

Archemy, Inc. v Wiener

2023 NY Slip Op 31212(U)

April 10, 2023

Supreme Court, New York County

Docket Number: Index No. 652457/2022

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

ARCHEMY, INC.

Plaintiff,

- v -

HOWARD M. WIENER,

Defendant.

-----X

INDEX NO. 652457/2022

MOTION DATE 03/31/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 11, 12, 13, 15, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 45, 46, 47

were read on this motion to/for DISMISS.

Defendant's motion to dismiss is granted only to the extent that the seventh cause of action for injunctive relief is severed and dismissed and denied with respect to the remaining requests for relief.

Background

Plaintiff contends it is a private information technology consulting company that uses novel IT methodologies. It alleges that it created a software platform to house, organize and evolve a company's digital information. Plaintiff insists that defendant is a technology professional who had a long relationship with plaintiff's founder and that he began working with plaintiff in early 2016. It claims that in connection with this relationship, defendant signed a non-disclosure agreement ("NDA") in order to protect plaintiff's confidential information.

Plaintiff acknowledges that defendant was named Chief Operating Officer of plaintiff in May 2017. It alleges that defendant even loaned plaintiff's founder \$90,000 (that is purportedly the subject of another pending lawsuit). Plaintiff contends that defendant resigned from his

employment with plaintiff in December 2018 and that, thereafter, he breached the NDA by including plaintiff's confidential information in various presentations. For instance, plaintiff observes that defendant used certain confidential information in slides for a presentation for the NYU Entrepreneur Institute.

Plaintiff also argues that defendant published other confidential information online in October 2021 and in February 2022. It alleges that defendant asserted a copyright over certain of plaintiff's trade secrets.

Plaintiff complains that defendant announced he was publishing a new book in March 2022 that allegedly discussed, in great detail, plaintiff's confidential information. Plaintiff brings seven causes of action for specific performance of the NDA, breach of the NDA, unjust enrichment, breach of fiduciary duty, unfair competition, declaratory judgment and for injunctive relief. Plaintiff seeks, essentially, to halt the publication of the book.

Defendant moves to dismiss on the ground that the entire case is based upon an NDA that he never saw or signed. He also argues that complaint only makes vague allusions to what trade secrets or confidential information were allegedly disclosed in violation of this NDA. He insists that he was never an employee of plaintiff and his relationship was never formalized in writing or via an oral agreement. Defendant insists he was not paid, given a formal title or any compensation for what he describes as a consultancy role.

In opposition, plaintiff attaches a copy of what it asserts is an NDA signed by defendant on December 3, 2017. Plaintiff also details what it claims constitutes the confidential information that was disclosed to defendant that he later misappropriated. The Court declines to discuss the specifics of the confidential information in detail as the opposition was filed under seal and it is not necessary in connection with this decision.

In reply, defendant asserts that plaintiff has a history of bringing frivolous lawsuits, the exhibits attached by plaintiff in opposition are inadmissible and that plaintiff has failed to plead a cognizable cause of action.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

The NDA Causes of Action (1&2)

The Court denies the branches of the motion that seek to dismiss these claims because plaintiff attached a copy of an NDA allegedly signed by defendant in its opposition. Although defendant claimed he never signed an NDA (or recalled signing one), the submission of the NDA along with the allegations in the complaint state cognizable causes of action for specific performance and breach of the NDA.

Defendant’s assertion that the exhibits attached to the opposition are inadmissible is without merit. Plaintiff submitted the affidavit of Jean-Claude Franchitti (plaintiff’s CEO), who attached the NDA as exhibit as well as an email in which defendant allegedly sent a signed copy of the NDA to plaintiff (NYSCEF Doc. No. 33).

Unjust Enrichment

To state a claim for unjust enrichment, “[t]he plaintiff must show that the other party was enriched, at plaintiff’s expense, and that it is against equity and good conscience to permit the

other party to retain what is sought to be recovered. Further, although privity is not required for an unjust enrichment claim, a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part" (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd sub nom. Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012]).

The Court denies the branch of the motion to dismiss this cause of action. Plaintiff alleges that defendant profited off of his use of plaintiff's confidential information. Plaintiff is permitted to pursue this claim in the alternative to the breach of the NDA as defendant claimed in his moving papers that he never signed the NDA (so there is an issue about the validity of this contract).

Breach of Fiduciary Duty

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Bd. of Managers of Brightwater Towers Condominium v FirstService Residential New York, Inc.*, 193 AD3d 672, 147 NYS3d 78 [2d Dept 2021]).

The key issue on this cause of action is whether defendant owed a fiduciary duty to plaintiff as COO of the company. Plaintiff attaches emails in which an image of a business card is attached that indicates defendant was the COO (NYSCEF Doc. No. 32).

Defendant's assertion that plaintiff has to produce employment contracts and payroll records is without merit. Those are issues that can be explored in discovery. His claim that the business card was simply part of a scheme to create the illusion of a business is an allegation—it is not a basis to dismiss this claim on the grounds of documentary evidence or on the failure to

state a claim. The fact is that plaintiff sufficiently alleged in the pleading and in its opposition that defendant was COO and that he used confidential information gained during his time as COO to seek profit (by including it in his book). Defendant did not have to be paid in order for there to be a fiduciary duty not to disclose confidential information protected by an NDA.

Moreover, defendant's argument that plaintiff has not detailed, with enough particularity, the trade secrets or confidential information at issue is not supported in this record. Plaintiff detailed the information at issue on pages 5 and 6 of its memo of law (NYSCEF Doc. No. 29). Contrary to defendant's opposition, plaintiff need only state a cognizable cause of action to defeat a motion to dismiss. It need not prove every argument, include every conceivable detail relating to an allegation, or explicitly lay out all of its damages. That is the purpose of the discovery process.

Unfair Competition

Similarly, the Court declines to dismiss the unfair competition cause of action. This claim involves an allegation "that defendant acted in bad faith in misappropriating a commercial advantage belonging to plaintiff" (*Redf Organic Recovery, LLC v Rainbow Disposal Co., Inc.*, 116 AD3d 621, 622, 985 NYS2d 10 [1st Dept 2014]). "[A] court may sustain an unfair competition claim even if the parties are not 'actual competitors'" (*id.*).

Here, plaintiff sufficiently alleged that defendant acted in bad faith by using confidential information belonging to plaintiff as part of his book and by publishing it online. Defendant's claim that the NDA did not contain a non-compete clause is not a basis, at the pleadings stage, to conclude he was entitled to use information covered by the NDA that he acquired while having some role for plaintiff.

Declaratory Judgment and Injunctive Relief Claims

The Court declines to dismiss the declaratory judgment cause of action as it simply seeks a declaration that defendant violated the NDA and the Court has yet to make a final determination about the rights and legal relations between the parties.

However, the Court grants the motion to the extent it seeks a mandatory injunction barring defendant and his publisher from continuing to publish the subject book. As an initial matter, plaintiff did not include the publisher (a necessary party for this claim) in this action. And the complaint alleges that the book was released on June 30, 2022. Although plaintiff commenced this case on July 15, 2022, it has not sought a preliminary injunction to stop publication. Instead, plaintiff did nothing in this matter (defendant filed the RJI) until defendant made a motion to dismiss in September 2022 (and the parties subsequently sought numerous adjournments).

In other words, the Court finds that the request for injunctive relief is denied as academic because the book was published last year (*Smith v Goro*, 66 Misc 2d 1011, 1016, 323 NYS2d 47 [Sup Ct, NY County 1970] [denying a motion for preliminary injunction where certain material was published in a past issue of New York Magazine]). The information plaintiff complains about has already been publicly disseminated for nearly a year and, despite seeking injunctive relief barring publication, plaintiff did not do anything to stop the sale of the book while this case has remained pending.

Summary


The Court recognizes that defendant insists that this is a bad faith lawsuit and points to another litigation in which a federal judge made unflattering observations about plaintiff's CEO. But that case was from 2006 and it has nothing to do with the instant matter. Defendant admits

he was a consultant for plaintiff and both parties admit defendant even loaned money to plaintiff's CEO. Questions about the exact nature of defendant's role for plaintiff and whether he violated (or even signed) the NDA must be explored in discovery. The Court cannot simply dismiss at the pleadings stage because defendant disagrees with the allegations in the complaint.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted only to the extent that the seventh cause of action for injunctive relief is severed and dismissed and defendant is directed to answer pursuant to the CPLR.

Conference: June 22, 2023 at 11:30 a.m. By June 15, 2023, the remaining parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute regarding discovery or 3) letters explaining why no agreement about discovery could be reached. Based on these submissions, the Court will assess whether an in-person appearance is necessary. The failure to upload anything by June 15, 2023 will result in an adjournment of the conference.

<p><u>4/10/2023</u> DATE</p>		 <hr/> ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE