a trade secret may be “any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” *See Ashland Management Inc. v Janien*, 82 NY2d 395, 407 (1993). Here, the plaintiff has stated a cause of action based on misappropriation of trade secrets. The amended complaint alleges that the client list at issue contained personal information concerning each client, was password protected, and accessible only by certain credentialed employees. According to the amended complaint, the nature of the information contained in the client list was compiled through the business Amberstone and Turis provided to its clients over a thirty-year period for tax preparation, and was not readily ascertainable to the public, as it was private and sensitive in nature.

The plaintiff's second cause of action states a proper claim for civil conspiracy. Although New York does not recognize civil conspiracy to commit a tort as an independent cause of action, it may be cognizable if the plaintiff pleads the existence of a conspiracy in order to connect the actions of the defendants with an underlying tort, and establish that their actions were part of a common scheme. *See Swartz v Swartz*, 145 AD3d 818 (2d Dept 2016). “The plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement.” *Id.* at 825-826 (internal quotation marks omitted). Moreover, “[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort.” *See Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 (1986). The plaintiff has properly alleged a cognizable tort such as, *inter alia*, misappropriation of trade secrets. Further, the plaintiff has plead the necessary elements of a civil conspiracy, including the existence of an agreement between defendants Botton and Paul, and an overt act in furtherance of the conspiracy, which consists of allegations that Paul improperly assisted Botton in obtaining documents and information from the plaintiff to assist her in establishing her new business by soliciting the plaintiff's clients.

In its third cause of action the plaintiff alleges conversion of its data, trade secrets, confidential and proprietary information. To establish a cause of action to recover damages for conversion a 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." See *RD Legal Funding Partners, LP v Worby Groner Edelman & Napoli Bern, LLP*, 195 AD3d 968, 970 (2d Dept 2021), quoting *National Ctr. for Crisis Mgt., Inc. v Lerner*, 91 AD3d 920 (2d Dept 2012) (internal quotation marks omitted). Electronic documents stored on a computer may be the subject of a conversion claim, as are printed versions of the documents. See *Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283 (2007); *Volodarsky v Moonlight Ambulette Service Inc.*, 122 AD3d 619 (2d Dept 2014). The plaintiff has plead a valid cause of action for conversion. The plaintiff alleges that it had a superior right of possession to the private, password-secured information the defendants allegedly took possession of, and that the defendants "improperly obtained, stole and transmitted to each other information from [p]laintiffs."

The plaintiff's fourth cause of action seeks injunctive relief. In order to sufficiently plead a cause of action for a permanent injunction, "a plaintiff must allege that there was a violation of a right presently occurring, or threatened and imminent, that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor." See *In re Long Is. Power Auth. Hurricane Sandy Litig.*, 134 AD3d 1119, 1120 (2d Dept 2015); see also *Caruso v Bumgarner*, 120 AD3d 1174, 1175 (2d Dept 2014) [citation and internal quotation marks omitted]. "A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction." See *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408 (2d Dept 2009), quoting *Icy Splash Food & Beverage, Inc. v Henckel* 14 AD3d 595 (2d Dept 2005) (internal quotation marks omitted). The plaintiff has plead a proper cause of action for permanent injunctive relief, by alleging that there is no adequate remedy at law to remedy the acts of Botton and Paul, which have resulted in a loss of 50% of the plaintiff's business. The plaintiff has properly plead that serious and irreparable harm will result to the plaintiff absent the injunction.

The plaintiff's fifth cause of action alleges that the defendants engaged in 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. See *Robert I. Gluck, M.D., LLC v Kenneth M. Kamler, M.D., LLC*, 74 AD3d 1166 (2d Dept 2010); see also *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473 (2d Dept 2009). Here, the plaintiff has stated a cause of action based on unfair competition. In particular, the plaintiff has alleged that defendant Botton wrongfully diverted the plaintiff's business to herself, by misappropriating information and the client list compiled by the plaintiff, and used that information to solicit clients and establish her own tax preparation business.

Lastly, the plaintiff's sixth cause of action alleges tortious interference with business relations. In order to state a proper cause of action sounding in tortious interference with business relations, a plaintiff is required to plead "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.” See *Qosina Corp. v C & N Packaging, Inc.*, 96 AD3d 1032,1034 (2d Dept 2012), quoting *Nassau Diagnostic Imaging & Radiation Oncology Assoc. v Winthrop-University Hosp.*, 197 AD2d 563, 563-564 (2d Dept 1993) (internal quotation marks omitted). An allegation that the defendant “was motivated solely by malice or intended to inflict injury by unlawful means” is required. *Kenneth H. Brown & Co., Inc. v Dutchess Works One-Stop Empl. & Training Ctr., Inc.*, 73 AD3d 984, 985 (2d Dept 2010). Further, “where the offending party's actions are motivated by economic self-interest, they cannot be characterized as solely malicious.” See *Law Offices of Ira H. Leibowitz v Landmark Ventures, Inc.*, 131 AD3d 583, 586 (2d Dept 2015); see also *Stuart’s, LLC v Edelman*, 196 AD3d 711 (2d Dept 2021).

That prong of the defendant’s motion seeking to dismiss the sixth cause of action based on tortious interference with business relations must be granted. Although the plaintiff alleged that, with Paul’s assistance, Botton took possession of confidential information and the client list in order to establish Botton’s new business, the amended complaint did not allege that the defendant was motivated by malice or intended to inflict injury upon the plaintiff by unlawful means.

The remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that defendant Botton’s motion to dismiss the plaintiff’s amended complaint is **GRANTED** solely to the extent that the plaintiff’s sixth cause of action is dismissed. The balance of the defendant’s motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: February 9, 2022



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020