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INDEX
No. 14024-06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 12-26-06
Submission Date: 1-24-07
Motion Sequence No.: 001,002,003/
MOT D

OCEAN SIDE INSTITUTIONAL INDUSTRIES, INC.

Plaintiff,

- against -

SUPERIOR LAUNDRY

Defendant.

COUNSEL FOR PLAINTIFF
Moses & Sinder, Esqs.
405 Lexington Avenue
New York, New York 10174

COUNSEL FOR DEFENDANT
Novak, Juhase & Stern, LLP
483 Chestnut Street
Cedarhurst, New York 11516

ORDER

The following papers were read on Defendant's motion for summary judgment and Plaintiff's cross-motion for summary judgment dismissing the counterclaim:

Notice of Motion dated November 9, 2006;[1]
Affirmation of Marvin Halon dated November 6, 2006;
Affirmation of G. Alexander Novak, Esq. dated November 9, 2006;
Notice of Cross-motion dated January 18, 2007;
Affirmation of Robert D. Lillienstein, Esq. dated January 18, 2007;
Affidavit of Giacomo Ferrara sworn to on January 16, 2007;
Plaintiff's Memorandum of Law.

[1]Motion Sequences 1 and 2 are identical motions made by Defendant seeking summary judgment dismissing the complaint.

OCEAN SIDE INSTITUTIONAL INDUSTRIES, INC. v. SUPERIOR LAUNDRY
Index No. 14024-06

Defendant Superior Laundry ("Superior") moves for summary judgment dismissing this action. Plaintiff Ocean Side Institutional Industries, Inc. ("Ocean Side") cross-moves for summary judgment dismissing the Superior's counterclaim.

BACKGROUND

Ocean Side is an institutional supplier of linen rental, laundry service and uniform rental service. Superior is in the same business.

Ocean Side had written contracts to provide linen service to Rockaway Care Center ("Rockaway"), Hempstead Park Nursing Home ("Hempstead") and Resort Nursing Home ("Resort"). Ocean Side alleges Superior solicited the linen service from these nursing homes. As a result of Superior's actions, these nursing homes terminated Ocean Side as their linen service supplier and then began to use Superior as their supplier.

Ocean Side further alleges Superior is soliciting business from two other customers with whom Ocean Side has a written contract. Ocean Side seeks to enjoin Superior from soliciting business from these customers as well as money damages for tortious interference with contract and unfair competition resulting from Rockaway, Hempstead and Resort terminating their contracts with Ocean Side.

Superior has counterclaimed for *prima facie* tort. Superior alleges that Ocean Side brought this action in bad faith solely for the purpose of forcing a competitor out of business. Superior concedes it competes with Ocean Side. Superior asserts Ocean Side's actions are an effort to drive a small competitor out of business.

DISCUSSION

A. Tortious Interference with Contract

Superior has an absolute right to compete with Ocean Side. However, Superior does not have a right to tortiously interfere with Ocean Side's existing contractual relationships.

Tortious interference with contract involves an existing contract between Plaintiff and a third party, Defendant's knowledge of the contract, Defendant intentionally procuring the breach of that contract and damages. Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413 (1996); Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90 (1993); and Bernberg v. Health Management Systems, Inc., 303 A.D.2d 348 (2nd Dept. 2003).

Ocean Side had an existing contract with Rockaway, Hempstead and Resort when these nursing homes terminated Ocean Side and switched their linen service to Superior. These contracts were breached in July 2006.

The contract with Rockaway ran through November or December 2008. This contract automatically renewed for a two-year period unless either party gave notice to the other of its intent to terminate not less than sixty days prior to the termination of the initial term.

Ocean Side's contract with Hempstead ran for a period of three years commencing on December 1, 1999. The contract automatically renewed at the end of the initial term for additional terms of two years unless either party gave the other notice of their intention not to renew at least sixty days prior to end of the initial term or any

renewal thereof. Based upon this provision, Ocean Side's contract with Hempstead ran at least through November 30, 2006.[2]

The agreement with Resort was terminable on thirty days written notice. The record does not indicate whether Resort properly terminated its agreement with Ocean Side before it began receiving linen service from Superior.

To succeed on a cause of action for tortious interference with contract, Plaintiff must prove Defendant had knowledge of the contract between Plaintiff and the third party. Fusco v. Fusco, 36 A.D.3d 589 (2nd Dept. 2007); and Beecher v. Feldstein, 8 A.D.3d 597 (2nd Dept. 2004). See also, Burns Jackson Miller Summit & Spitzer v. Lindner, 88 A.D.2d 50 (1st Dept. 1982), *aff'd.* 59 N.Y.2d 314 (1983); and A A Tube Testing Co. v. Sohne, 20 A.D.2d 639 (2nd Dept. 1964). To be liable, the Defendant does not have to know the actual terms of the contract. Gold Medal Farms, Inc. v. Rutland Count Co-op Creamery, Inc., 9 A.D.2d 179 (3rd Dept. 1959): and 4A N.Y.Prac., *Com. Litig. in New York State Courts* § 80:47 (2d ed.).

Superior denies having knowledge of the contracts Rockaway, Hempstead and/or Resort had with Ocean Side. Ocean Side asserts Superior must have known of the contract since all of the linens and linen carts supplied by Ocean Side bore its logo. Additionally, tractor-trailers bearing the Ocean Side logo made deliveries to these

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[2] The initial term of Ocean Side's contract with Hempstead expired on November 30, 2002. Based upon the renewal provisions, the agreement was apparently renewed for two two-year term; the first running from December 1, 2002 through November 30, 2004 and the second running from December 1, 2004 through November 30, 2006.

nursing homes six days a week. Ocean Side asserts that any representative of Superior who went to these nursing homes to solicit laundry business would have to have seen the linens and/or linen carts bearing the Ocean Side logo.

Ocean Side further asserts that when a commercial laundry solicits business from new customers it attempts to learn when the contract with the current supplier expires. Ocean Side alleges that a commercial laundry will generally refuse to do business with a customer unless and until it is certain the contract with the prior supplier has been properly terminated.

Ocean Side's attorney sent an overnight letter to Superior dated July 24, 2006 indicating that Ocean Side had a contract with Rockaway, Hempstead, Resort and other nursing homes. This letter indicated that Ocean Side would consider Superior's interference with these contracts as actionable. The letter further indicated Ocean Side would take all appropriate action to protect its contractual relationship with its customers. Thus, on July 25, 2006, Superior knew Ocean Side had contracts with Rockaway, Hempstead and Resort.

Superior is supplying linen service to Rockaway. Rockaway advised Ocean Side it would cancel Superior as its linen provider if Ocean Side met Superior's price.

The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). A motion for summary judgment should be denied if

the court has any doubt as to the existence of a triable issue of fact. Freese v. Schwartz, 203 A.D.2d 513 (2nd Dept., 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2nd Dept., 1984).

When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must give the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); and Louniakov v. M.R.O.D. Realty Corp., 282 A.D.2d 657 (2nd Dept., 2001).

This action is in its early stages. A preliminary conference has only recently been held. Depositions have not yet been conducted.

Ocean Side has established the existence of a contract between itself and third parties. Superior concedes it solicited business from Rockaway, Hempstead and Resort. Each of these nursing homes terminated their contracts with Ocean Side. This caused Ocean Side to be damaged.

Superior's motion is premised on its assertion that it did not know that these nursing homes had a contract with Ocean Side.

Giving Ocean Side the benefit of all favorable inferences, the Court finds that questions of fact exist regarding whether Superior had knowledge of Ocean Side's contracts with Rockaway, Hempstead and Resort and when it obtained that knowledge. Since questions of fact exist regarding Superior's knowledge of the contracts, Superior's

motion for summary judgment dismissing the cause of action for tortious interference with contract must be denied.

B. Unjust Enrichment

Unjust enrichment involves a claim by Plaintiff that it performed services on behalf of the Defendant at the request or behest of the Defendant resulting in the Defendant receiving an unjust benefit. See, Clark v. Daby, 300 A.D.2d 732 (3rd Dept. 2002); and Prestige Caterers v. Kaufman, 290 A.D.2d 295 (1st Dept. 2002).

Ocean Side has failed to establish any of the elements of this cause of action. Therefore, summary judgment dismissing this cause of action should be granted.

C. Unfair Competition

New York recognizes seven bases for a claim of unfair competition. They fall into the following categories: (1) monopoly; (2) restraint of trade; (3) trade secrets; (4) trademark or trade name infringement; (5) palming off; (6) misappropriation; and (7) false labeling or advertising. See, 2 NY PJI 3d 3:58, at 525 (2007).

Ocean Side's complaint does not allege what practice or activity of Superior constitutes unfair competition. The complaint generally alleges that Superior's solicitation of business from Ocean Side's customers constitutes unfair competition.

Such allegations clearly do not support a cause of action for monopoly, restraint of trade, trademark or trade name infringement or false labeling or advertising.

Trade secrets are a formula, pattern, device or compilation of information which gives the possessor of the information an advantage over a competitor who does not

possess the information. Ashland Management Inc. v. Janien, 82 N.Y.2d 395 (1993); Beverage Marketing USA, Inc. v. South Beach Beverage Co., Inc., 20 A.D.3d 439 (2nd Dept. 2005); and Eagle Comtronics, Inc. v. Pico, Inc., 89 A.D.2d 803, (4th Dept. 1982).

Ocean Side's customer list cannot be considered a trade secret. A customer list will be treated as a trade secret where the names and addresses of the customer are not known in the trade or can be obtained only through extraordinary effort. Stanley Tulchin Assoc., Inc. v. Vignola, 186 A.D.2d 183 (2nd Dept. 1992); and Greenwich Mills Co. Inc. v. Barrie House Coffee Co., 91 A.D.2d 398 (2nd Dept. 1983). This is especially true where the customers' patronage has been secured through years of effort and advertising involving a substantial expenditure of time and money. Leo Silfen, Inc. v. Cream, 29 N.Y.2d 387 (1972); and WMW Machinery Co. Inc. v. Koerber AG, 240 A.D.2d 400 (2nd Dept. 1997). However, trade secret protection will not be accorded to customer lists where the names and addresses of the customers are readily ascertainable. Leo Silfen, Inc. v. Cream, *supra;* and Atmospherics Ltd. v. Hansen, 269 A.D.2d 497 (2nd Dept., 2000).

Ocean Side provides commercial laundry, linen service and uniform rental. Superior provides similar services. The customers at issue in this litigation are nursing homes. The names of these nursing homes can be obtained from the telephone book and other public sources. Thus, Ocean Side cannot claim the identity of its customers as confidential or a trade secret.

Ocean Side could prevent Superior from misappropriating its skill, expenditures or labors. See, Electrolux Corp. v. Val-Worth Inc., 6 N.Y.2d 556 (1959). Ocean Side does not allege that Superior has misappropriated any of these items.

Palming off occurs when the Defendant assembles a product that is so similar to that of Plaintiff's so that the public will be confused regarding the identity of the products. Shaw v. Time-Life Records, 38 N.Y.2d 201 (1975). Ocean Side does not allege that Superior is palming off.

Since Ocean Side has failed to place before the Court any facts supporting its claim for unfair competition, this cause of action must be dismissed.

D. Permanent Injunction

Ocean Side seeks a permanent injunction enjoining Superior from tortiously interfering with Ocean Side's relationship with Glen Cove Center for Nursing and Rehabilitation and Marquis Care Center.

A permanent injunction is a drastic remedy that will be issued only where Plaintiff demonstrates it suffer irreparable harm in the absence of injunctive relief. Icy Splash Food & Beverage v. Henckel, 14 A.D.3d 595 (2nd Dept. 2005). Irreparable harm means injury for which money damages would be insufficient. See, Klein, Wagner & Morris, v. Lawrence A. Klein, P.C., 186 A.D.2d 631 (2nd Dept.1992).

Tortious interference with contract is compensable by money damages, the pecuniary loss of the contract with which the Defendant interfered. See, Guard-Life

Corp. v. S. Parker Hardware Manufacturing Corp., 50 N.Y.2d 183 (1980); and 2 NY PJI3d 3:56 at 511 (2007).

Since Ocean Side can be fully compensated by money damages, it cannot obtain injunctive relief. Therefore, the fourth cause of action must be dismissed.

E. Plaintiff's Cross-Motion to Dismiss Counterclaims

Plaintiff's counterclaim seeks damages for *prima facie* tort and sanctions pursuant to 22 NYCRR 130-1.

New York does not recognize a separate cause of action for sanctions. See, Aurora Loan Services, LLC v. Cambridge Home Capital, LLC, 12 Misc.3d 1152 (A), (Sup.Ct. Nassau Co. 2006); and Yankee Trails, Inc. v. Jardine Ins. Brokers, Inc., 145 Misc.2d 282 (Sup.Ct. Rensselaer Co. 1989). To the extent the counterclaim seeks sanctions, it must be dismissed.

Prima facie tort is the label given to an action arising out of the intentional infliction of economic harm without justification. Board of Education v. Farmingdale Classroom Teachers Assoc., Inc., 38 N.Y.2d 397 (1975).

The elements of a cause of action for *prima facie* tort are "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (citations omitted)." Freihofer v. Hearst Corp., 65 N.Y.2d 135, 142-143 (1985). See also, Cardo v. Board of Managers, Jefferson Village Condo 3, 29 A.D.3d 930 (2nd Dept. 2006); and Del Vecchio v. Nelson, 300 A.D.2d 277 (2nd Dept. 2002).

Recovery cannot be had in an action for prima facie tort "...unless malevolence is the sole motive for the Defendant's otherwise lawful act." Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 333 (1983). See also, Beardsley v. Kilmer, 236 N.Y. 80 (1923); and Lynch v. McQueen, 309 A.D.2d 790 (2nd Dept. 2003). Plaintiff must plead and prove the existence of malice and ill will. Lynch v. McQueen, *supra* ; and Smith v. County of Livingston, 69 N.Y.2d 993 (4th Dept. 1979).

An essential element of the cause of action for *prima facie* tort is an allegation that Plaintiff suffered specific, measurable damages or special damages. Curiano v. Suozzi, 63 N.Y.2d 113 (1984); and Keskin v. State, 14 Misc.3d 537 (Ct. Cl. 2006). The complaint fails to make such allegations.

The gravamen of Superior's counterclaim rests upon the perceived bad faith of Ocean Side in prosecuting this action. Having denied its motion for summary judgment dismissing this action, no bad faith or improper motive can be discerned. The counterclaim fails to state a cause of action.

Therefore, the counterclaim must be dismissed.

Accordingly, it is,

ORDERED, that Defendant's motion for summary judgment is **granted** to the extent of dismissing the second, third and fourth causes of action and is **denied** as to the first cause of action; and it is further,

OCEAN SIDE INSTITUTIONAL INDUSTRIES, INC. v. SUPERIOR LAUNDRY
Index No. 14024-06

ORDERED, that Plaintiff's motion for summary judgment dismissing the counterclaim is **granted** and the counterclaim is hereby dismissed.

This constitute the decision and Order of the Court.

Dated: Mineola, NY
March 29, 2007

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
APR 03 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE