SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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Millennium Consolidated Holdings, LLC et al

Plaintiffs,

- v -

Bluefin Capital Management, LLC

Defendant.

INDEX NO. 656387/2022

MOTION DATE 07/15/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44

were read on this motion to/for DISMISSAL.

In this action arising from defendant's employment of plaintiffs' former employee Ruochen "Frank" Zhou (Zhou), defendant moves pursuant to CPLR 3211 (a)(1) and (7) for an order dismissing the complaint, or in the alternative, staying the action pending a determination from FINRA on a related matter between plaintiffs and non-party Zhou. Plaintiffs oppose the motion.

Background

According to their complaint, plaintiff Millennium Advisors, LLC (Millennium Advisors) is "a technology-driven broker dealer specializing in executing fixed income securities transactions" registered with the Securities and Exchange Commission (SEC) and is a member of FINRA (NYSCEF # 29 – Complaint, ¶¶ 1-2). Millennium Consolidated Holdings, LLC (Millennium Holdings) is Millennium Advisors' parent (collectively, Millennium or plaintiffs) (*id.*, ¶ 2). Plaintiffs are both limited liability companies organized under the laws of the State of North Carolina with their principal places of business in Mecklenburg County, North Carolina (*id.*, ¶ 22). Defendant is a broker-dealer registered with the SEC and a privately-owned multi-strategy trading firm, primarily providing liquidity for exchange-traded products (*id.*, ¶¶ 33-34). Defendant is a limited liability company organized under the laws of New York with a principal place of business in New York, New York, and not a FINRA member (*id.*, ¶¶ 23, 46).

In November 2018, Millennium offered Zhou, a 2018 graduate with a Master of Science degree in Quantitative and Computational Finance from Georgia

Institute of Technology, a position as an Associate Credit Trader (*id.*, ¶¶ 5-6, 50-51). Zhou accepted the offer and began working for Millennium in January 2019 (*id.*, ¶ 55). By the time of his termination in June 2021, Zhou held the title of "Vice President – High Yield and Crossover" at Millennium (*id.*, ¶ 84).

In connection with his employment, Zhou executed three separate and successive Restrictive Covenant Agreements on November 18, 2018, January 22, 2019, and March 23, 2021, respectively (*id.*, ¶¶ 8, 51, 56, 69). In addition, Zhou and Millennium Holdings entered into two Unit Incentive Bonus Agreements (UIB Agreements), on March 25, 2020 and March 24, 2021, respectively, which were designed to incentivize Zhou's performance and ensure his compliance with certain contractual obligations (*id.*, ¶¶ 60-61, 79-81).

The Restrictive Covenant Agreements and UIB Agreements set forth Zhou's non-compete and confidentiality obligations (*id.*, ¶¶ 9, 51-56, 65-66, 69-72, 77-78, 83), in which Zhou acknowledged that those provisions were necessary to protect Millennium's legitimate business interest and that any breach would cause Millennium irreparable harm (*id.*, ¶ 10). Additionally, the agreements prevented Zhou from working for a competing business during the restricted period of twenty-four months after his separation (*id.*, ¶¶ 9, 16).

On or around June 10, 2021, Millennium terminated Zhou's employment "for Cause" due to Zhou's violations of company policy (*id.*, ¶ 88). Upon his termination, Zhou entered a Severance Agreement with Millennium on June 15, 2021 (together with Restrictive Covenant Agreements and UIB Agreements, the agreements), agreeing to destroy or return all Millennium information in his position (*id.*, ¶¶ 89, 95). Later, on October 15, 2021, Zhou informed Millennium of his intention to work as a Prop Trader/Portfolio Manager for defendant (*id.*, ¶¶ 34, 98). Upon review, Millennium confirmed that defendant was a competitor of them and informed Zhou that his employment with defendant would violate his non-compete obligations (*id.*, ¶ 16). On or about March 16, 2022, Millennium sent a cease-and-desist letter to defendant regarding Zhou's "apparent ongoing violations of the Agreements, and [defendant's] assistance of such violations" (*id.*, ¶ 106).

On May 20, 2022, plaintiffs commenced this action by filing a summons and complaint, alleging three causes of action against defendant: (1) tortious interference with Zhou's contracts with plaintiffs, (2) tortious interference with the prospective business relationship between plaintiffs and their trading partners, and (3) unfair competition with plaintiffs by exploiting their confidential and proprietary information and secrets (*id.*, ¶¶ 115-134). Relevant to this action, Zhou also filed a FINRA claim against Millennium asserting that Millennium breached the Severance Agreement for failing to pay him compensation, in which action Millennium also filed a counterclaim (*id.*, ¶ 112).

Defendant moves to dismiss the complaint on the ground that plaintiffs fail state the claims. As a preliminary matter, defendant argues that the law of North Caroline—where plaintiffs are located—should apply here. With respect to the tortious interference with contract claim, defendant argues that plaintiffs fail to allege that Zhou has violated his confidentiality or non-compete obligations. Defendant also argues that the restrictive covenants in the agreements are overbroad and thus cannot be enforced. Further, defendant argues that it was not aware of the terms of Millennium's agreements with Zhou and did not procure any breach of the agreements. Defendant further argues that plaintiffs fail to allege any damages. As to the tortious inference with prospective contractual relations claim, defendant argues that this claim is frivolous since plaintiffs do not even allege any conduct of defendant directed toward plaintiffs' trading partners. As to the unfair competition claim, defendant argues that plaintiffs similarly fail to allege any supporting facts.

Lastly, defendant moves alternatively for a stay of the action pending a determination from FINRA on a breach of contract action between plaintiffs and Zhou, arguing that FINRA's adjudication will determine issues that are directly in question in this action, such as whether Zhou has breached any restrictive covenants and whether the covenants are enforceable.

In opposition, plaintiffs first content that New York law should apply since it is the law of the forum state and not materially conflicting with North Carolina law. On the merits, plaintiffs maintain that Zhou has breached the non-compete and confidentiality provisions in the agreements, which are enforceable. Plaintiffs argue that as the complaint should be construed liberally, they have pled cognizable claims. Plaintiffs also emphasize that since defendant helped Zhou prepare a certification to plaintiffs in March 2022 asserting that Zhou did not violate any agreements, which was after plaintiffs notified Zhou of his breaches, defendant had knowledge of the restrictive covenants' terms and actively participated in covering up Zhou's breaches.

Discussion

A motion to dismiss pursuant to CPLR 3211 (a)(1) on the basis of a defense founded on documentary evidence may be granted "only if the documentary evidence utterly refutes plaintiff's factual allegations ... and conclusively establishes a defense to the asserted claims as a matter of law" (*Mill Financial, LLC v Gillett,* 122 AD3d 98, 103 [1st Dept 2014] [internal citation and quotation marks omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). While CPLR 3211 (a)(1) does not explicitly define "documentary evidence," typically a document will qualify as "documentary evidence" if it is unambiguous, authentic, and its contents are essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC,* 171 AD3d 189, 193 [1st Dept 2019]).

On a CPLR 3211 (a)(7) motion to dismiss, 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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff ... can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3 204, 211 [1st Dept 2013]).

As a preliminary matter, the parties dispute whether New York or North Carolina law controls. While conceding that North Carolina law and New York law are substantially similar, defendant argues that they are not "identical in all material respects" (NYSCEF # 41 – def reply at 3).

As the forum state, New York's choice-of-law principles govern in determining the applicable substantive law (*Lerner v Price*, 119 AD3d 122, 127 [1st Dept 2014]). "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co.*, 81 NY2d 219, 223 [1993]; *Elson v Defren*, 283 AD2d 109, 114 [1st Dept 2001] ["there is no reason to engage in a choice of law analysis" when no conflict exists]. Here, as defendant concedes, North Carolina law and New York law are substantially similar on the enforceability of restrictive covenants, tortious interference with contracts, tortious interference with prospective business relations and unfair competition in crucial respects. Defendant also has not shown any authority supporting its proposition that, for a court to find no actual conflict, the competing jurisdictions' laws must be identical in all material respects. As it does not appear that there is a "meaningful conflict" between the law of the two states (*Elson*, 283 AD2d at 115), the court applies New York law to the claims (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003] ["[i]f no conflict exists, then the court should apply the law of the forum state in which the action is being heard"].

Tortious interference with contract

Tortious interference with contract requires that four elements be pleaded: the existence of a valid contract between plaintiffs and a third party, defendant's knowledge of that contract, defendant's intentional procuring of the breach, and damages (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006], *lv denied* 7 NY3d 704 [2006]). Defendant argues that the complaint fails to plead each of the elements because: first, the restrictive covenants are overbroad and thus cannot be enforced; second, plaintiffs do not properly allege that Zhou breached the confidentiality or non-compete covenants in the agreements; third, plaintiffs do not allege that

defendant was not aware of the terms of Millennium's agreements with Zhou and did not procure any breach; and lastly, plaintiffs fail to allege any damages.

Generally, "negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness" (*Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976]). Yet, "the formulation of reasonableness may vary with the context and type of restriction imposed" (*id.*). Here, as Zhou's work at Millennium in the inter-dealer broker business involved use of plaintiffs' trading tools, quantitative models and other confidential information, plaintiffs have alleged sufficient facts to support that the agreements' restrictive covenants were necessary to protect their legitimate business interests, which Zhou himself also expressly acknowledged in the agreements (NYSCEF # 12 – Restrictive Covenant Agreement, §§ 1, 7). Also, the complaint alleges that Zhou received post-separation compensation in exchange for complying with his restrictive covenants, further evidencing the need and reasonableness of those covenants in protecting plaintiffs from economic injury (*see Maltby v Harlow Meyer Savage, Inc.*, 166 Misc 2d 481, 486 [Sup Ct, NY County 1995] [restrictive covenants that are on condition of plaintiff's post-termination salary are reasonable]). As plaintiffs have made sufficient preliminary showing, the court declines to dismiss this claim on this ground at this stage (*see also Globaldata Mgt. Corp. v Pfizer Inc.*, 10 Misc 3d 1062[A] [Sup Ct, NY County 2005] [reasonableness and enforceability of the restrictive covenants require consideration of relevant facts and cannot be decided on a motion to dismiss]).

Defendant next argues that Zhou did not "compete" as defined in the agreements or share any confidential information; instead, he merely provided similar services for defendant as he did for plaintiffs. Although defendant is not a FINRA member, plaintiffs have provided documents such as defendant's SEC filings and webpages establishing that, like Millennium, defendant is also a broker-dealer registered with the SEC that does corporate grade, high-yield emerging market fixed-income securities trading, with similar securities inventory as plaintiffs, and thus is a competitor to plaintiffs (*see* NYSCEF #'s 3-8). In this regard, as Zhou commenced employment with defendant within the restricted period to provide similar services, plaintiffs have sufficiently raised a plausible inference that Zhou breached the restrictive covenants.

Defendant's argument that it did not know the restrictive covenants in the agreements or procure any breaches thereof is also unpersuasive. The complaint alleges that defendant's general counsel helped Zhou prepare his certification to plaintiffs in March of 2022, addressing the restrictive covenants imposed by plaintiff on Zhou. During March 2022, plaintiffs were also in conversations with a

representative of defendant concerning Zhou's violation.[1] These facts, viewed together, have raised a plausible inference that defendant has knowledge the terms of the agreements, including the confidentiality and non-compete covenants.

Finally, as defendant points out, plaintiffs have not precisely quantified the damages in the pleading. However, at this early stage, "plaintiff need only plead allegations from which damages attributable to defendants' conduct might be reasonably inferred" (*Risk Control Assocs. Ins. Group v Maloof, Lebowitz, Connahan & Oleske, P.C.*, 127 AD3d 500, 500 [1st Dept 2015]). Here, actual damages can be inferred from the complaint as it alleges that plaintiffs have paid Zhou compensation pursuant to the agreements with which defendant tortiously interfered, and that they suffered irreparable harm caused by the misappropriation of their intellectual assets and proprietary and confidential information. Accordingly, defendant's motion to dismiss the tortious interference with contract claim is denied.

Tortious interference with prospective business relations

To state a claim for tortious interference with business relations, a plaintiff must plead that it had a business relationship with a third party that defendant knew but intentionally interfered, that defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort, and that the defendant's interference caused injury to the relationship (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]). Defendant argues that this claim must be dismissed since plaintiffs do not allege any facts that would support an inference of malice and do not identify any third party toward which defendant directed any malicious conduct. This court agrees.

Plaintiffs merely allege, vaguely, that they had business relationships with their trading counterparties, but fail to identify any of the trading partners and cannot establish the but-for causation required (*Learning Annex Holdings, LLC v Gittelman*, 48 AD3d 211, 211 [1st Dept 2008] [dismissing the claim since "the plaintiff has failed to identify any specific customers it would have obtained but for defendant's actions"]; *Vigoda v DCA Productions Plus Inc.*, 293 AD2d 265, 267 [1st Dept 2002] [dismissing the claim since the plaintiffs "cannot name the parties to any specific contract they would have obtained"]). Therefore, plaintiffs' claim for tortious interference with prospective business relations is not viable.

Unfair competition

A claim for unfair competition requires that plaintiffs show that "a defendant

[1] At the oral argument held on January 10, 2023, plaintiffs additionally argued that Zhou's LinkedIn profile also states publicly that he is in two-year noncompete (NYSCEF # 44 – Tr at 21:12-19).

misappropriated plaintiffs' labor, skills, expenditures or good will, and displayed some element of bad faith in doing so" *Schroeder v Pinterest Inc.*, 133 AD3d 12, 30 [1st Dept 2015]). Defendant moves to dismiss plaintiffs' unfair competition claim, arguing that plaintiffs do not allege any actual misappropriation of their proprietary information but only conclusively allege that Zhou could theoretically use the knowledge and skills he acquired at plaintiffs in his work with defendant.

The complaint alleges that Zhou, without any prior working experience, had gained knowledge of plaintiffs' trading tools, quantitative models, trading algorithms and methods of trading during his employment with Millennium, which were developed by plaintiffs' software developers, quantitative analysts, traders and executives using significant confidential and proprietary information over ten years with over $40 million invested. The information, as Zhou himself acknowledged in the agreements, gives plaintiffs competitive commercial advantage, and is protected under New York law.

However, as defendant argues, the complaint does not allege that Zhou disclosed any of the information or that defendant obtained or used the information. Thus, even affording plaintiffs the benefit of every possible favorable inference, the court cannot find a plausible inference of defendant's bad-faith misappropriation.

Alternative request for a stay

Defendant alternatively moves for an order under CPLR 2201 to stay the instant action pending the determination of a related FINRA proceeding. The FINRA proceeding was commenced by Zhou against plaintiffs, claiming that plaintiffs breached the Severance Agreement by withholding payment even though he allegedly abided by his restrictive covenants. "[I]t is only where the decision in one action will determine all the questions in the other action, and the judgment on one trial will dispose of the controversy in both actions that a case for a stay is presented" (*Hope's Windows v Albro Metal Prod. Corp.*, 93 AD2d 711, 712 [1st Dept 1983]). While the FINRA proceeding would reach the issue of Zhou's and Millennium's breach of the agreements, the instant action focuses on defendant's tortious interference that requires different proof. Thus, a granting of stay is not warranted as the FINRA action involves different parties for different causes (*id.* ["[w]hat is required is complete identity of parties, causes of action and judgment sought"]).

Conclusion

In view of the above, it is

ORDERED that the branch of defendant's motion to dismiss plaintiffs' first cause of action for tortious interference with contract is denied; and it is

misappropriated plaintiffs' labor, skills, expenditures or good will, and displayed some element of bad faith in doing so" *Schroeder v Pinterest Inc.*, 133 AD3d 12, 30 [1st Dept 2015]). Defendant moves to dismiss plaintiffs' unfair competition claim, arguing that plaintiffs do not allege any actual misappropriation of their proprietary information but only conclusively allege that Zhou could theoretically use the knowledge and skills he acquired at plaintiffs in his work with defendant.

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Conclusion

In view of the above, it is

ORDERED that the branch of defendant's motion to dismiss plaintiffs' first cause of action for tortious interference with contract is denied; and it is further

ORDERED that the branch of defendant's motion to dismiss plaintiffs' second cause of action for tortious interference with prospective business relations is granted, and the second cause of action is thereby dismissed; and it is further

ORDERED that the branch of defendant's motion to dismiss plaintiffs' third cause of action for unfair competition is granted, and the third cause of action is thereby dismissed; and it is further

ORDERED that defendant's motion, in the alternative, for an order staying the instant action pending the related FINRA proceeding is denied; and it is further

ORDERED that defendant is to serve an answer to the complaint within 20 days of the entry of this order.

4/17/2023
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE