

SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 9

ROK PROMOTIONS, INC.,
Plaintiff

INDEX NO.: 015977/2008
MOTION DATE: 03/03/2009
MOTION SEQUENCE: 001 and 002

- against -

TREASURE GARDEN, INC., NEXT PHASE
ENTERPRISES, LLC, BUY GLOBAL, INC.,
MARK KNOLL, DEBRA FERRY and
ANTONIETTA IVANCICH,
Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed	1
Affirmation in Opposition of Arnold L. Kert, Esq., Affidavit in Opposition of Robert Kreisner & Exhibits Annexed	2
Reply Affidavit in Further Support of Thomas A. Telesca, Esq.	3
Notice of Motion & Affidavits	4
Affirmation in Opposition to Defendant Next Phase's Motion to Dismiss of Arnold L. Kert, Esq.	5

PRELIMINARY STATEMENT

Motion Sequence # 1 is on behalf of Buy Global, Inc., Mark Knoll, Debra Ferry, and Antonietta Ivancich to dismiss the action pursuant to Civil Practice Law and Rules § 3211 (a)(7) on the ground that the Plaintiff has failed to state a cause of action upon which relief can be granted. Motion Sequence # 2 is by Next Phase Enterprises, LLC pursuant to § 3211 (a)(8) on the ground of lack of personal jurisdiction.

BACKGROUND

The Parties.

ROK is a domestic corporation, located in Oceanside, which is in the business of importing, promoting and selling various products to retail and wholesale establishments.

TREASURE GARDEN is a foreign corporation which manufactures commercial and residential patio umbrellas and accessories through an affiliated company, ACTIVA LEISURE, INC.

NEXT PHASE is a foreign limited liability company which brokers sales transactions between manufacturers and importers and wholesale or retail establishments which purchase the products for sale to the ultimate consumer.

BUY GLOBAL is a domestic corporation located in West Hempstead which manufactures and imports promotional products for sale to retail establishments.

Statement of Facts.

The Plaintiff claims that it was deprived of profits on the sale of a product known as “Umbrella Light” to Sam’s Club as a result of a conspiracy among various Defendants, breach of contract by Treasure Garden, breach of contract by Next Phase for failure to pay a portion of net profits from Spring 2008 sales to Plaintiff, unauthorized disclosure of and misappropriation of trade secrets and confidential information by the individual defendants, and breach of a fiduciary duty by Knoll.

By agreement of August 25, 2006 Treasure Garden gave ROK the exclusive right to promote and sell a Umbrella Lights to Sam’s Club “for the year 2007 (9/01/06 — 8/31/07).”¹

The following chronology then ensues:

- 11/5/06 ROK receives purchase orders from Wal-Mart/Sam’s Club for 79,810 pieces of Umbrella Lights and places order with Treasure Garden/Activa;
- 1/15/07 ROK and Next Phase agree upon apportionment of profits;

¹ Exh. “A” to Affirmation of Arnold L. Kert, Esq. in Opposition to Motion to Dismiss.

- 6/27/07 Sam's Club orders 101,820 Umbrella Light pieces for Spring 2008 Season;
- 6/29/07 ROK places order with Treasure Garden/Activa;
- 7/6/07 Sam's Club orders an additional 234,746 pieces;
- 7/17/07 ROK places order with Treasure Garden/Activa.

In following up on the status of its orders, ROK learns that Buy Global had been substituted for ROK. ROK thereafter commenced this proceeding, with five causes of action.

The First Cause of Action alleges conspiracy to induce breach of contract against Treasure Garden, Next Phase, Buy Global and Knoll. The Second Cause of Action alleges breach of contract by Treasure Garden by virtue of its granting exclusive rights to Buy Global for the sale of Umbrella Lights for the Spring 2008 season. In the Third Cause of Action the Plaintiff seeks from Next Phase the proportion of net profits provided for in their agreement of January 15, 2007.² The Fourth Cause of Action alleges unauthorized disclosure and misappropriation of trade secrets and confidential information, and the Fifth charges Knoll with breach of a fiduciary duty.

DISCUSSION

Curiously, the allegations of the complaint are couched in terms of the Spring 2007 and the Spring 2008 season. The document identified as the contract, however, gives ROK the exclusive right to sell the Umbrella light to Sam's Club "for the year 2007 (9/01/06 — 8/31/07)." What is more curious, is that the Plaintiff takes the position that Treasure Garden exercised its option to renew the contract for the 2008 Spring Season when the Plaintiff placed orders for Umbrella Lights for the 2008 Spring season.³ As the earlier chronology reflects, orders were placed by Sam's Club in June and July 2007 and orders were placed with Treasure Garden promptly upon receipt.

These orders were taken and placed well before the expiration of the contract on August

² Exh. "B" to Kert Affirmation.

³ Affirmation of Arnold L. Kert at ¶ 9.

31, 2007. While these orders may well have been for sale in the Spring of 2008, the contract is written in terms of a beginning and ending date, and does not differentiate between sales in Spring 2007 as opposed to Spring 2008.

The Court does not believe that there was a contract extension by virtue of the placement of orders by the Plaintiff for sale by Sam's Club in Spring 2008. On the face of the contract it appears that the Plaintiff had the exclusive right to sell Umbrella Lights to Sam's Club for the 2007 year, defined in the contract as beginning on September 1, 2006 and ending on August 31, 2007.

Summary Judgment Standard

When presented with a motion for summary judgment, the Court's function is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact."⁴

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented.⁵ It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue.⁶

The evidence will be considered in a light most favorable to the opposing party.⁷ The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party.⁸ In considering a motion to dismiss, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal

⁴ *Quinn v. Krumland*, 179 A.D.2d 448, 449 (1st Dept. 1992). See also, *S.J. Capelin Associates, Inc. V. Globe Mfg. Corp.*, 34 N.Y.2d 338, 343 (1974).

⁵ *Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 (1957).

⁶ *Moskowitz v. Garlock*, 23 A.D.2d 94 (3d Dept. 1965). See also *Crowley's Milk Co. V. Klein*, 24 A.D.2d 920 (3d Dept. 1965).

⁷ *Weill v. Garfield*, 21 A.D.2d 156 (3d Dept. 1964).

⁸ *Tortorello v. Carlin*, 260 A.D.2d 201, 206 (1st Dept. 2003).

theory.’ “⁹ This rule does not apply where the opposition is evasive or indirect. The opposing party must come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation to which is appended material in admissible form, and the failure to do so may lead the Court to conclude that there is no triable issue of fact.¹⁰

Tortious Interference with a Contract

In order to plead a claim for tortious interference a party must claim(i) a valid agreement with a third party; (ii) the Defendant’s knowledge of that agreement; (iii) interference with the agreement; (iv) which interference is intentional and improper; and, (v) which damages the Plaintiff.¹¹ A valid agreement is one which is enforceable.¹² The defendant’s knowledge must be actual, not constructive, but need not include all details, but simply the existence of the contract.¹³ The claim of interference must be actual, and be the causative influence which leads to the non-performance of the contract and the resultant out-of-pocket damages. To succeed, the plaintiff must establish that were it not for the actions of the defendant, the breach would not have occurred.¹⁴

The Courts of New York do not recognize an independent cause of action for civil conspiracy, but “ . . . a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those

⁹ *Braddock v. Braddock*, 60 A.D.3d 84 (1st Dept. 2009).

¹⁰ *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

¹¹ *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 424 (1996). *See also*, *Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center*, 59 A.D.3d 473, 476 (2d Dept. 2009).

¹² *Sater v. Wyckoff Heights Hospital*, 228 A.D.2d 427, 427—428 (2d Dept. 1996).

¹³ *A A Tube Testing Co. v. Sohne*, 20 A.D.2d 639 (2d Dept. 1964).

¹⁴ *Cantor Fitzgerald Associates L.P. v. Tradition North America, Inc.*, 299 A.D.2d 204 (1st Dept. 2002); *lv. to appeal den.*, 99 N.Y.2d 508 (2003).

actions were part of a common scheme.”¹⁵

The First Cause of Action

In the First Cause of Action the Plaintiff alleges that Treasure Garden, Next Phase, Buy Global, and Knoll acted in concert to cause a breach of ROK’s contract with Treasure Garden. The allegations that ROK had an enforceable contract with Treasure Garden, that each of the named Defendants had actual knowledge of the contract, that they intentionally acted to substitute Buy Global for ROK in the contract with Treasure Garden, and that as a result of the actions of these Defendants the Plaintiff was deprived of the benefit of sales of Activa Umbrella lights to Sam’s Club under the terms of an existing contract is adequate to state a cause of action. The motion to dismiss the First Cause of Action is denied.

The Second Cause of Action

The motion to dismiss this cause of action is also denied. The Plaintiff alleges an enforceable contract and an intentional breach by Treasure Garden in that, despite the contract of August 25, 2006, they deprived the Plaintiff of the right to sell Umbrella lights to Sam’s Club by granting such right to Buy Global. Again, the standards applicable to summary judgment require the Court to give the benefit of any doubt to the opponent of the motion. While the Plaintiff’s argument that Treasure Garden exercised an option to extend the contract for the Spring 2008 year based upon an order by Sam’s Club is untenable, the contract itself quite clearly granted the Plaintiff an exclusive right to make such sales between September 1, 2006 and August 31, 2007, during which time the controverted orders from Sam’s Club were placed by the Plaintiff.

The Third Cause of Action

The Plaintiff alleges breach of the January 15, 2007 contract by Next Phase.¹⁶ Next Phase has moved for dismissal of the complaint for lack of personal jurisdiction. Jurisdiction over non-domiciliaries is governed by Civil Practice Law and Rules § 302, which provides, in pertinent part, as follows:

¹⁵ *Litras v. Litras*, 254 A.D.2d 395, 396 (2d Dept. 1998).

¹⁶ Exh. “B” to Affirmation of Arnold L. Kert in Opposition to Buy Global’s Motion.

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

Defendant Next Phase's motion enumerates the Defendant's lack of presence in New York, and its Reply denies that it transacted business in New York out of which this litigation arose. Plaintiff, on the other hand, alleges jurisdiction over the Defendant based upon the transaction of business in New York from which the cause of action arose. Next Phase acknowledges that its Chief Executive Officer was in New York and met with ROK on one occasion in the summer of 2005, but denies that this was for the transaction of business which is involved in this litigation. This factual uncertainty precludes the grant of Next Phase's motion for summary judgment based upon lack of personal jurisdiction. Next Phase's motion to dismiss the complaint for lack of jurisdiction is denied, subject to a factual hearing at the time of trial.

The Fourth Cause of Action

The Plaintiff claims that the four individually-named Defendants are responsible for unauthorized disclosure and misappropriation of trade secrets and confidential information. This

cause of action is dismissed. The Defendants were not in possession of and did not disclose trade secrets or confidential information.

The complaint alleges “(t)hat since ROK’s inception, ROK maintained confidential contacts, customer and contract information that is not readily available to the general public, and developed over years of service.” While this may be true, the fact that Treasure Garden manufactured “Umbrella Lights” and that Sam’s Club sold them, is not included in this trove of information. While trade secrets may encompass a broad range of information, from chemical processes and software codes, to an accumulation of confidential customer and client data, the critical components of a trade secret are that the information affords the holder a competitive advantage, and that it be sufficiently secret and inaccessible to others.¹⁷ These elements are not present in the instant action. The motion to dismiss the Fourth Cause of Action is granted.

The Fifth Cause of Action

This cause of action alleges a fiduciary relationship between the Plaintiff and Knoll. Knoll is described in the complaint as an independent contractor. There is no written agreement between them which contains a confidentiality or non-competition clause. But even in the absence of such an agreement, a confidential relationship may exist.

The prohibition against breaching a confidential or fiduciary relationship necessarily involves the misuse of trade secrets. The prohibition of an agent or employee against using confidential information acquired in the former employment in competition with his former principal is implicit in the relationship.¹⁸ Having already concluded that the information which is the subject matter of this proceeding is not a trade secret or confidential, there is no need to determine whether or not the parties were in a confidential relationship.

The Fifth Cause of Action against Knoll is dismissed.

¹⁷ *Atmospherics, Ltd. v. Hansen*, 269 A.D.2d 343 (2d Dept. 2000).

¹⁸ *Kaufman v. International Business Machines Corp.*, 97 A.D.2d 925 (3d Dept. 1983; *aff’d* 61 N.Y.2d 930 (1984)).

CONCLUSIONS

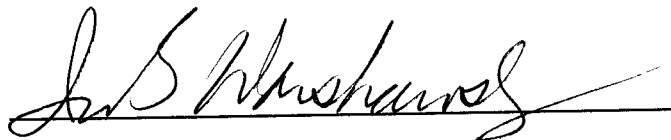
The motion to dismiss the First and Second Cause of Action is denied. The motion by Next Phase to dismiss the Third Cause of Action is denied, pending a hearing on the question of whether or not Next Phase transacted business in New York which is the subject of this dispute. The motion to dismiss the Fourth and Fifth Causes of Action is granted.

If issue has been joined, then this matter is set down for a Preliminary Conference (see NYCRR 202.12) on June 10, 2009, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County. If issue has yet to be joined, meaning no answer has yet been served, then an answer shall be served by all defendants by May 28, 2009 and the above scheduled Preliminary Conference shall then go forward on June 10, 2009.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

This constitutes the Decision and Order of the Court.

Dated: May 4, 2009



J.S.C.

ENTERED

MAY 13 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**