Rosetti Handbags & Accessories, Ltd. v Hersh
2011 NY Slip Op 33827(U)
June 16, 2011
Sup Ct, New York County
Docket Number: 650350/10
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 650350/2010
ROSETTI HANDBAGS AND
vs.
HERSH , AHRON
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision

Dated: 6/16/11

JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---------- X

ROSETTI HANDBAGS AND ACCESSORIES, LTD.
(formerly known as RH&A Acquisition Corp.),

Index No. 650350 /10

Plaintiff,

DECISION & ORDER

- against -

AHRON HERSH, LENA JONES, and LATIQUE HANDBAGS AND ACCESSORIES, LLC,

Defendants.

---------- X

SHIRLEY WERNER KORNREICH, J.:

Defendants Ahron Hersh (Hersh) and Lena Jones (Jones) are former employees of plaintiff Rosetti Handbags and Accessories, Ltd. (Rosetti). Rosetti commenced this action alleging that Hersh, with Jones's participation, wrongfully solicited employees of Rosetti to leave their employ to work for a competing company, defendant LaTique Handbags and Accessories, LLC (LHA), in violation of Hersh's contractual obligations owed to Rosetti.

Presently, all three defendants seek a pre-answer dismissal of the action's amended complaint through two motions – motion sequence numbers 003 and 004. In motion 003, defendants Jones and LHA move for dismissal of the amended complaint, pursuant to CPLR 3211 (a) (1) (defense founded on documentary evidence) and (a) (7) (failure to state a cause of action). In motion 004, Hersh moves for dismissal of the amended complaint, pursuant to CPLR 3211 (a) (1) and (a) (7), and CPLR 3016 (b) (failure to state in detail the circumstances constituting the alleged breach of fiduciary duty). The motions are joined for dispositin and denied.

I. Background

The following allegations are taken from the complaint and are presumed true for purposes of these motions.

Rosetti is in the business of designing, importing, marketing, and selling, as well as arranging the manufacture of, women's handbags, with its principal place of business in New York and an office in China (amended complaint, ¶ 10). Hersh and Jones started the "Rosetti business" in 1994 after working together for several years at a company called Bag Bazaar. At Rosetti, Jones was the sales manager and served as Hersh's "right hand person" (*id.*, ¶ 24). Hersh was a controlling shareholder of what was then called Revah Associates Ltd., formerly known as Rosetti Handbags and Accessories, Ltd. (Old Rosetti) (*id.*, ¶ 2).

On July 7, 2006, Rosetti, as purchaser, and Hersh and his partner Chi Yueh Chen, as principal shareholders and sellers of Old Rosetti, entered into an Asset Purchase Agreement (APA) for the purchase of Old Rossetti's assets. The APA contains non-compete and non-solicitation provisions (*id.*, ¶ 16).

As a precondition to the closing of the APA, Hersh entered into the "Hersh Employment Agreement" with Rosetti, to serve as Rosetti's president, with an annual salary of $250,000 (*id.*, ¶ 17). Hersh was substantially responsible for the development, implementation, and management of strategies and plans for Rosetti, which provided him with access to confidential proprietary information, including employee information, client lists, marketing strategies and projections, and price lists (*id.*, ¶ 18). Hersh agreed not to participate in any "Competitive Business" for a period from July 7, 2006 through June 30, 2010 (*id.*, ¶¶ 19, 20). The Hersh Employment Agreement defines Competitive Business as "any person or entity engaged in the design, manufacture, sourcing, importing, marketing, licensing or selling of women's branded

and private label handbags, purses and related accessories" (*id.*, ¶ 22).

Rosetti provided Jones with an offer letter, dated July 7, 2006 (Jones Letter), pursuant to which Rosetti appointed Jones as co-president with Hersh, and they worked closely together. The Jones Letter contains a confidentiality agreement, acknowledging that Jones would be given access to Rosetti's valuable confidential and proprietary information, including trade secrets, which she agreed to not divulge (*id.*, ¶¶ 25, 26).

On January 29, 2009, Hersh submitted his resignation to Rosetti, effective April 30, 2009. Jones' submitted her resignation on March 30, 2009, effective May 31, 2009 (*id.*, ¶ 23). In May 2009, Jones ceased providing employment services for Rosetti, and she left Rosetti to develop LHA, a competing business (*id.*, ¶ 24, 28).

In March 2010, Jones acquired the assets of Perlina Handbags, Inc. (Perlina) under LHA's name, intending to compete with Rosetti (*id.*, ¶¶ 7, 30). In violation of the APA and the Hersh Employment Agreement, Hersh participated in the operation of LHA by soliciting former employees of Rosetti, who are now employed at LHA, and offering financial and management advice to LHA in support of his longtime friend and colleague, Jones (*id.*, ¶ 31).

Since as early as April 2009, Hersh has been substantially involved in the creation of a competing business, including the recruiting of employees, financing of operations, and the design of business and marketing strategies (*id.*, ¶ 32). As early as that time, Hersh told several Rosetti employees that he intended to "destroy Rosetti and establish a competing business," and, in violation of the APA, the Hersh Employment Agreement and his fiduciary duties, he began to induce Rosetti's employees to leave Rosetti employment (*id.*, ¶ 33). These employees include Jane Thompson, Maureen Schwarz, and Susan Biasi (*id.*, ¶ 35). In May 2010, Maureen Schwartz

and Susan Biasi, along with several other former Rosetti employees, began working at LHA after resigning from Rosetti (*id.*, ¶¶ 35, 36). These former Rosetti employees have disclosed confidential information which has been improperly used by defendants (*id.*, ¶¶ 37, 38).

The abrupt departure of key employees has negatively impacted Rosetti's business (*id.*, ¶ 37). Additionally, four employees in Rosetti's Hong Kong offices resigned abruptly in May 2010, within days of each other after being induced to join LHA (*id.*, ¶ 40). This has caused Rosetti to incur significant costs to avoid further employee departures (*id.*, ¶ 43).

The amended complaint contains four causes of action. The first, second, and third causes of action are against Hersh for breach of the APA, breach of the Hersh Employment Agreement, and breach of fiduciary duty, respectively, by participating in a Competitive Business and soliciting Rosetti's employees (*id.*, ¶¶ 47, 52, 56).

The fourth cause of action is against Jones and LHA for tortious interference with contractual relations. It alleges that these defendants knew of the existence of the APA and the Hersh Employment Agreement, and of the non-compete covenants contained therein. Without justification, Jones and LHA induced Hersh to breach his agreements with Rosetti by participating in a Competitive Business and soliciting and hiring Rosetti's employees (*id.*, ¶ 62).

II. Discussion

A. Motion by Hersh

Hersh moves for dismissal of the entire complaint on the grounds of a defense founded on documentary evidence, failure to state a cause of action, and failure to state in detail the circumstances constituting the alleged breach of fiduciary duty.

Hersh first argues that documentary evidence completely contradicts the allegations of the

amended complaint. The documentary evidence consists of the APA, the Employment Agreement, Hersh's termination letter, a print-out from the Department of State database, and the LHA/Perlina asset purchase agreement. Contrary to this assertion, this documentary evidence does not conclusively establish a defense to the claims asserted as a matter of law, and, therefore, dismissal at this stage of the litigation is not warranted (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

According to Hersh, these documents establish that during the relevant time period (when the non-competition provisions were in effect), Hersh had not purchased an interest in LHA, i.e., in a "Competing Business." The New York Department of State records shows that LHA was formed in December 2009. LHA and Jones bought Perlina's assets in March 2010, and only Jones and LHA signed the LHA/Perlina asset purchase agreement, not Hersh. Thus, Hersh contends, in April 2009, he could not have been assisting Jones or soliciting employees for LHA, which was not in business until March 2010. Hersh contends further that the Employment Agreement's non-compete clause terminated on April 30, 2010, and, therefore, it is irrelevant that LHA hired Rosetti's employees in May 2010.

Even if true, these facts do not refute the allegation that, beginning in April 2009, Hersh wrongfully solicited Rosetti employees to leave Rosetti to work for Jones' competing business, in violation of the non-compete provisions that had not yet terminated. Hersh concedes that he had a month's time (rather than one year) within which to allegedly breach the agreements (*see* Reply Memorandum, at 3).[1] An actionable breach could occur in a single day.

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[1]As noted above, Hersh contends that LHA became operational in March 2010, when it acquired Perlina's assets, and the restrictive covenant expired in April 2010.

For pleading purposes, the validity of the claims against Hersh does not depend on a finding that Hersh was part owner of LHA or that LHA had already acquired Perlina's assets at the time of the alleged wrongful conduct. In interpreting the documentary evidence upon which Hersh relies, Hersh is, in effect, asking the court to draw inferences from this evidence in his favor. On a motion to dismiss directed at the sufficiency of the complaint, it is the plaintiff, not the defendant, who is to be afforded the benefit of a liberal construction of the pleadings and, as stated above, the benefit of all reasonable inferences (*1199 Hous. Corp. v International Fid. Ins. Co.*, 14 AD3d 383, 384 [1st Dept 2005]). Assuming that the non-compete provision expired at the end of April 2010, it is not fatal to the claim that the employees may have actually begun employment in May 2010, if the wrongful solicitation occurred during the restrictive period. A defense founded upon documentary evidence must conclusively contradict the pleading, which is not the case here (*Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382, 383 [1st Dept 2008]).

Hersh also argues that the amended complaint fails to state a cause of action for breach of contract because it is "devoid of any factual allegations" concerning how Hersh breached the agreements. He argues the allegations are conclusory. Hersh's argument appears to overlook the following allegations, among others: as early as April 2009, Hersh told several Rosetti employees that he intended to "destroy Rosetti and establish a competing business," and he began toinduce employees of Rosetti to leave Rosetti employment in violation of the APA, the Hersh Employment Agreement, and his fiduciary duties (amended complaint, ¶ 33). These include Jane Thompson, Maureen Schwarz, and Susan Biasi (*id.*, ¶ 35). In May 2010, Maureen Schwartz and Susan Biasi, along with several other former Rosetti employees, began working at LHA after

resigning from Rosetti (*id.*, ¶¶ 35, 36). These former Rosetti employees have disclosed confidential information which has been improperly used by defendants (*id.*, ¶¶ 37, 38). These allegations are sufficiently detailed to "fairly apprise" Hersh of the "circumstances constituting the wrong" under CPLR 3016 (b) (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]).

As for Hersh's argument that Rosetti fails to allege damages, the amended complaint alleges that the abrupt departure of key employees has negatively impacted Rosetti's business (*id.*, ¶ 37). Four employees in Rosetti's Hong Kong offices resigned abruptly in May 2010, within days of each other after being induced to join LHA (*id.*, ¶ 40), and this has caused Rosetti to incur significant costs to avoid further employee departures (*id.*, ¶ 43). The amended complaint also alleges:

> "As a result of rumors regarding Rosetti's demise and the abrupt departure of the Hong Kong Employees, several other employees from Rosetti's Hong Kong office threatened to resign. Not only was it difficult for Rosetti to replace those key employees who had left Rosetti for LaTique, Rosetti had to provide retroactive raises to all of the employees remaining in its Hong Kong office in order to prevent a mass employee defection from that office. This in turn has negatively impacted Rosetti's profitability."

(*id.*., ¶ 41). Furthermore, these allegations connect Hersh's alleged wrongful conduct to LHA's hiring of Rosetti's employees.

Hersh argues that the breach of fiduciary duty cause of action should be dismissed because Rosetti does not allege a breach with sufficient particularity and because it is duplicative of the claim for breach of contract. The issue of the sufficiency of the pleading has been addressed above.

As for the second ground, in assessing whether a contractual claim will preclude a claim

of breach of fiduciary duty, the question is whether there exists an independent basis for the fiduciary duty claims apart from the contractual claims, even if both are related to the same or similar conduct (*Mandelblatt v Devon Stores*, 132 AD2d 162, 167-68 [1st Dept 1987]; *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 463 [1st Dept 2007]). As co-president, Hersh owed a fiduciary duty to Rosetti (*Coastal Sheet Metal Corp. v Vassallo*, 75 AD3d 422, 423 [1st Dept 2010]). This duty is independent of the breach of contract claim that was created by the non-compete provisions in the agreements.

B. Motion by Jones and LHA

Jones and LHA make the identical argument that Hersh makes concerning documentary evidence, and the above analysis is equally applicable to their argument. That Jones formed LHA without Hersh's involvement does not refute the tortious interference cause of action, which is not dependent on Hersh's participation in the corporate formation of the entity or the acquisition of Perlina's assets. Additionally, as discussed above, the formation of LHA as a legal entity in December 2009 and its purchase of Perlina's assets in March 2010, does not conclusively resolve the issue in their favor.

Jones and LHA also argue that the amended complaint fails to state a cause of action for tortious interference with contractual relations because it is conclusory and speculative. They argue that the amended complaint contains no factual allegations concerning (1) what Jones and LHA did to induce or encourage Hersh, (2) whether Jones and LHA were even aware of Hersh's restrictive covenants, and (3) what Jones and LHA did to intentionally procure Hersh's breach of the restrictive covenants. Moreover, they contend that the amended complaint fails to allege that the alleged tortious interference was the "but for" cause of Hersh's alleged breach, and they

assert an economic justification defense.

A claim of tortious interference with contract "requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages" (*Foster v Churchill*, 87 NY2d 744, 749-50 [1996]; *Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002]). The amended complaint, here, satisfies these elements.

The amended complaint alleges that Jones and LHA (through Jones) were aware of the restrictive covenants, which can reasonably be presumed true for purposes of this motion, because Hersh and Jones worked as co-presidents at Rosetti. Jones and LHA, however, argue that there is no fact alleged as to what they did to procure the breach, even though the amended complaint alleges that they induced Hersh to solicit employees to leave Rosetti. The involvement of Jones and LHA can be reasonably presumed because these employees left Rosetti to work for LHA, an entity in which, defendants assert, Hersh had no interest. It also is reasonable to infer that the employees would not have left but for the solicitation. Moreover, a "cognizable claim for tortious interference does not require an allegation that the defendant's conduct was the sole proximate cause of the alleged harm" (*Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317, 318 [1st Dept 2006]). As previously stated, to the extent that the amended complaint is brought pursuant to CPLR 3211 (a) (7), it is to be liberally construed, the allegations taken as true, and all reasonable inferences resolved in favor of plaintiff (*Yuko Ito v Suzuki,* 57 AD3d 205, 207 [1st Dept 2008]).

Nor does Jones' and LHA's contention that they had an economic justification succeed. They argue that they hired the Rosetti employees in furtherance of the lawful ownership of a

competing business. However, decisions in the First Department hold that, where the claim involves interference with an existing contract, rather than with pre-existing contractual relations, the defense of economic justification is inapplicable (*see e.g. Havana Cent. NY2 LLC v Lunney's Pub, Inc.*, 49 AD3d 70, 72-73 [1st Dept 2007], *appeal withdrawn* 10 NY3d 761 [2008]; *Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d at 318). Other decisions, including some from the Court of Appeals, hold that a defendant's own economic interest, without improper means, may be a defense (*see e.g. Foster v Churchill*, 87 NY2d at 750-51; *Felsen v Sol Cafe Mfg. Corp.*, 24 NY2d 682 [1969]). In finding an economic justification, however, the Court in *Felsen v Sol Cafe Mfg. Corp.* stated: "That case represents *one of the few instances* in which a court has precisely identified a particular 'interest', the protection of which may provide the basis for the 'just cause or excuse'" (24 NY2d at 687 [emphasis added] [citations omitted]).

Thus, the apparent inconsistency can be reconciled by a comparison of the purported economic justifications of each case (*see e.g. Foster v Churchill*, 87 NY2d at 751 ["Respondents were clearly acting in the economic interest of Microband, which was on the brink of insolvency"]; *Felsen v Sol Cafe Mfg. Corp.*, 24 NY2d at 687 ["Thus, Chock Full O'Nuts, as the sole stockholder of Sol Cafe, had an existing economic interest in the affairs of Sol Cafe which it was privileged to attempt to protect when it 'interfered' with plaintiff's contract of employment with Sol Cafe"]; *Havana Cent. NY2 LLC v Lunney's Pub, Inc.*, 49 AD3d at 72-73 [economic justification defense denied where wrongful holdover tenant prevented new tenant from taking possession]). In any event, this presents an issue of fact for trial that cannot be determined on these pleadings consisting of only an unanswered amended complaint (*Bank of N.Y. v Berisford*

Intl., 190 AD2d 622 [1st Dept 1993]).

Accordingly, it is

ORDERED that the motion (003) by Lena Jones and LaTique Handbags and Accessories, LLC is denied; and it is further

ORDERED that the motion (004) by Ahron Hersh is denied; and it is further

ORDERED that defendants are directed to serve their answers to the amended complaint within 20 days after service of a copy of this order with notice of entry and are to appear in Part 54, room 228, 60 Centre St., New York, N.Y. on July 14, 2011 at 9:30 a.m.

Dated: June 16, 2011

ENTER:

J.S.C.