

A Base IX Co. LLC v Murciano

2025 NY Slip Op 32954(U)

July 21, 2025

Supreme Court, New York County

Docket Number: Index No. 652275/2020

Judge: Nicholas W. Moyne

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NICHOLAS W. MOYNE PART 41M

Justice

-----X

A BASE IX COMPANY LLC,CSCO LLC

Plaintiff,

- v -

SALOMON A MURCIANO, SVES APPAREL, LLC,

Defendant.

-----X

INDEX NO. 652275/2020

MOTION DATE 03/13/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 66, 70, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, it is

The Defendants, Salomon A. Murciano and SVES Apparel, LLC, move for summary judgment, seeking the dismissal of the plaintiffs' Complaint. The plaintiffs, A Base IX Company, LLC and CSCO, LLC, oppose this motion. For the reasons set forth below, and upon review of all submissions and relevant deposition transcripts, the defendants' motion for summary judgment is denied.

I. Procedural and Factual Background

Plaintiffs A Base IX Company, LLC ("ABIX") and CSCO, LLC ("CSCO") are designers and wholesalers of women's apparel. Defendant Salomon A. Murciano was formerly an equal one-third partner in the plaintiffs' business along with David Apperman and Albert Gammal. In early 2019, Murciano decided to leave the plaintiffs' companies. To effectuate this departure, Murciano and the plaintiffs executed a Membership Interest Redemption Agreement (the "Redemption Agreement") on March 19, 2019.

The Redemption Agreement contained several key covenants, including a "Confidentiality; Non-Solicitation; Non-Disparagement" paragraph. Specifically, Murciano agreed not to disclose or use the plaintiffs' confidential information, with certain carve-outs for information already in the public domain. Additionally, for a period of one year after the execution of the Agreement, Murciano was prohibited

from directly or indirectly soliciting business from any of the suppliers identified on Schedule 3(b)(ii). Weihai Lianqiao International Co-op Group Co., Ltd. was explicitly listed as a prohibited supplier. Furthermore, Murciano agreed not to hire or offer to hire any employees identified on Schedule 3(b)(iii). Inyoung Park was among those employees.

A critical aspect of the Redemption Agreement, as highlighted by the plaintiffs, is that Murciano acknowledged that if he violated these covenants, the plaintiffs "may suffer irreparable harm," and that "money damages may not be a sufficient remedy for future harm". The Redemption Agreement explicitly provided that the plaintiffs "shall also be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach or threatened breach by Murciano, without proof of money damages" and also "monetary damages". The Redemption Agreement also included an indemnification clause for attorneys' fees resulting from Murciano's alleged breach.

The amended complaint asserts two causes of action: (1) breach of the Redemption Agreement against Murciano and SVES Apparel, LLC, and (2) tortious interference with the Redemption Agreement against SVES Apparel, LLC. SVES Apparel, LLC ("SVES") is a limited liability company of which Murciano is a member, and the plaintiffs allege he is its founder, majority, and managing member. Previously, Justice Ellen Gesmer denied a motion to dismiss brought by SVES, finding that the plaintiffs adequately alleged SVES as Murciano's alter ego and stated a claim for tortious interference with contract.

Defendants now seek summary judgment on several grounds. First, they claim neither Murciano nor SVES breached the Redemption Agreement, arguing that any information used was already in the public domain, communications with the supplier Weihai occurred after the restricted period expired and Inyoung Park was hired only after her employment with Plaintiffs was terminated and not solicited within the restricted period. The defendants also maintain that even if a breach occurred, the plaintiffs cannot prove damages, as SVES never sold any merchandise to Dollar General ("DG") and the plaintiffs' lost profit claims are speculative, lacking supporting sales history or projections with DG. Furthermore, the defendants contend that in the course of discovery, the plaintiffs have failed to produce a single document detailing how the net profit was allegedly calculated.

Finally, the defendants once again argue that SVES was not Murciano's alter ego, asserting it is a distinct legal entity and Murciano is not its sole member.

In opposing the motion, the plaintiffs argue that the defendants' own admissions and deposition testimony reveal factual disputes that preclude summary judgment. They emphasize that Murciano's statement in his deposition that he did not recall anything regarding his use of the plaintiffs' materials amounts to a tacit admission of misappropriation. They also point to his affidavit in support of the motion in which he admits to creating garment specifications based on information obtained from Park's computer, although he denies that any of the information was confidential or not in the public domain. Plaintiffs contend that the determination of confidentiality is a matter for trial.

Regarding damages, the plaintiffs initially asserted that New York law allows for approximation of lost profits where precise calculation is difficult and that proximate cause is a question of fact for trial. Crucially, at oral argument the plaintiffs indicated a shift in their damages claim and now appear to be seeking only what they term as the disgorgement of the \$250,000 consideration paid to Murciano and attorneys' fees, explicitly relying on the contractual provisions allowing remedies "without proof of money damages.". Plaintiffs maintain that the alter ego determination is a question of fact for trial, as Murciano wields considerable authority over SVES.

II. Legal Standard for Summary Judgment

Summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party (CPLR § 3212[b]). The proponent of a summary judgment motion, herein "moving party", must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate an absence of any material issues of fact (*see Pullman v Silverman*, 28 NY3d 1060, 1062-1063 [2016]). The moving party's failure to make a prima facie showing of entitlement requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Conclusory allegations, expressions of hope, or mere denials are insufficient to either warrant or defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *McGahee v Kennedy*, 48 NY2d 832, 834 [1979]).

When reviewing a motion for summary judgment, the non-moving party's facts must be accepted as true and the benefit all favorable inferences which may be drawn therefrom (*Asabor v Archdiocese of New York*, 102 AD3d 524, 527 [1st Dept 2013]; *Demshick v Community Hous. Mgt. Corp.*, 34 AD3d 518, 520 [2d Dept 2006]). Accordingly, a motion should not be granted where there is any doubt as to the existence of a factual issue, conflicting inferences may be drawn, or where there are issues of credibility, as those are the functions of a jury (*Id.*).

III. Analysis of the Motion

Defendants contend that neither Murciano nor SVES breached the Redemption Agreement. However, the record presents significant factual disputes regarding alleged breaches of confidentiality, supplier non-solicitation, and employee non-solicitation.

Plaintiffs allege that the defendants breached the Redemption Agreement by utilizing their confidential information. The Redemption Agreement defines "Confidential Information" to include "customer data, supplier data, trade secrets, and other techniques, manufacturing processes, methods, strategies, plans, procedures, pricing, sourcing and other information not generally available to the public and which is proprietary to the Companies". The Redemption Agreement also states that the Companies' business would be "greatly and irreparably damaged by the release or use of this confidential information outside of its own business". Defendants argue that no confidential information was used because the information contained in the cost and spec sheets was already in the public domain. However, during oral argument, this Court indicated that whether information is truly confidential or in the public domain is an issue of fact to be determined at trial, not on summary judgment.

Furthermore, the plaintiffs presented evidence suggesting direct misappropriation rather than public domain acquisition. Specifically, Inyoung Park, a former employee of Plaintiffs and current employee of Defendants, testified at her deposition that Jaime Stein (a former sales representative for Plaintiffs, now working for Defendants) requested that Ms. Park send her designs Ms. Park had created while at Base IX. Ms. Park confirmed in her deposition that, in compliance with Ms. Stein's request, she "dragged whatever [she] happened to have in [her] computer and e-mailed her" without checking style types. Plaintiffs also noted that the spec sheets used by Defendants "has Base IX's name in them" and "references price-point cost!". This manner of acquisition, involving the direct transfer of files from a former employee's laptop, is highly relevant to whether the information

constitutes a protectable trade secret or confidential information, irrespective of its theoretical public availability (*see Ecolab Inc. v Paolo*, 753 F Supp 1100, 1111 [E.D.N.Y. 1991]). Courts consider the method by which a defendant acquired the information, and unauthorized physical taking and exploitation of internal company documents by an employee for future business is subject to injunction as unfair competition. (*see id.*; *see also Advanced Magnification Instruments of Oneonta, N.Y., Ltd. v Minuteman Optical Corp.*, 135 AD2d 889 [3d Dept 1987] ["an employee's illegal physical taking or copying of an employer's files or confidential information constitutes actionable unfair competition."]).

At his deposition, Mr. Murciano essentially claimed not to remember anything regarding how the information about the designs was created or obtained. This testimony contradicts Ms. Park's statements, further highlighting a factual dispute. These disputed points, including the explicit definition of confidential information in the Redemption Agreement and the manner of its alleged acquisition, create triable issues of fact regarding the breach of confidentiality provisions.

The plaintiffs also allege that the defendants violated the non-solicitation provision by soliciting Weihai Lianqiao International Co-op, a supplier, within the restricted one-year period following the March 19, 2019 Redemption Agreement. Defendants claim that communications with Weihai did not occur until after the expiration of this one-year restricted period. David Apperman testified in his deposition that while he did not have direct evidence of pre-March 19, 2020 solicitation of Weihai, he believed there was "evidence that we saw to date of the supplier solicitation." This conflicting testimony, coupled with the allegations in the complaint, raises a factual dispute about the timing and nature of the alleged solicitation. The plaintiffs also allege that the defendants breached the Redemption Agreement by soliciting and hiring Ms. Inyoung Park, an employee listed on Schedule 3(b)(iii) of the Agreement, within the one-year restricted period. The defendants claim that Ms. Park was hired after her employment with Plaintiffs had been terminated and that she was not improperly solicited. However, Ms. Park's own deposition testimony creates a factual dispute. She testified that Murciano discussed an open position at his new company, offering her a significant pay increase (\$100,000 vs. her \$80,000 salary at the old company) for an "easier job". She also confirmed meeting Murciano twice before being employed by him, with the second meeting being when they decided on her employment. This directly contradicts the defendants' assertion that she was simply hired after a chance meeting in the street. Mr. Murciano's lack of memory on this point further underscores the factual dispute.

The defendants' primary argument for summary judgment on damages was that Plaintiffs could not prove lost profits related to DG sales, asserting that defendants never sold to DG, plaintiffs had no prior sales history with DG, and the plaintiffs provided no discovery on DG. During oral argument, plaintiffs' counsel clarified and narrowed their damages claim. He explicitly stated that they were "not arguing those lost profits" related to DG sales. Instead, the plaintiffs now seek the return of the \$250,000 consideration paid to Mr. Murciano in the Redemption Agreement, plus attorney's fees, arguing that this is a valid claim for breach of contract, where Murciano received money as a material inducement not to engage in certain activities, and then breached that agreement.

While the defendants objected to this as a bait and switch due to discovery being closed and this specific theory not being articulated in interrogatories, this Court noted that the amended complaint might broadly allege such a claim, and that an interrogatory response alone does not necessarily constitute a waiver of a claim pled in the complaint. Crucially, the Redemption Agreement itself explicitly addresses remedies for breach of the covenants, stating: "Murciano acknowledges and agrees that if he violates any of his covenants under this Section 3: the Companies may suffer irreparable harm for any judicially determined breach of his covenants under this Agreement and that that money damages may not be a sufficient remedy for future harm. In addition to all other remedies (including damages for injuries suffered), the Companies shall also be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach or threatened breach by Murciano, without proof of money damages and without posting a bond or other security in order to obtain equitable relief. Murciano further agrees that seeking equitable relief to prevent future harm shall not prevent the Companies from also obtaining monetary damages against Murciano for the same breach."

This contractual language directly contradicts the defendants' argument that the plaintiffs must prove lost profits to establish damages and defeats their summary judgment motion on this ground. The Redemption Agreement specifically contemplates that the plaintiffs may seek remedies, including monetary damages, without proof of money damages for certain breaches. The question of whether Murciano's alleged breaches were material to the Redemption Agreement, impacting the benefit of the bargain, is a factual issue that can only be resolved at trial.

Finally, the plaintiffs allege that SVES Apparel, LLC is the "alter ego" of Salomon Murciano, making SVES contractually liable for Murciano's alleged

breaches and for tortious interference with the Redemption Agreement. The defendants argue that the plaintiffs have offered no proof to support this claim. Murciano's own deposition testimony indicates his involvement in forming some of the entities referenced in the complaint, even if he denies remembering other details. The determination of whether one entity is the alter ego of another is concerned with reality and not form and can be found where an individual exercises considerable authority over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the plaintiff, thus warranting intervention by a court of equity (*see Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]). This remains a disputed issue of fact that cannot be resolved on a motion for summary judgment.

For the foregoing reasons, the defendants have failed to meet their burden of establishing the absence of material issues of fact. There are significant factual disputes regarding whether the defendants breached the confidentiality, supplier non-solicitation, and employee non-solicitation provisions of the Redemption Agreement. Furthermore, while the nature of the damages claim has evolved during litigation, the terms of the Redemption Agreement and relevant caselaw indicate that the damages claims are not speculative and are appropriate for determination at trial. Finally, the question of alter ego liability remains a triable issue of fact.

Accordingly, it is hereby

ORDERED that Defendants' Motion for Summary Judgment is DENIED in its entirety.

The parties shall confer with the Court regarding next steps in this litigation.



<u>7/21/2025</u> DATE					<u>NICHOLAS W. MOYNE, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE