

Parrots Towing & Recovery, LLC v Beard

2023 NY Slip Op 30486(U)

January 5, 2023

Supreme Court, Onondaga County

Docket Number: Index No. 006642/2020

Judge: Scott J. DelConte

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This opinion is uncorrected and not selected for official publication.

At a Special Term of the Supreme Court of the State of New York held in and for the County of Onondaga on January 5, 2023.

PRESENT: **HON. SCOTT J. DELCONTE**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
ONONDAGA COUNTY

PARROTS TOWING AND RECOVERY, LLC,
Individually and doing business as **MIDSTATE TOWING,**

Plaintiff,

v.

ROBERT BEARD and BLUE LINE AUTOMOTIVE, LLC,

Index No. 006642/2020

Defendants.

DECISION AND ORDER
(Motion No. 3)

APPEARANCES:

Byrne, Costello & Pickard, P.C., *by Jordan R. Pavlus, Esq. for Defendants*

Pappas, Cox, Kimpel, Dodd & Levine, P.C., *by Thomas P. Givas, Esq. for Plaintiff*

This action involves commercial fraud and unfair trade practices allegations. Specifically, Plaintiff Parrots Towing and Recovery, LLC, individually and doing business as Midstate Towing, contends that its former general manger (Defendant Robert Beard) and Beard's current employer (Defendant Blue Line Automotive, LLC) sabotaged and converted Parrots' business operations while Beard was still employed by – and running – Parrots Towing, actively leading it on by misrepresenting his intention to buy the business. Beard and Blue Line now move for summary judgment (Motion No. 3) contending that, despite extensive discovery, Parrots is unable to offer any admissible evidence to support its wide-ranging breach of fiduciary duty, fraud, unfair trade practices and tortious interference claims. Parrots opposes the motion, arguing that the evidence in this action creates material questions of fact as to whether the Defendants engaged in actionable misconduct, which can only be resolved by the trier of fact. For the reasons set forth below, summary judgment is **GRANTED** with respect to the fraud, unfair competition and tortious interference claims, and **DENIED** with respect to the breach of fiduciary duty claim.

I.

Plaintiff Parrots is a central New York based towing company that has been operating as Midstate Towing for several years (NYSCEF Doc. 49). Defendant Robert Beard was an executive employee of Parrots Towing, serving as its general manager in 2019 and 2020 (*Id.*). In June of 2020, Beard approached Parrots' owner, Jay Meyer, and started negotiations about purchasing the towing business and all of its assets. While the parties discussed pricing and financing over the next few months, and Beard continued to manage and oversee Parrots' ongoing operations, no firm purchase and sale agreement was entered into (*Id.*). In August of 2020, because of a proposed increase in the lease payments at its location at the time in Elbridge, Parrots decided to relocate

beginning in September of 2020 (*Id.*). On September 1, 2020, Beard abruptly left Parrots and opened Blue Line's towing business at the former Parrots location in Elbridge (*Id.*).

As affirmed by Meyer, Parrots claims that Beard spent the month of August 2020 actively deceiving Meyer into believing that he was competently running Parrots' towing operations, aggressively renegotiating favorable lease terms at Parrots' site in Elbridge and intending, in good faith, to purchase the business assets, while instead Beard was actually actively sabotaging Parrots' business operations, setting up a corporate competitor, and acquiring the commercially well-established leased premises in Elbridge. On October 15, 2020, after finding out that Beard had opened a new towing company – Blue Line – at Parrot's former Elbridge location, Parrots commenced the instant action by filing a Summons and Complaint alleging, essentially, four causes of action, namely: (1) breach of fiduciary duty; (2) fraud; (3) unfair competition; and (4) tortious interference with contract and business relations (there is also a fifth cause of action that seeks injunctive relief and the sixth cause of action repeats the claims from the first four causes of action) (NYSCEF Doc. 1).

Defendants Beard and Blue Line filed an Answer raising several affirmative defenses (NYSCEF Doc. 7). Discovery was then conducted and, on May 17, 2022, the Note of Issue was filed (NYSCEF Doc. 32). By Notice of Motion dated July 15, 2022, Defendants Beard and Blue Line now move for summary judgment dismissing the Complaint (Motion No. 3), arguing that there is no competent, admissible evidence that Beard or Blue Line did anything wrongful that would support any of Parrot's tort claims against them (NYSCEF Docs. 34-46). Parrots opposes the motion, arguing that there are questions of fact as to whether Beard, working with Blue Line, breached Beard's fiduciary duty to it and made false and damaging statements while Beard was working for it (NYSCEF Docs. 49-56).

II.

A.

Beginning with the first cause of action for breach of fiduciary duty, Defendants Beard and Blue Line argue that there is no admissible evidence that Beard, aided by Blue Line, committed any act inconsistent with his employment while he was working for Parrots (NSYECF Doc. 37). However, the law is clear: “an employee owes a duty of good faith and loyalty to an employer in the performance of the employee’s duties’ [and] may breach his or her fiduciary duty to the employer, by improperly ‘using [the employer’s] time and resources to form a new business and promote themselves while still working for [the employer]’” (*McKinnon Doxsee Agency, Inc. v Gallina*, 187 AD3d 733, 736 [2d Dept 2020]). Here, the evidence submitted along with Beard and Blue Line’s motion, including the deposition transcripts, demonstrates triable questions of fact as to whether Beard was directly performing work to undermine Parrots’ ongoing operations and start his competing towing business – Blue Line – during his regular working hours for Parrots (NYSCEF Doc. 42, 44; *Coastal Sheet Metal Corp. v Vassallo*, 75 AD3d 422, 423 [1st Dept 2010] [“However, by, among other things, running Spiral on Coastal’s premises at the same time that he was managing Coastal, converting assets belonging to Coastal in operating Spiral, and executing a sublease of Coastal’s space to Spiral on highly favorable terms, Vassallo, as the then president of Coastal, breached his fiduciary duty to the corporation.”]). As such, Beard and Blue Line have failed to establish their *prima facie* entitlement to judgment as a matter of law on the first cause of action for breach of fiduciary duty.

B.

Turning to the second cause of action alleging fraud and misrepresentation, Beard and Blue Line argue that there is no admissible evidence that they made any fraudulent statements (NYSCEF Doc. 37), and their motion papers establish a *prima facie* entitled to summary judgment on this issue. This shifts the burden to Parrots to “assemble, lay bare and reveal [its] proofs, in order to show that the matters set up in [its complaint] are real and are capable of being established upon a trial (*Di Sabato v Soffes*, 9 AD2d 297, 301 [1st Dept 1959]). To raise a triable question of fact on its fraud and misrepresentation claim, Parrots must – among other things – submit evidence that the Beard and Blue Line actually made fraudulent statements, including the “specific dates and items” of those statements (*Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 661 [2d Dept 2010] [citing, *inter alia*, CPLR 3016[a]). Parrots, however, fails to submit any admissible, non-hearsay evidence that Beard or Blue Line made any specific fraudulent statement or misrepresentation, other than non-actionable representations that Beard was interested in purchasing Parrots’ business (NYSCEF Docs. 46, 49). Accordingly, the second cause of action for fraud and misrepresentation must be dismissed.

C.

Moving to the third cause of action alleging unfair competition, Beard and Blue Line argue that there is no admissible evidence that Beard or Blue Line misappropriated any confidential business information from Parrots to solicit its customers (NYSCEF Doc. 37), and their motion papers establish a *prima facie* entitled to summary judgment on this issue, shifting the burden to Parrots to raise a triable issue of fact. Since neither Beard nor Blue Line were subject to a restrictive covenant, “[a]bsent any wrongdoing ... [they] should [not] be prohibited from utilizing [their]

knowledge and talents in [their] area [of expertise]" (*Accent Stripe v Taylor*, 204 AD2d 1054, 1055 [4th Dept 1994]). In opposition to the motion, a detailed reading of the opposition papers demonstrates that Parrots fails to submit any admissible, non-hearsay evidence that Beard or Blue Line wrongfully misappropriated any confidential trade secrets that they subsequently used to solicit its customers and unfairly compete with it. Accordingly, the third cause of action for unfair competition must be dismissed.

D.

With respect to the fourth cause of action alleging interference with contracts or business relations, Beard and Blue Lines argue that there is no admissible evidence of any contractual or business relationship interfered with by either of them (NYSCEF Doc. 37), and their motion papers establish a *prima facie* entitled to summary judgment on this issue, shifting the burden to Parrots to raise a triable issue of fact. Among other things, a claim for tortious interference with contract or business relations requires evidence of either: (1) a defendant intentionally inducing the breach of an existing contract; or (2) a defendant's use of wrongful means to induce the end of an existing business relationship (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 623-24 [1996]). In opposition to the motion, Parrots fails to submit any admissible, non-hearsay evidence of an existing contract with a third-party that was breached, or of a wrongful act committed by Beard or Blue Line that resulted in the termination of an existing business relationship. Accordingly, the fourth cause of action for tortious interference must be dismissed.

E.

Finally, the fifth and sixth causes of action are dismissed as duplicative (*Board of Mgrs. of 325 Fifth Ave. Condominium v Continental Residential Holdings LLC*, 149 AD3d 472, 476 [1st Dept 2017]).

III.

Accordingly, upon due deliberation, it is hereby

ORDERED that the motion of Defendants Robert Beard and Blue Line Automotive, LLC for summary judgment (Motion No. 3) is **GRANTED** in part, and the Second, Third, Fourth, Fifth and Sixth Causes of Action are **DISMISSED**, with prejudice; and it is **DENIED** in all other respects; and it is further

ORDERED that a virtual pretrial conference is scheduled on **Wednesday, January 18, 2023, at 3:00 p.m.**, via Microsoft Teams to set a trial date in this action.

Dated: January 5, 2023


HON. SCOTT J. DELCONTE, J.S.C.

**ENTER
PAPERS CONSIDERED:**

1. Defendants' Notice of Motion dated July 15, 2022 (NYSCEF Doc. 34);
2. Affidavit of Robert Beard, sworn to July 14, 2022 (NYSCEF Doc. 35)
3. Affidavit of Veronica Kempisty, sworn to July 14, 2022(NYSCEF Doc. 36)
4. Attorney Affirmation of Jordan R. Pavlus, Esq. affirmed July 15, 2022, with Exhibits A through I, attached (NYSCEF Docs. 38-46);
5. Defendants' Statement of Material Facts filed July 15, 2022 (NYSCEF Doc. 48);
6. Affidavit of Jay Meyer sworn to August 16, 2022, with Exhibits 1 through 7, attached (NYSCEF Docs. 49-56);
7. Plaintiff's Response to Statement of Material Facts filed August 16, 2022 (NYSCEF Doc. 57); and
8. Reply Attorney Affirmation of Jordan R. Pavlus, Esq. affirmed August 22, 2022 (NYSCEF Docs. 59).