SHORT FORM ORDER

INDEX NO.: 19411-14

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 1-7-15
SUBMITTED: 3-5-15
MOTION NO.: 001-MOT D; RTC

CORAM COUNTRY LANES, LLC & FARMINGDALE LANES, LLC,

Plaintiffs,

-against-

WILLIAM DeCICCO, JR., ADAM KRAUSS, MICHAEL GARGIULO, WILLIAM VREELAND & PORT JEFF BOWL,

Defendants.

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Upon the following papers read on this motion to dismiss ; Notice of Motion and supporting papers 2-24 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 27-31 ; Replying Affidavits and supporting papers 34-37 ; it is,

ORDERED that this motion by the defendants for an order dismissing the compliant is granted as to the second, fifth, and eighth causes of action; insofar as the first, third, and fourth causes of action are asserted against all defendants except William DeCicco, Jr.; and insofar as the remaining causes of action are asserted against the defendant Port Jeff Bowl; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference, which shall be held on August 6, 2015 at 9:45 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

The plaintiff LLCs own and operate bowling centers in Coram and Farmingdale, respectively. Both LLCs are owned by John LaSpina. The plaintiff Coram Country Lanes, LLC

("Coram Country"), was previously owned by LaSpina and William DeCicco, Sr., the father of the defendant William DeCicco, Jr. In February 2014, the senior DeCicco sold his interest in Coram Country to LaSpina and agreed not to compete, either directly or indirectly, with any of LaSpina's bowling centers for a period of five years.[1] The defendants William De Cicco, Jr., and Michael Gargiulo were employed at Coram Country. DeCicco, Jr., was an assistant general manager, and Gargiulo ran the junior bowling leagues. The defendant Adam Krauss owned and operated the pro shop at Coram Country, and he and the defendant William Vreeland owned and operated the pro shop at the plaintiff Farmingdale Lanes, LLC ("Farmingdale").

The plaintiff alleges that, in July 2014, all of the individual defendants left Coram Country and Farmingdale and went to a competing bowling center, the defendant Port Jeff Bowl ("Port Jeff"). The plaintiff alleges, inter alia, that they used Coram Country's confidential and proprietary information to induce some of Coram Country's bowling leagues to leave Coram Country and start bowling at Port Jeff, causing Coram Country to lose substantial revenues. The complaint contains causes of action for unfair competition, for misappropriation of trade secrets, for replevin, for conversion, for tortious interference with economic relations, and causes of action against Vreeland and Krauss, respectively to recover for property damage to the pro shops. The defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) or, alternatively, for summary judgment pursuant to CPLR 3211 (c). The plaintiffs oppose the motion with an amended complaint that adds additional factual allegations and a cause of action for tortious interference with contractual relations.

Contrary to the defendants' contentions, a party may amend its pleading without leave of court any time before the period for responding to it expires (CPLR 3025 [a]). Service of a motion to dismiss extends the time to serve a responsive pleading until ten days after service of notice of entry of the order deciding the motion (CPLR 3211 [f]). Thus, the plaintiffs amended the complaint as of right. Since the amended complaint supercedes the original complaint and the defendants' reply papers address the new allegations contained in the amended complaint, the court will consider the motion to dismiss as addressed to the amended complaint (*see*, **Reynolds v All Island Media, Inc.**, 2013 NY Slip Op 32583[U] [Sup Ct, Suffolk County] at *4 [and cases cited therein]). Moreover, the court declines to treat the motion as one for summary judgment pursuant to CPLR 3211 (c) since the plaintiffs object thereto, arguing that the matter is not ripe for summary judgment and that discovery is necessary to amplify their allegations (*see*, **Lockheed Martin Corp. v Aatlas Commerce, Inc.**, 283 AD2d 801, 803). Accordingly, the court finds that the parties have not deliberately charted a summary judgment course (**Id**. at 802).

It is well settled that, on a motion to dismiss pursuant to CPLR 3211, the court is

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[1]The court notes that, while the senior DeCicco signed a restrictive covenant, the plaintiffs do not allege, nor does the record reflect, that any of the defendants signed a covenant not to compete.

to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (**Leon v Martinez,** 84 NY2d 83, 87-88). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (**Goshen v Mut. Life Ins. Co.**, 98 NY2d 314, 326, *citing* **Leon v Martinez**, *supra* at 88). In assessing a motion under CPLR 3211(a)(7), however, the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (**Leon v Martinez**, *supra*).

The first two causes of action for unfair competition and misappropriation of trade secrets allege that the defendants used confidential and proprietary information maintained by Coram Country to solicit Coram Country's bowling leagues and to induce some of them to leave Coram Country and start bowling at Port Jeff, causing Coram Country to lose substantial revenues. The plaintiffs contend that the purported confidential and propriety information consisted of contact information for individual bowlers (addresses, telephone numbers, and email addresses), personal information on individual bowlers such as their bowling histories and skill levels, as well as pricing, promotional, and marketing information.

In the absence of a restrictive covenant, an employee is free to compete with his former employer unless trade secrets are involved or fraudulent methods employed (**Catalogue Serv. of Westchester v Henry**, 107 AD2d 783, 784). Although there is no generally accepted definition of a trade secret, New York and other courts have cited with approval the definition found in the Restatement of Torts, which defines a trade secret as "any formula, pattern, device, or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it (**Ashland Mgt. v Janien**, 82 NY2d 395, 407). Knowledge of the intricacies of a business operation does not necessarily constitute a trade secret; and, absent any wrongdoing, it cannot be said that a former employee should be prohibited from utilizing his knowledge and talents in an area (**Reed, Roberts Assoc. v Strauman**, 40 NY2d 303, 309). In determining whether something is protectable as a trade secret, courts frequently examine the method by which the defendant acquired it, such as by stealing or copying (**Ecolab, Inc. v Paolo**, 753 F Supp 1100, 1111 [EDNY], *citing* **Ferranti Elec., Inc. v Harwood**, 43 Misc 2d 533). Even when the information does not rise to the level of a trade secret, the unauthorized physical taking and exploitation of internal company documents by an employee for use in his future business or employment may be enjoined as unfair competition (**Ecolab, Inc. v Paolo**, *supra* [and cases cited therein]). Thus, solicitation of an employer's customers by a former employee is not actionable unless the customer list could be considered a trade secret or there was wrongful conduct by the employee such as physically taking or copying the employer's files (**Amana Express Intl. v Pier-Air Intl.**, 211 AD2d 606). Moreover, trade secret protection will not attach to customer lists when the alleged confidential information is readily ascertainable from sources outside the former

employee's business unless the employee has stolen or memorized the customer lists (**Id**. at 606-607; *see also*, **Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp**, LLC, 813 F Supp 2d 489, 510 [SDNY] [and cases cited therein]).

The record reflects that the information compiled by the plaintiffs about individual bowlers, including their personal bowling information, is publicly available on the internet. The plaintiffs' assertions that the information compiled by them is different from the information available on the internet are conclusory and insufficient to establish that the information is a trade secret or otherwise confidential (**Business Networks of N.Y. v Complete Network Solutions**, 265 AD2d 194; **Amana Express Intl. v Pier-Air Intl.**, *supra* at 607). Likewise, the plaintiffs' conclusory assertions are insufficient to establish that their pricing, promotional, and marketing information constitute trade secrets. The mere fact that the plaintiffs kept the information from others does not confer trade-secret status upon it (*see*, **Weiner v Lazard Freres & Co.**, 241 AD2d 114, 124). Accordingly, the second cause of action for misappropriation of trade secrets is dismissed.

However, the court declines to dismiss the first cause of action for unfair competition insofar as it is asserted against the defendant William DeCicco, Jr.. The plaintiffs allege that DeCicco was employed by Coram Country in a managerial position, that he had access to its database and written bowling-league contracts, and that he was supplied with a laptop computer. The plaintiffs further allege that, upon leaving Coram Country's employ, DeCicco downloaded internal, company information from the database onto the laptop and took the laptop and written bowling-league contracts with him. While the defendants contend that the laptop was purchased by DeCicco for personal use and that Coram Country did not have written contracts with its bowling leagues, the court is required to liberally construe the complaint, accept the alleged facts as true, and give the plaintiff the benefit of every possible favorable inference (**Leon v Martinez,** *supra*). Moreover, the documentary evidence submitted by the defendants does not utterly refute the plaintiffs' allegations (**Goshen v Mut. Life Ins. Co.**, *supra*). Since DeCicco is the only defendant who is alleged to have had access to Coram Country's database and contracts and who is alleged to have purloined them, the first cause of action for unfair competition is dismissed insofar as it is asserted against the remaining defendants.

The third and fourth causes of action for replevin and conversion, respectively, are based on the same factual allegations. Accordingly, they are dismissed insofar as they are asserted against all of the defendants except William DeCicco, Jr.

The fifth cause of action is for tortious interference with economic relations. Tortious interference with economic relations requires an allegation that the plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct (**Vigoda v DCA Prods. Plus**, 293 AD2d 265, 266). It applies when there has been no breach of an existing contract, but only interference with prospective contract rights (**NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.**, 87 NY2d 614, 621). The plaintiffs allege that the defendants

interfered with Coram Country's existing contracts with its bowling leagues. They fail to identify anyone else with whom they would have had an economic or contractual relationship but for the defendants' alleged wrongful conduct. Since the plaintiffs allege interference with existing contacts only, the fifth cause of action for tortious interference with economic relations is dismissed.

The sixth cause of action for tortious interference with contractual relations alleges that the defendants tortiously interfered with Coram Country's existing bowling-league contracts. Tortious interference with contractual relations applies when there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contact (**Id.**). Liberally construing the complaint, accepting the alleged facts as true, and giving the plaintiff the benefit of every possible favorable inference (**Leon v Martinez,** *supra*), the court finds that the sixth cause of action states a claim for tortious interference with contractual relations. Moreover, contrary to the defendants' contentions, it is not necessary for the plaintiffs to allege malice or "wrongful means." A claim of tortious interference with contractual relations requires less culpable conduct on the part of a defendant than a claim of tortious interference with economic relations, and a plaintiff may recover even if the defendant was engaged in lawful behavior (*see*, **NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.**, *supra*). Accordingly, the court declines to dismiss the sixth cause of action for tortious interference with contractual relations.

The seventh and eighth causes of action seek to recover for property damage to the pro shops at Farmingdale and Coram Country, respectively. The seventh cause of action is asserted against both Krauss and Vreeland and the eighth cause of action against Krauss only. The defendants seeks dismissal of these causes of action on the grounds that Krauss and Vreeland are not personally liable because they did not sign the leases for the pro shops in their individual capacities and that Coram Lanes released Krauss from liability.

The record reflects that Farmingdale entered into a lease with *The Perfect Fit Pro Shop* on May 2, 2012. The lease was signed by Krauss and Vreeland on behalf of *The Perfect Fit Pro Shop*. *The Perfect Fit Pro Shop* is a trade name with no separate jural existence and can neither sue nor be sued independently of its owners (*see*, **Anastasuou v Fulton Street Pub**, 133 AD2d 796, 797; **Provsty v Lydia E. Hall Hosp.,** 91 AD2d 658, 659, *affd* 59 NY2d 812). Thus, the eighth cause of action is properly asserted against Krauss and Vreeland individually. Contrary to the defendants' contentions, the lease is clearly between Farmingdale and *The Perfect Fit Pro Shop,* not *The Perfect Fit Pro Shop Too, Inc.* A party who signs a document is presumed to have knowledge of its contents and is conclusively bound by its terms whether or not the document was read and understood (*see*, **Avanta Bus. Servs. Corp. v Colon**, 4 Misc 3d 117, 119; *see also*, **Daniel Gale Assocs. v Hillcrest Estates**, 283 AD2d 386, 387; **Sofio v Hughes**, 162 AD2d 518, 519). Accordingly, the court declines to dismiss the seventh cause of action.

The record reflects that Coram Country also entered into a lease with *The Perfect*

Fit Pro Shop, which was signed by Krauss in his individual capacity as the tenant. On July 21, 2014, Coram Country released Krauss and *The Perfect Fit Pro Shop* from the lease and from "any known claims or claims that should have been known." Accordingly, the eighth cause of action is dismissed.

Finally, the court notes that *Port Jeff Bowl* is a trade name. Like *The Perfect Fit Pro Shop*, it has no separate jural existence and can neither sue nor be sued independently of its owners (*see*, **Anastasuou v Fulton Street Pub**, supra; **Provsty v Lydia E. Hall Hosp.,** *supra*). Thus, the plaintiff may not maintain this action against the defendant Port Jeff Bowl. Accordingly, the amended complaint is dismissed insofar as it is asserted against the defendant Port Jeff Bowl for all of the foregoing reasons and for the additional reason that the plaintiffs may not maintain an action against a trade name.

In sum, the second, fifth, and eighth causes of action are dismissed in their entirety; the first, third, and fourth causes of action are dismissed insofar as they are asserted against all defendants except William DeCicco, Jr.; and the remaining causes of action are dismissed insofar as they are asserted against the defendant Port Jeff Bowl.

Dated: May 11, 2015

HON. ELIZABETH HAZLITT EMERSON

J.S.C.