SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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10 SOUTH STREET CLUB OPERATOR, INC. D/B/A CASA CIPRIANI CLUB SOUTH STREET

Plaintiff,

- v -

JULIA MOSHY,

Defendant.

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INDEX NO. 651744/2023

MOTION DATE N/A

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, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISSAL.

Defendant's motion to dismiss is granted in part and denied in part.

Background

Plaintiff operates a private, membership-only club based in Manhattan. It claims it hired defendant to work as a consultant and that part of this agreement required her to not collaborate or work with other private membership clubs in New York City or Milan, Italy (locations where plaintiff has clubs) for a period of 12 months after her work for plaintiff ended.

The consultant contract paid defendant $3,000 a month starting in mid-August 2021. However, the parties both agree that plaintiff stopped paying defendant in the summer of 2022. Defendant claims that plaintiff refused to pay her for her work while plaintiff insists that defendant simply disappeared and stopped responding to its emails. Plaintiff maintains that it discovered that defendant was traveling around Europe during the summer. Yet, despite this

apparent discovery, plaintiff subsequently offered her a new role under a separate consultancy agreement that paid her more than double ($6,250 per month).

Defendant claims that she never signed this second agreement; however, she billed plaintiff under this agreement (for the increased monthly fee) and plaintiff admits it made some additional payments under this new contract. Plaintiff insists that defendant was again non-responsive in November and December 2023. Eventually, plaintiff fired defendant in January 2023 when she allegedly failed to respond to emails for a week and a half. It claims that defendant subsequently started working as the Chief Membership Officer for another private membership club in New York City.[1] Plaintiff insists that this directly violates the non-compete clause in both of her contracts with plaintiff.

Plaintiff brings four causes of action against defendant for breach of contract relating to both the 2021 services agreement and the 2022 services agreement, breach of the implied duty of good faith and fair dealing, unfair competition, and misappropriation.

Defendant moves to dismiss and offers a differing account of her professional relationship with plaintiff. She claims that plaintiff failed to pay her and withheld compensation she is owed. Defendant insists she only sought employment with a competing private membership club after plaintiff shortchanged her. She claims that plaintiff has not shown that it suffered any damages whatsoever as a result of her leaving plaintiff and working for another club. Defendant argues that the breach of the implied duty of good faith and fair dealing cause of action is duplicative of the breach of contract claim. She adds that the misappropriation and unfair competition claims do not alleges facts sufficient to state these claims.

[1] At oral argument on September 7, 2023, counsel for defendant informed the Court that defendant is no longer working for this membership club, or any other club. However, that alleged fact played no role in this opinion.

Discussion

"In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction. Indeed, we accord plaintiffs the benefit of every possible favorable inference" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002] [internal quotations and citation omitted]). A motion to dismiss based on documentary evidence (CPLR 3211[a][1]) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*id*.).

Breach of Contract Claims

Plaintiff's breach of contract claims alleges that under both the 2021 and 2022 services agreement, defendant violated the non-compete provision of each contract.

Defendant insists that the 2022 consultancy agreement (the second contract) is not enforceable against her because she never signed it. The Court denies this branch of the motion because the complaint alleges that defendant billed, plaintiff paid, and defendant accepted payment under the new consultancy agreement (NYSCEF Doc. No. 1, ¶¶ 35, 38). At the motion to dismiss stage, the Court must take the allegations as true—the assertion that defendant allegedly sought, and received, payment under the new contract states a cognizable claim for the enforceability of the contract even if she never actually signed it. "[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369, 795 NYS2d 491 [2005] [citation omitted]).

Defendant also argues that plaintiff did not perform under the terms of the 2021 consultancy agreement (the first contract) because it failed to pay her in July or August 2022.

Unfortunately, that does not state a basis to invalidate the entire contract (including the non-compete provision of this contract). Defendant does not allege that she *was never* paid under the contract, which could raise a cognizable claim that plaintiff never performed. Instead, plaintiff and defendant have an apparent disagreement about her work product for a couple of months. And plaintiff alleges that it paid defendant after this disagreement. On this record, there is no basis to find that (at this stage of the case) the Court should disregard the agreement.

The 2021 agreement provides that:

> "Both parties acknowledge a duty not to disclose any confidential information (including Members Names/Information) which is not in the public domain concerning the other's business, or the terms of this Agreement, without the other's prior written agreement save for disclosures required by law. Julia Moshy agrees not to collaborate or work with another Private Members Club in a city where there is a Casa Cipriani for a period of twelve (12) months from the date a termination is finalized" (NYSCEF Doc. No. 2, ¶ 11).

The 2022 agreement contains the exact same language (although it has additional language relating to a club being developed in Manhattan, presumably by plaintiff; in any event, this additional language is not at issue here).

This clearly states a claim for breach of contract of both agreements. Two parties entered into an agreement that contained a non-compete agreement and plaintiff alleges that defendant breached it by working for a another "Private Members Club" in the same geographic area within 12 months after her termination. There is no dispute that defendant started working for this other club shortly after leaving her job with plaintiff. The Court makes no factual findings about defendant's exact termination date; the Court merely finds that plaintiff stated a valid cause of action here.

Defendant's assertion that plaintiff cannot show any damages is not a reason to dismiss these claims. "Nominal damages are always available in breach of contract action" (*Kronos, Inc.*

v AVX Corp., 81 NY2d 90, 95, 595 NYS2d 931 [1993]); *see also Schleifer v Yellen*, 158 AD3d 512, 513, 71 NYS3d 420 [1st Dept 2018] [declining to dismiss a breach of contract claim where movant argued that plaintiff suffered no injury]). In other words, at this stage of the case, plaintiff need not prove that it suffered a specific amount of monetary damages. Of course, at some point (and probably during discovery) it will have to show its purported losses.

The Court observes that at oral argument, counsel for defendant made numerous arguments, such as public policy concerns, about the enforceability of the non-compete clause at issue here. Those arguments, and the cases mentioned during oral argument, were not included in its memorandum of law in support. Therefore, the Court declines to consider and analyze claims not included in the papers as plaintiff did not have a chance to address these claims in its opposition.

Breach of Implied Duty of Good Faith and Fair Dealing

The Court severs and dismisses this claim as it is duplicative of the breach of contract claim. The allegations in the complaint pertaining to this cause of action arise "from the same facts and sought identical damages" (*Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 588, 923 NYS2d 479 [1st Dept 2011]). In fact, the complaint does not readily identify an implied duty that plaintiff breached other than that defendant breached the contract (*see* NYSCEF Doc. No. 1, ¶¶ 57 and 58).

Unfair Competition and Trade Secrets

The Court dismisses both of these causes of action.

Both claims point to conduct that is expressly prohibited by the agreements at issue, which renders these claims duplicative of the breach of contract claim. "[T]hese causes of action are entirely based on alleged conduct that is proscribed by contract; hence, they are duplicative of plaintiff's contract claim" (*Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 125 NYS3d 92 [1st Dept 2020] [dismissing claims for misappropriation of trade secrets and unfair competition as duplicative]).

On the merits, the Court finds that both claims failed to state a cognizable cause of action. In the complaint, the unfair completion alleged is that defendant accepted a job with another private membership club (NYSCEF Doc. No. 1 at 9-10). That is it. Although plaintiff alleges that it ***will*** suffer the loss of confidential information and members, it does not allege that it ***has*** suffered the loss of any members (information surely within its knowledge) or even what specific confidential information defendant took. In other words, that defendant worked for a rival club is covered by the contract but plaintiff did not explain with any specificity how many members it lost. Of course, at this stage of the case, plaintiff may not know that it specifically lost members to the other club where defendant worked. But it certainly has the data to show a sudden loss in membership that correlates to defendant's employment with this other club.

Similarly, the claim for misappropriation of trade secrets fails (aside from the fact that it is duplicative) because the complaint does not identify what trade secrets were misappropriated. The complaint asserts that "Upon information and belief, Moshy is pursuing a plan to intentionally and wrongfully misappropriate Casa Cipriani's confidential information through a knowledge transfer to The Ned [the other club]" (NYSCEF Doc. No. 1 ¶ 65). This is simply too conclusory of an assertion to state a claim for misappropriation of trade secrets.

Plaintiff's reliance on the inevitable disclosure doctrine is inapposite because plaintiff did not adequately plead what confidential information plaintiff had access to and that she gave it to her new employer. Plaintiff did not claim, for instance, that defendant worked on, or had access to, plaintiff's membership lists and it thinks that some of those members left plaintiff's club for defendant's new employer. The complaint does not mention membership lists at all.

To the extent that plaintiff is implying that defendant improperly took the member lists, plaintiff's complaint is still lacking. "A trade secret, like any other secret, is nothing more than private matter; something known to only one or a few and kept from the general public, and not susceptible to general knowledge" (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 394-95, 328 NYS2d 423 [1972] [citation omitted]). Plaintiff did not explain how it protects any of the alleged trade secrets and how, therefore, defendant improperly acquired these trade secrets. In fact, the term confidential information is not even defined in its agreements with defendant. The agreements merely note that confidential information includes members' names and information. Of course, plaintiff never pled in the complaint that defendant took members' names or information and used it at the rival club. Plaintiff merely asserts that defendant worked at this other club.

And this Court's review of the inevitable disclosure doctrine suggests that it is usually applied when a party asks for injunctive relief related to the misappropriation of a trade secret and it is generally disfavored unless a movant has actual evidence of misappropriation (*see Marietta Corp. v Fairhurst*, 301 AD2d 734, 737, 754 NYS2d 62 [3d Dept 2003]). In fact, the cases cited by plaintiff for the inclusion of this doctrine (*e.g.*, *Spinal Dimensions, Inc. v Chepenuk*, 16 Misc 3d 1121(A) [Sup Ct, Albany County 2007]) concern an application for a preliminary injunction. Plaintiff did not seek injunctive relief (and this is a motion to dismiss).

The Court finds that whatever this doctrine's application is to motions outside of requests for injunctive relief, a plaintiff still must allege with some specificity the nature of the trade secrets at issue, how the defendant allegedly wrongfully acquired and used this information (the misappropriation) and what harm plaintiff suffered by defendant's actions. Plaintiff's complaint (the Court observes that plaintiff did not supplement its complaint with an affidavit in opposition) only offers conclusory allegations about these claims.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted to the extent that the second, third and fourth causes of action are severed and dismissed and denied with respect to the remaining requests for relief, and defendant is directed to answer pursuant to the CPLR.

Conference: December 13, 2023 at 11:30 a.m. By December 6, 2023, the 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 or 3) letters explaining why no agreement can be reached. Based on these submissions the Court will assess whether or not an in-person conference is necessary. The failure to upload anything by December 6, 2023 will result in an adjournment of the conference.

9/8/2023
DATE

ARLENE P. BLUTH, J.S.C.

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