SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

AMENDED DECISION/ ORDER

AUTOMATION GRAPHICS, INC.,
Plaintiff,

INDEX NO. 153918/12

-against-

MOTION SEQ. NO. 001

CHRISTOPHER E. ALLAN and DEAN LARGMANN,
Defendants.

The following papers, numbered 1-8 were considered on this motion for summary judgment:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits _____	3
Replying Affidavits	4

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, defendants' motion for, *inter alia*, summary judgment is granted, as detailed below, based upon the theories of res judicata and collateral estoppel.

This case was commenced by plaintiff against defendants (former employees of plaintiff), who resigned from plaintiff corporation, on or about February 2010, over four (4) years ago. In its amended complaint, plaintiff asserts causes of action for: (1) breach of fiduciary duty based upon defendants' alleged stealing of confidential client lists/information, and delivering such lists/information to plaintiff's competitor, Candid Litho, Ltd. ("Candid"), defendants' subsequent employer; (2) tortious interference with prospective economic advantage; (3) diversion of corporate opportunities; and (4) unfair competition.

This is the third action commenced by plaintiff involving defendants and defendants' former employment with plaintiff. Both prior actions were summarily dismissed, as explained below.

Action Number One: The Civil Court Action

In 2010, plaintiff commenced an action against the within defendants, in the Civil Court of the City of New York, entitled *Automation Graphics, Inc. v. Christopher E. Allan and Dean Largmann*, (index number CV045360/2010) ("Civil Court action"), alleging that defendants breached certain non-compete agreements, after they ceased working for plaintiff. The Civil Court action was dismissed, by order of the Hon. Andrea Masley, dated July 13, 2011. Exhibit I, Notice of Motion. In such decision, the court found the covenants not to compete to be unenforceable and the client lists were deemed not to be confidential trade secrets. Additionally, by order dated February 7, 2012, Judge Masley denied plaintiff's motion to reargue the July 13, 2011 dismissal.

Action Number Two: The Action Against Defendants' Subsequent Employer

Prior to the dismissal of the Civil Court action, plaintiff commenced an action, in this court, against the within defendants' subsequent employer, Candid, entitled *Automation Graphics, Inc. v. Candid Litho Printing, Ltd. and Howard Weinstein* (index number 104338/2011)("the Candid action), alleging causes of action for conversion, tortious interference with a contract and accounting. The Candid action was also summarily dismissed, by order dated May 22, 2012, by the Honorable Manuel Mendez. In seeking summary judgment of dismissal of the Candid action, the defendants argued that the Candid action was barred by the dismissal of the Civil Court action and Justice Mendez agreed.

In the May 22, 2012 decision in the Candid action, the court indicated that plaintiff had alleged that such "defendants tortuously interfered with non-disclosure and non-competition agreements [plaintiff] had with two former employees, that [such] defendants hired the former employees with the intention of obtaining confidential lists of clients and prices in order to compete against plaintiff and outbid plaintiff for business". Exhibit K, Notice of Motion. The "two former employees", referenced in the May 22, 2012 decision, are Christopher E. Allan ("Allan") and

Dean Largmann ("Largmann"), the defendants in the within action. In dismissing the Candid action, the court stated, *inter alia*, that: "[t]his action has identical issues with the one decided by Judge Masley in Civil Court. Plaintiff had full and fair opportunity to litigate the issues in the [C]ivil [C]ourt action. The Civil Court action decided the issues in favor of defendants and against the plaintiff. Plaintiff is collaterally estopped from re-litigating these issues..." (citations omitted). Exhibit K, Notice of Motion.

Defendants' Motion in this Third Action

Summary Judgment of Dismissal

As stated above, this is plaintiff's third action, arising out of the business relationship it had with its former employees, defendants Allan and Largmann. In seeking summary judgment of dismissal of this action defendants argue that the action is barred by the doctrines of collateral estoppel and *res judicata*. This court agrees.

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Stillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395 (1957). The proponent of a summary judgment motion must "make a prima face showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so." *Zuckerman v. City of New York*, 49 NY2d 557 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 (1978).

"The doctrine of res judicata holds that a final judgment bars further actions between the same

parties on either the same cause of action *or any claim related to the same course of conduct*, unless the requisite elements and proof required for the new claim 'vary materially' from those of the claim in the prior action. *Ginezra Associates LLC v Ifantopoulos,* 70 AD3d 427, 429 (1st Dept 2010)(emphasis supplied). A judgment on the merits precludes another action based on the same foundation of facts, even though a different theory for similar relief is set forth. *See Matter of Reilly v. Reid*, 45 NY2d 24 (1978); *Eidelberg v. Zellermayer*, 5 AD2d 658 (1st Dept 1958). Under the doctrine of collateral estoppel, issues of law and questions of fact necessarily decided by a court of competent jurisdiction remain binding upon the parties and those in privity with them, in all subsequent litigation in which the same issues are material. A party asserting collateral estoppel must demonstrate that there is an identity of issue that has necessarily been decided in the prior action and is decisive of the present action, and that there must have been a full and fair opportunity to contest the decision now said to be controlling [internal citation omitted]." *Ginezra Associates LLC v Ifantopoulos,* 70 AD3d at 429.

Applying such principles herein, the within action is barred and, therefore, defendants' motion for summary judgment of dismissal is granted. In the prior two (2) actions and in the within action, the plaintiff is the same entity, Automation Graphics, Inc. In the Civil Court action and in this action, the parties are identical. In all three (3) actions, the causes of action set forth in the complaints arose from the same facts that, *inter alia*, Allan and Largmann worked as sales associates for plaintiff and when they left their employment with plaintiff, they commenced working for Candid. As stated, plaintiff's Civil Court action against defendants was dismissed, after the court determined that the alleged covenant not to compete (which was the basis of plaintiff's action) was not enforceable, and the client list was found to be not confidential and not considered a "trade secret". See Exhibit I, Notice of Motion. Similarly, in this action, while plaintiff now asserts alleged "new" theories of liability, the premise and the underlying facts are the same as in the two (2) prior actions, namely, that defendants improperly used the confidential client list; however, as indicated above, there has already been a specific determination, in the Civil Court action, that the client list is not confidential.

Significantly, in opposition to defendants' motion to dismiss, plaintiff does not even address the

legal issues asserted by defendants as to *res judicata* or collateral estoppel, except to conclusively state that the causes of action asserted herein were never claimed or litigated before. Plaintiff fails, however, to raise any factual issues, and instead, merely argues that defendant's motion should be denied because discovery is not complete. Plaintiff's argument as to discovery is disingenuous, at best, and was previously addressed by this court, at the discovery conference on May 2, 2013.

At the May 2, 2013 conference, plaintiff argued and also argues herein, that documentary remains outstanding. Defendants strongly disagree and claim that they have produced all documents in their possession and control. As such, and as required by this court's discovery conference order dated May 2, 2013, defendants supplied plaintiff with an affidavit indicating that the documents demanded by plaintiff do not exist. Additionally, in opposition to defendants' motion for summary judgment, plaintiff does *not* detail the specific documentary discovery that it claims remains outstanding, which allegedly would defeat defendants' entitlement to summary judgment. In fact, plaintiff admits that some of the discovery which it claims remains outstanding, is from non-parties, upon whom subpoenas were allegedly served. Moreover, it is disingenuous and frivolous to now claim that discovery is outstanding when a note of issue was filed by plaintiff, on or about May 29, 2013, indicating that all discovery had been completed. Thus, plaintiff's argument that defendants' motion for summary judgment must be denied due to outstanding discovery is without merit.

It is noted that, in opposing defendants' motion for summary judgment, plaintiff cites the incorrect legal standard to be applied by this court on a motion for summary judgment and instead cites the law which is applicable on a pre-answer motion to dismiss for failure to state a cause of action. See ¶22, Affidavit in Opposition.

Sanctions for Frivolous Conduct Pursuant to 22 NYCRR §130-1.1

Defendants' request for sanctions and penalties against plaintiff and its counsel for frivolous conduct pursuant to 22 NYCRR §130-1.1 is granted, as explained below, as the conduct of

plaintiff and its attorney Richard Savitt during the litigation of this case has been "completely without merit in law [and] fact" and was "undertaken primarily to...harass" defendants. 22 NYCRR 130-1.1(c).

22 NYCRR §130-1.1 provides in relevant part as follows:

> Costs; sanctions (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court...costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct...".

In accordance with 22 NYCRR §130-1.1 (c) defines conduct as frivolous if:

> "(1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injury another; or (3) it asserts material factual statements that are false".

Here, as correctly argued by defendant in seeking an award of sanctions, plaintiff's conduct and that of its attorney Richard Savitt has been frivolous throughout this litigation from its inception with the filing of the complaint. As noted, incredibly, this is the third action commenced by plaintiff and its counsel against defendants and/or their employer, involving the exact same allegations of misappropriating trade secrets, corporate opportunity and breach of contract, with respect to a business relationship that ended over four (4) years ago. The two prior actions were summarily dismissed. Nevertheless, plaintiff and its counsel Richard Savitt were not deterred, and they frivolously commenced this third action, without legal merit and then frivolously continued to pursue it, over the course of approximately two (2) plus years. During the course of discovery and prior to the filing of a note of issue, several court appearances were made by the parties and depositions of the parties were held. Significant documentary discovery was exchanged and a note of issue filed by plaintiff, yet, plaintiff's counsel Richard Savitt, without justification, frivolously continued to argue (and continues to frivolously argue in opposition to the within motion) that discovery remains outstanding.

Additionally, according to defendant Largmann, after the commencement of this third action, he filed a disciplinary proceeding against plaintiff's counsel Richard Savitt for abuse of process amd "Mr. Savitt has used this [action] to seek information to defend himself in the disciplinary action and intimidate and threaten [him]". ¶42, Largmann Affidavit in Support. *Significantly*, plaintiff's counsel Richard Savitt *does not dispute any of the allegations made against him with respect to his alleged frivolous conduct*, as Mr. Savitt has not supplied the court with an affidavit/affirmation in opposition to the imposition of sanctions.

Additionally, a review of the submissions reveals that Mr. Savitt did in fact use this proceeding and the discovery process improperly, to obtain information with respect to the grievance filed against him, which also constituted frivolous conduct. For example, over defendants' counsel's continuous objections, at the deposition of defendant Largmann, Mr. Savitt asked numerous questions of defendant Largmann, unrelated to the within action, as to the grievance, including, *inter alia*: "Are you going to answer any questions as it relates to the grievance you filed against me" [Exhibit L, Notice of Motion, Largmann EBT at 71, lines 23-25]; "Did your attorney tell you that you could be open to a lawsuit from me for defamation, slander and liable because of...the false statements that you made in your grievance complaint against me" [*id.* at 73, lines 5-12]. Plaintiff's counsel also served upon defendants inappropriate interrogatories and discovery demands, which sought information as to the grievance filed against Mr. Savitt. Exhibits E & F, Notice of Motion for Summary Judgment.

Plaintiff and its counsel Richard Savitt's commencement of this case, despite <u>two</u> prior summary dismissals, the continuation of this case over the course of two (2) plus years and the abuse of the discovery process in an attempt to obtain information unrelated to this case, as well as the plaintiff's counsel's continuous demands for discovery which were either previously exchanged or do not exist, constitute numerous acts of frivolous conduct "to harass or maliciously injure" defendants, evincing a complete lack of respect for the court, the parties, the judicial process and judicial resources. Plaintiff is a corporate entity which demonstrates sufficient business and legal acumen to discern that the filing of this case would be problematic and frivolous, given the dispositions of the first two cases, and awareness of the other inappropriate and frivolous conduct

engaged herein. Such frivolous conduct warrants the imposition of separate sanctions of $5,000 on the plaintiff and $10,000 on attorney Richard Savitt, as well as costs imposed on both plaintiff and attorney Richard Savitt, which shall be in the form of reimbursement to defendants of the attorneys' fees incurred in this action, not to exceed $10,000, as provided in 22 NYCRR §130-1.2. *See Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons International, Inc.,* 94 AD3d 580 (1st Dept 2012). The court also notes that Mr. Savitt's conduct observed herein, appears to be consistent with a pattern of conduct that he has displayed in numerous other cases in this state, as detailed in the recent 63 page decision by the Hon. James E. D'Auguste, in the case of *Tribeca Equity Partners L.P. v. Ricard Savitt*, (2014 WL 2977372, 2014 NY Slip Op 50956[U][Civ Court, New York County June 24, 2014]), in which it was determined that Mr. Savitt "committed multiple acts of frivolous conduct in violation of 22 NYCRR 130-1.3" and sanctions were imposed of $10,000.

Based upon the above, it is

ORDERED that defendants' motion for summary judgment of dismissal of this case is granted; it is further

ORDERED that defendants' motion for the imposition of sanctions and penalties against plaintiff and its counsel Richard Savitt for frivolous conduct as defined in 22 NYCRR §130-1.1 is granted to the extent that: (1) sanctions of $5,000 are imposed on plaintiff, to be deposited with the clerk of the court for transmittal to the Commissioner of Taxation and Finance, in accordance with 22 NYCRR §130-1.3; (2) sanctions of $10,000 are imposed on plaintiff's counsel Richard Savitt to be paid to the Lawyers' Fund for Client Protection of the State of New York, 119 Washington Avenue, Albany, New York, 12210, in accordance with 22 NYCRR §130-1.3; and (3) defendants are awarded the attorneys' fees they incurred in this action[1], not to exceed $10,000, to be determined by a Special Referee, in accordance with CPLR §4317(b); it is further

ORDERED that, within 45 days of entry of this order, defendants shall serve a copy of this order, with notice of entry, upon the Clerk of the Judicial Support Office (Room 119M), who shall arrange for a calendar date for such reference to a Special Referee, to hear and determine the

[1] Such fees shall include attorneys fees expended in preparing and appearing for such hearing.

amount of attorneys' fees to be awarded to defendants, in accordance with CPLR §4317(b)[2]; and it is further

ORDERED that, upon proof of service of a copy of this order with notice of entry, the Clerk of the Court shall enter a judgment of dismissal in favor of defendants, with costs and disbursements; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy of this order upon all parties, with notice of entry.

A copy of this order will be sent by the court to the Lawyers' Fund for Client Protection, in accordance with 22 NYCRR §130-1.3

Dated: July __ , 2014

DORIS LING-COHAN, J.S.C.

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[2] In accordance with 22 NYCRR §130-1.2, a judgment shall be entered against plaintiff and its counsel Richard Savitt, in the amount determined by the Special Referee to be awarded to defendants for their attorneys' fees.