

<b>Tapestry, Inc. v Gibb</b>
2019 NY Slip Op 31055(U)
April 5, 2019
Supreme Court, New York County
Docket Number: 653042/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

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TAPESTRY, INC.,

Plaintiff,

- v -

THOMAS GIBB INDIVIDUALLY, HOMEGROWN FOR GOOD,  
LLC D/B/A TIDAL NEW YORK

Defendants.

INDEX NO. 653042/2018

MOTION DATE 12/28/2018,  
12/28/2018

MOTION SEQ. NO. 001 002

**DECISION AND ORDER**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 62

were read on this motion

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 7, 8, 9, 10, 11, 12, 23, 41, 46, 60

were read on this motion

DISMISS

Defendant Thomas Gibb moves pursuant to CPLR 3211 to dismiss plaintiff's complaint for breach of contract (Count I), breach of fiduciary duty (Count II), breach of loyalty and diversion of corporate assets (Count III), unfair competition (Count IV), and unjust enrichment (Count V). Defendant Homegrown for Good LLC d/b/a Tidal New York (Tidal) moves to dismiss Count V for unjust enrichment, the only claim against Tidal in the complaint.

Tapestry Inc. (Tapestry) is a global fashion house of modern luxury lifestyle brands including Coach,<sup>1</sup> Kate Spade and Stuart Weitzman. (NYSCEF Doc. No. 1 at ¶

<sup>1</sup> Coach changed its name to Tapestry, Inc. on October 41, 2017. (NYSCEF Doc. No. 1 at n 2).

22). Coach offered Gibb employment in a letter dated February 15, 2017 (the Agreement).<sup>2</sup> On March 27, 2017, Gibb commenced his employment at Tapestry as Vice President of Footwear Operations for the Coach brand, and he later transitioned to the Stuart Weitzman brand. (*Id.* ¶ 19). Tapestry admits that Gibb disclosed that he had an ongoing ownership interest in Tidal, a business he co-founded with his brother that manufactures and sells rubber flop-flops. (*Id.* ¶¶ 4, 35). Tapestry was aware that Gibb's brother remains actively involved in managing Tidal and that Gibb continues to use an email address at Tidal as his personal address. (*Id.* ¶¶ 35-40). However, Tapestry asserts that Gibb failed to disclose a four-year consulting agreement with Tidal pursuant to which he was paid a monthly fee of \$4,800. (*Id.* ¶¶ 43, 44).

On May 29, 2018, Gibb initiated a sexual harassment action against Tapestry and Giovanni Morelli, the former Creative Director of Stuart Weitzman. (See Index No. 155005/2018 [Sup Ct, NY County 2018].)

Tapestry initiated this action on June 18, 2018 and denies retaliation against Gibb.

CPLR 3211 (a) (1) provides that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence." "A cause of action may be dismissed under CPLR 3211 (a) (1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion*

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<sup>2</sup> While referenced in the complaint, the Agreement is not attached. (NYSCEF Doc. No. 16). The court considers the copy submitted by Gibb, signed by Tapestry, but not Gibb for the purposes of this motion to dismiss. (*Alliance Network, LLC v Sidley Austin LLP*, 43 Misc 3d 848, 852 n 1 [Sup Ct, NY County 2014]).

*Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2017] [citation omitted].) “The documents submitted must be explicit and unambiguous.” (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623 [1st Dept 2017] [citation omitted].)

CPLR 3211 (a) (7) provides that a “party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action.” A motion made pursuant to CPLR 3211, requires the court to give the pleadings a liberal construction and accept the facts alleged as true. (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) The court will accord plaintiff the benefit of every possible favorable inference to determine if the facts as alleged in the complaint fit within any cognizable legal theory. (*Id.* at 87-88.) The court's analysis of plaintiff's claims is “limited to the four corners of the pleading.” (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015].) In “circumstances where legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference,” and “the criteria becomes whether the proponent of the pleading has a cause of action, not whether she has stated one.” (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] [internal quotation marks and citations omitted].)

To assert a cause of action for breach of contract, Tapestry must allege the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages. (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Tapestry alleges that Gibb agreed to be bound by an employment agreement and Code of Conduct and breached both by failing to disclose to Tapestry a consulting agreement with Tidal. (NYSCEF Doc. No. 1 at ¶¶ 63, 64). Tapestry also

asserts that Gibb breached a confidentiality obligation by sharing information “he obtained through a shoemaking company, Luis Onfre,” which “he came in contact with as a result of his position at Tapestry” and “shared it with a family member who is employed by another New York-based company that also designs and produces apparel and accessories.” (*Id.* at ¶ 57). At argument, Tapestry identified the family member as his wife who works for another fashion company. (NYSCEF Doc. No. 62 at 17:21-24). Tapestry also alleges that Gibb emailed some confidential documents to himself in violation of a confidentiality obligation. Should Tapestry prevail, it seeks forfeiture based on Gibb’s Stock Option Grant Notice and Agreements, which provide “that any Wrongful conduct, ... would result in his termination for cause as well as his forfeiture and clawback of any financial gain as a result of his equity awards.” (*Id.* ¶ 34).

First, Gibb attacks Tapestry’s claim for breach of the Code of Conduct.

As an at-will employee, Gibb argues he could not have breached an employment contract with Tapestry. While it is true that an offer to hire an employee at-will does not create a contractual relationship, that is not what Tapestry alleges. (*see Pardy v Gray*, 2008 WL 2756331, 2007 US Dist. Lexis 45428 [SD NY, July 15, 2008, No. 07 Civ. 6324(LAP)]). Rather, Tapestry asserts breach of the Code of Conduct as incorporated by the Agreement. While the Agreement mentions Tapestry’s policies “including the Executive Stock Ownership Policy, and our Confidentiality, Information Security and Privacy Agreement; and the terms and conditions of individual equity award agreements,” it does not list the Code of Conduct. (NYSCEF Doc. No. 16 at p. 4). Moreover, plaintiff fails to allege how Gibb breached the Code of Conduct. Therefore,

the breach of contract claim is dismissed to the extent it alleged a breach of the Code of Conduct.

Gibb argues that Tapestry fails to allege a breach of the Conflicts of Interest provision in the Code of Conduct (the Provision). The Provision requires an employee to be "doing business with or competing with organizations that employ or are partially owned by family members." Again, the court is compelled to dismiss this claim because the Code of Conduct was not listed in the Agreement. In addition, Tapestry fails to allege that Tidal is a competitor. Indeed, Tidal is not listed on Tapestry's Competitor list. (NYSCEF Doc. No. 16). Tapestry also fails to allege that a "Family Member or close Personal Relationship" or "Personal Investment" created any conflict. The court cannot simply infer that Gibb's family members are necessarily competitors.

As to Gibb's alleged breach of the provisions in Tapestry's November 2017 Confidentiality, Information Security and Privacy Agreement (CISP Agreement), mentioned in the Agreement, the motion to dismiss is denied. It provides, in part:

"In connection with your work as an employee of Tapestry, Inc. (Tapestry), you have had and will have access to certain financial, business, personal, and legal information of Tapestry which is strictly confidential, proprietary, and/or trade secret (the "Confidential Information"). Examples of private, confidential information include, but are not limited to: information concerning Tapestry's employees, customers or suppliers, credit card numbers, names and addresses, social security numbers, financial information, phone numbers, passwords, intellectual property, etc.

It is important to handle Confidential Information with discretion safeguarding it when in use, filing or disposing of it properly when not in use, and discussing/sharing it only with those who have a need to know for a legitimate business reason. The following sets forth your obligations regarding Confidential Information:

- You agree to regard and preserve as confidential the Confidential Information, which includes all oral, written and electronic information given to you, as well as your notes, compilations, reports, analyses and recordings of such information during job-related activities
- The Confidential Information remains the property of Tapestry at all times, is for internal use only, and may not be taken from Company premises, either on paper or in any electronic format, except for purposes of performing work outside the normal workplace
- You may not use, share, copy or disseminate the Confidential Information outside of Tapestry during employment and after employment except as necessary to perform your duties for Tapestry
- You further agree that you will not disclose to any person, firm or enterprise, not otherwise authorized by this letter to receive the Confidential Information, the fact that the Confidential Information has been made available to you
- Third-party vendors are required to sign a confidentiality agreement before sharing any Confidential Information with them.”

(NYSCEF Doc. No. 26 at 1.) While Tapestry fails to explain how information obtained from Onfre would be confidential, the court can infer the confidentiality of design plans in the highly competitive fashion industry. Disclosure of confidential information to Gibb's wife, brother or Tidal, as alleged in the complaint, may constitute a violation of the CISP Agreement. Maintaining confidentiality, the bargained-for-conduct, may constitute harm in and of itself. (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 213-214 [1st Dept 2013]). Therefore, Tapestry has stated a claim for breach of the CISP Agreement. The breach of contract claim is otherwise dismissed.

Next, Gibb argues that Tapestry has not adequately alleged a single element of a breach of fiduciary duty cause of action. To state such a claim, a plaintiff must allege (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3)

damages. (*Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]). Tapestry claims that Gibb breached his fiduciary duty by misappropriating Tapestry's confidential information, attempting to leverage relationships he formed by his position at Tapestry for his own economic benefit or the benefit of third-parties and interfered with Tapestry's business relationships. Specifically, Tapestry alleges that Gibb failed to disclose his Tidal Consulting Agreement. Whether he did or not is an issue of fact and not appropriate for determination on this motion to dismiss. (See *Phansakkar v Anderson Weinroth & Co., LP*, 344 F3d 184, 200, 203 [2d Cir 2003] [employee's failure to disclose that he sat on the boards of other companies could have caused harm to employer which would constitute a breach of fiduciary duty]). Likewise, it would be premature for the court to determine whether Gibb, hired as a vice president according to the Agreement, has a fiduciary duty or not. The court is not able to determine at this juncture whether Gibb is a typical employee, from which it is insufficient to infer a fiduciary relationship, or an officer or key employee which could trigger a fiduciary duty. (See *WSP USA Corp. v Marinello*, 2013 WL 6704885, \*8, 2013 US Dist LEXIS 178419, \*23 [SD NY, Dec. 19, 2013]). As to damages, Tapestry seeks to recoup Gibb's salary and benefits, if a breach of fiduciary duty is established. Contrary to Gibb's demand, Tapestry is not required to plead and prove damages at this pleading stage. (*Matikos Capital Mgmt LLC v Frontpoint Partners LLC*, 2007 NY Misc Lexis 9253 at \*9 [Sup Ct, NY County 2007]). Though this count is likely duplicative of the contract claim, the court finds that it is premature to dismiss it.

Tapestry claims that Gibb breached his duty of loyalty and diverted corporate opportunities by misappropriating Tapestry's confidential information, attempting to



leverage relationships he formed by his position at Tapestry for his own economic benefit or the benefit of third-parties and interfered with Tapestry's business relationships, and seeking reimbursement from Tapestry for illegitimate business expenses for his personal benefit or the benefit of Tidal. Gibb's motion is granted to the extent that the claim for diverting a corporate opportunity is dismissed. "That claim is available only where the employee has acted directly against the employer's interests - as in embezzlement, improperly competing with the current employer, or usurping business opportunities." (*Sullivan & Cromwell LLP v Charney*, 15 Misc 3d 1128[A] [Sup Ct, NY County 2007]). Tapestry's failure to identify the opportunity diverted is fatal to its claim. (*Veritas Capital Mgt., L.L.C. v Campbell*, 82 AD3d 529, 530 [1st Dept 2011]). Therefore, the third count is dismissed.

In Count IV, Tapestry alleges that Gibb engaged in unfair competition by using Tapestry's confidential information to benefit Tidal. The allegations are identical to the breach of contract allegations. The court is compelled to dismiss Count IV as duplicative of Count I.

In Count V, Tapestry alleges that Gibb and Tidal were unjustly enriched by their wrongful conduct. Unjust enrichment occurs when one person has obtained money or benefit because of the actions by another person, under such circumstances that, in fairness and good conscience, the benefit should not be retained. (PJI 4:2). "To state a claim for unjust enrichment, a plaintiff must allege that: (1) the [defendant] was enriched, (2) at [plaintiff's] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered." (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015] [internal quotation marks omitted]). Tapestry alleges

that Gibb impermissibly used his Tidal email account to send himself Tapestry's proprietary footwear plans. (NYSCEF Doc. No. 1 at ¶ 54). There is no allegation that Tidal used the alleged purloined plans. Likewise, Tapestry fails to explain how Tidal benefitted from Gibb's alleged disclosure to Tapestry customers of his connection to Tidal. (*See D. Penguin Bros. Ltd v National Black United Fund, Inc.*, 137 AD3d 460, 461 [1st Dept 2016] [failure to allege facts demonstrating that defendant participated in and benefitted from the scheme is tantamount to a conclusory allegation]). The court agrees with Tapestry that evidentiary support is not required at this stage. However, stating that Tidal was unjustly enriched does not make it so. Tapestry must assert some facts, any facts, in support. (*See Mandarin Trading Ltd v Wildenstein*, 16 NY3d 173, 182-183 [2011]). Therefore, Tapestry fails to state how Tidal was enriched, let alone how it would be unjust.

Tapestry's claim for unjust enrichment against Gibb is also dismissed as duplicative of the breach of contract claim against him.

Accordingly, it is

ORDERED, that Gibb's motion to dismiss is granted to the extent that the first cause of action is dismissed in part except as to breach of the confidentiality agreement. The Third, Fourth and Fifth counts are dismissed in their entirety; and it is further

ORDERED that Tidal's motion to dismiss the complaint is granted and the action is dismissed against Tidal.

April 5, 2019

ENTER:

Andrea Masley, J.S.C.