

Latin Mkts. Brazil, LLC v Salsinha
2019 NY Slip Op 30201(U)
January 4, 2019
Supreme Court, New York County
Docket Number: 650573/2018
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X

LATIN MARKETS BRAZIL, LLC d/b/a MARKETS
GROUP

Index No.: 650573/2018

Plaintiff,

-against-

Motion Seq. No.002

SALSINHA, ROY

Defendant.

-----X

Masley, J:

In motion sequence number (002), Roy Salsinha ("Defendant") moves pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(1) to dismiss the amended complaint dated May 15, 2018, ("Amended Complaint") filed by plaintiff Latin Markets Brazil, LLC D/B/A Markets Group Inc. ("Latin Markets").

Background:

The following facts are taken from the Amended Complaint. (NYSCEF Doc. No. 11.) Latin Markets is an executive forum provider that organizes conferences. (NYSCEF Doc. No. 11 at 1.) With respect to this business, Latin Markets maintains extensive customer lists. (NYSCEF Doc. No. 11 at 1.) The customer lists, according to Latin Markets, are trade secrets because Latin Markets developed them over many years, they are not available to the public and not ascertainable outside of Latin Markets' business. (*Id.* at 2.) To protect these lists, Latin Markets allegedly enters into confidentiality, non-solicitation, non-competition agreements with its employees. (*Id.*)

Latin Markets entered into one such agreement with Defendant ("Employment Agreement"). (*Id.*)

Latin Markets employed Defendant from May 02, 2013 to March 17, 2016. (*Id.* at 2, 3.) Under the terms of the Employment Agreement, Defendant, *inter alia*, agreed to keep certain information confidential, not solicit other employees of Latin Markets, not solicit the clients and contacts of Latin Markets, and not to compete with Latin Markets' business. (*Id.* at 2-3.)

Latin Markets claims that the Defendant violated these terms of the Employment Agreement by breaching the duty of confidentiality, non-solicitation and non-competition provisions. (*Id.* at 3-4.) Specifically, Latin Markets alleges that within twelve months of termination from employment, Defendant used Latin Markets' customer lists to solicit real estate event business for Defendant from clients lists. (*Id.* at 3.) Latin Markets also claims that the Defendant failed to return confidential and proprietary information after Defendant was no longer employed by Latin Markets. (*Id.* at 4.)

Additionally, Latin Markets alleges that Defendant engaged in business activities directly in competition with Latin Markets' real estate forum business activities within the twelve months of leaving Plaintiff's employment. (*Id.*) Plaintiff also claims that the Defendant solicited Latin Markets' employees to leave Latin Markets' employ and work for Defendant instead. (*Id.*) Further, Defendant allegedly induced Latin Markets' employees to disclose and steal Latin Markets' trade secrets and confidential information in exchange for cash. Latin Markets alleges damages for approximately \$400,000. (*Id.*)

In support, Latin Markets submits the affidavit of its Chief Executive Officer dated July 13, 2018. (NYSCEF Doc. No. 19.) This affidavit, along with the accompanying exhibits, details the specific instances where Defendant allegedly breached the confidentiality, solicitation and non-compete provisions. (*Id.* at 2.)

Procedural History

The original complaint, dated February 06, 2018, was captioned with Markets Group, Inc. as the plaintiff. (NYSCEF Doc. No. 1.) Latin Markets filed the Amended Complaint on May 15, 2018, amending the caption by changing the plaintiff from Markets Group, Inc. to Latin Markets Brazil, LLC D/B/A Markets Group. (NYSCEF Doc. No. 11.) On June 22, 2018, Defendant filed a motion to dismiss the Amended Complaint. (NYSCEF Doc. No. 16.)

Discussion

On a motion to dismiss for failure to state a claim, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. (*Leon v Martinez*, 84 N.Y.2d 83, 87-88 [1994].) The court must determine whether "from [the complaint's] four corners [,] factual allegations are discerned which taken together manifest any cause of action cognizable at law." (*Gorelik v Mount Sinai Hosp. CTR.*, 19 AD3d 319, 319 [1st Dept 2005].) Vague and conclusory allegations, however, are not sufficient to sustain a cause of action. (*Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 [1st Dept 2003].)

Standing

Defendant objects to the original plaintiff Markets Group, Inc. as an improper plaintiff. However, Markets Group, Inc. is not a party to the Employment Agreement, 4 of 8

and thus, has no standing to sue in this action. Defendant objects to Latin Markets' attempted cure of its lack of standing by changing Markets Group, Inc. in the original complaint to Latin Markets Brazil, LLC D/B/A Markets Group in the Amended Complaint. Defendant contends that this substitution is not proper without leave of this Court. In opposition, Latin Markets claimed at Oral Argument on September 25, 2018 that the caption in the original complaint is a typographical error, and it timely amended under CPLR 3025 as a matter of right.

Misnomers may be remedied by amending the caption so long as the parties are fairly apprised of the misnomer and are not prejudiced. (*See Opiela v May Industries Corp.*, 10 AD3d 340, 354 [1st Dept 2004].) In the context of misnomers, amendment of the caption does not amount to a change in parties. (*Continental Ins. Co. v Joseph E. Marx Co., Inc.*, 220 AD2d 343, 344 [1st Dept 1995].) Markets Group is the assumed name of Latin Markets according to a certificate issued by the New York State Department of State Division of Corporations. (NYSCEF Doc. No. 20.) Latin Markets also submits the affidavit of its Chief Executive Officer who states that Markets Group is the assumed name of Latin Markets. (NYSCEF Doc. No. 19.) Furthermore, Defendant has not shown how it was prejudiced by this misnomer. Defendant's argument that Latin Markets' amendment was improper is belied by the very case Defendant cites insofar as that court explicitly stated that amending the caption was improper because it did not involve "the correction of a mere misnomer." (*Resurgent Capital Services, LLC v Mackey*, 32 Misc3d 265, 266 [Dist Ct, Nassau County 2011].) While a motion to amend is good practice, given the convoluted procedural posture of this case, the amendment

was timely. Accordingly, dismissal on the grounds that Plaintiff lacks standing is denied.

First cause of action: Breach of Employment Agreement

Defendant's motion to dismiss Latin Markets' first cause of action for breach of contract is granted. To state a breach of contract claim, the plaintiff must establish that (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages. (*VisionChina Media Inc. v Shareholder Representative Servs., LLC.*, 109 AD3d 49, 58 [1st Dept 2013].) Latin Markets has provided a copy of the Employment Agreement signed by the Defendant, agreeing to work as a paid intern for Latin Markets at an hourly rate. The Defendant acknowledged in the Employment Agreement, that during the course of employment, the Defendant would have access to trade secrets and confidential and proprietary information relating to Latin Markets' business; and as such the Defendant expressly agreed to a duty of confidentiality, non-solicitation and non-competition. These provisions of the Employment Agreement applied both during and after twelve months of separation of employment with Latin Markets. Thus the first element is satisfied.

Latin Markets claims that it performed under the Employment Agreement and thus the second element is satisfied. Latin Markets alleges that after Defendant's employment was terminated, Defendant misappropriated Latin Markets' client lists and allegedly used the list to target Latin Markets' clients. Latin Markets further alleges that the Defendant approached Latin Markets' employee to seek additional confidential customer information in exchange for cash. Additionally, Latin Markets claims that the Defendant also offered the same employee employment at Defendant's new place of business. Thus the third element is satisfied.

The fourth element of damages however is not satisfied. The pleadings must set forth facts showing the damage upon which the action is based. (*Gordon v. Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988].) Indeed, a complaint is fatally deficient where it does not demonstrate how the defendant's alleged breach of the confidentiality agreement caused the plaintiff injury. (*Id.*) Here, Latin Markets only claims that as a result of breach of the Employment Agreement by the Defendant, Latin Markets suffered damages in an amount to be determined but no less than \$400,000. Latin Markets does not demonstrate any injury that can be attributed to Defendant's alleged breach of the Employment Agreement. Accordingly, this element fails. Without damages, a breach of contract claim cannot be sustained. (*See Lexington 360 Associates v First Union Nat. Bank of North Carolina*, 234 AD2d 187, 190 [1st Dept 1996].)

Defendant's motion to dismiss the first cause of action is granted.

Second cause of action: Misappropriation of Trade Secret

Defendant's motion to dismiss the second cause of action for misappropriation of trade secrets is also granted. "To prevail on a claim for misappropriation of trade secrets, a plaintiff must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means." (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015] [internal quotations omitted].) Here, Latin Market's sufficiently alleges a trade secret based on Latin Markets' allegations that it developed the lists over many years, the lists are not available to the public and not ascertainable outside of Latin Markets' business. (*Leo Silfen, Inc. v Cream*, 22 NY2d

387, 392-392] [“[C]ourts have not hesitated to protect customer lists and files as trade secrets ... especially ... where the customers’ patronage had been secured by years of effort and advertising effected by the expenditure of substantial time and money”).]

Thus the first element is satisfied. Although Latin Markets claims that the Defendant used the lists to send marketing materials to Latin Markets’ clients, breaching the Employment Agreement, Latin Markets has not adequately stated a claim for breach of the Agreement. Latin Markets fails to allege a confidential relationship or duty, or that Defendant discovered the lists by improper means. Accordingly, Defendant’s motion to dismiss the second cause of action is granted.

Accordingly, it is hereby

ORDERED that Defendant Roy Salsinha’s motion to dismiss is granted and the case is dismissed.

Dated:

1/4/19

ENTER:

