State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 31, 2020 530471

ARTHUR BRUNDAGE INC., Doing Business as EASTERN TRAVEL, Doing Business as ONEONTA BUS LINES,
Respondent,
v

CAMILLA MORRIS et al., MEMORANDUM AND ORDER
Defendants,
and

HALE'S BUS GARAGE, LLC, Doing Business as HALE TRANSPORTATION,
Appellant.

Calendar Date: November 18, 2020

Before: Lynch, J.P., Clark, Mulvey and Colangelo, JJ.

Jay G. Williams III, Clinton, for appellant.

Hinman, Howard & Kattell, LLP, Binghamton (Jeanette N. Warren of counsel), for respondent.

Lynch, J.P.

Appeal from an order of the Supreme Court (Burns, J.), entered May 28, 2019 in Otsego County, which denied a motion by defendant Hale's Bus Garage, LLC for summary judgment dismissing the complaint against it.

As set forth in our prior decision (174 AD3d 1088 [2019]), plaintiff operates a bus company in Otsego County and defendant Hale's Bus Garage, LLC (hereinafter defendant) operates a competing business in Oneida County. Defendant Camilla Morris (hereinafter Morris) and defendant Robert Morris resigned their positions with plaintiff in March 2017 and went to work for defendant. Plaintiff commenced this action in June 2017 to allege various claims against defendant and the Morrises, many of which related to allegations that Morris, beginning while she was still in plaintiff's employ, had schemed with defendant to poach plaintiff's customers and employees and used plaintiff's proprietary customer information to further those goals. Following joinder of issue, motion practice and limited discovery sought by defendant alone, defendant moved for summary judgment dismissing the complaint against it in February 2019. Plaintiff subsequently sought discovery from defendant and others and opposed defendant's motion upon the ground that, among others, it should be denied pending further discovery. Supreme Court agreed, denied defendant's motion with leave to refile at the conclusion of discovery and directed the parties to appear for a conference at which a discovery schedule could be established. Defendant appeals, and we affirm.

To succeed in its request that defendant's motion for summary judgment be denied pending further discovery (see CPLR 3212 [f]), plaintiff was obliged "to provide some evidentiary basis for its claim that further discovery would yield material evidence and also 'demonstrate how further discovery might reveal material facts in the movant's exclusive knowledge'" (Rochester Linoleum & Carpet Ctr. Inc. v Cassin, 61 AD3d 1201, 1202 [2009], quoting Scofield v Trustees of Union Coll. in Town of Schenectady, 267 AD2d 651, 652 [1999]; see Jackie's Enters., Inc. v Belleville, 165 AD3d 1567, 1569 [2018]). Plaintiff came forward with documents from the period when the Morrises were still working for it – such as one indicating that Morris had made a group restaurant reservation on defendant's behalf and another in which she apparently declined to give a potential customer a quote on plaintiff's behalf – raising the possibility that Morris had improper dealings with defendant during that period. Plaintiff further produced an email in which Morris

sought to arrange a meeting with plaintiff's customers just before she left to work for defendant, as well as one from several days later in which a former customer advised that it had "moved with" Morris to defendant. As Supreme Court concluded, the foregoing reflects that plaintiff was not conducting "a simple fishing expedition predicated on surmise and hope," but instead had reason to believe that discovery would uncover information in defendant's exclusive possession that illuminated both the nature of its relationship with the Morrises and the process by which it secured many of plaintiff's customers and employees (Pank v Village of Canajoharie, 275 AD2d 508, 510 [2000]; see Svoboda v Our Lady of Lourdes Mem. Hosp., Inc., 20 AD3d 805, 806 [2005]).

Finally, although a party should not be heard to oppose a summary judgment motion on discovery grounds where it had failed to seek discovery in a timely manner (see Meath v Mishrick, 68 NY2d 992, 994 [1986]; Svoboda v Our Lady of Lourdes Mem. Hosp., Inc., 20 AD3d at 806), plaintiff sufficiently explained its delay in seeking discovery. In the leadup to defendant's motion for summary judgment, Supreme Court had not issued a scheduling order, defendant had sought limited discovery, and plaintiff and the Morrises had sought none. In view of those facts, as well as the distractions arising from a then-pending appeal by Morris (174 AD3d at 1088) and an extended dispute relating to the confidentiality of certain documents sought by defendant, plaintiff "diligently pursue[d] discovery" despite seeking it for the first time after defendant moved for summary judgment (Spellburg v South Bay Realty, LLC, 49 AD3d 1001, 1003 [2008]; see Svoboda v Our Lady of Lourdes Mem. Hosp., Inc., 20 AD3d at 806; compare Jackie's Enters., Inc. v Belleville, 165 AD3d at 1569). Thus, Supreme Court did not abuse its discretion in denying defendant's motion for summary judgment so that discovery could occur (see Groves v Land's End Hous. Co., 80 NY2d 978, 980 [1992]; Cunningham v Keehfus, 112 AD3d 1272, 1273 [2013], lv denied 22 NY3d 865 [2014]; Loder v Nied, 89 AD3d 1197, 1201 [2011]).

In light of the foregoing, defendant's remaining arguments are academic.

Clark, Mulvey and Colangelo, JJ., concur.

ORDERED that the order is affirmed, with costs.

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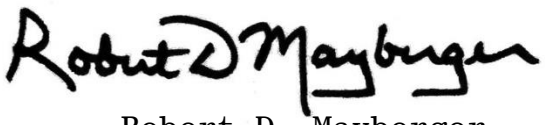

Robert D. Mayberger
Clerk of the Court