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| Mountain & Isles, LLC v Gillz, LLC |
| 2019 NY Slip Op 30872(U) |
| March 27, 2019 |
| Supreme Court, New York County |
| Docket Number: 652206/2018 |
| Judge: Andrea Masley |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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| MOUNTAIN & ISLES, LLC, | INDEX NO. | <u>652206/2018</u> |
| Plaintiff, | MOTION DATE | <u>07/09/2018,</u> <u>09/18/2018</u> |
| - v - | MOTION SEQ. NO. | <u>001 002</u> |
| GILLZ, LLC D/B/A GILLZ APPAREL, BRIAN DRENNEN, | | |
| Defendants. | | |

DECISION AND ORDER

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MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 71 were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97 were read on this motion to/for INJUNCTION/RESTRAINING ORDER

This action arises from a sales representative agreement and other business transactions between plaintiff Mountain & Isles, LLC (MI), a business that designs and manufactures apparel, and defendants Gillz, LLC d/b/a Gillz Apparel (Gillz), a business that also designs and manufactures apparel, and individual defendant Brian Drennan, a former MI employee who was hired by Gillz. In motion sequence number (Motion) 001, defendants seek, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss MI's amended complaint; MI opposes Motion 001 and cross-moves for leave to serve a second amended complaint.¹ In Motion 002, MI seeks, pursuant to CPLR 6301, a preliminary

¹ MI also seeks to serve a supplemental summons to add non-party Elmer Aglubat as another individual defendant; this decision and order does not address proposed claims against Aglubat as they are not before the court on these motions.

injunction enjoining defendants from improperly using MI's proprietary business intellectual property assets, among other things.

Oral argument was held for Motions 001 and 002, and the so-ordered transcripts of both proceedings are incorporated into this decision and order in their entirety.

Briefly, MI and Gillz entered into a sales representative agreement (Agreement) through which, for a term of January 1, 2017 to December 31, 2017, MI licensed and sold Gillz-branded merchandise to certain retailers in exchange for a sales commission (NYSCEF Doc. No. [Doc] 18 [supplemental summons and first amended complaint with exhibits]; *see* Docs 8-11 [same]). The Agreement provided that it would automatically renew for two years if MI's sales exceeded \$1 million in the initial term; however, if MI's sales did not exceed \$3 million by December 31, 2018 the Agreement would terminate before the final term, January 1, 2019 to December 31, 2019, commenced (Doc 10). MI alleges in its first amended complaint (FAC) that it booked sales for more than \$2 million in 2017, automatically renewing the Agreement (Doc 9).

In any event, MI continued selling Gillz-branded apparel from January 1, 2018 to May 2, 2018, when Gillz terminated the Agreement. On April 24, 2018, MI's employee, Drennan (employed by MI since October 24, 2016), informed MI that he was resigning, and left MI's employ as of May 3, 2018. Drennan was then hired by Gillz as its Chief Customer Officer, where he remains employed (Doc 9). MI alleges that Gillz and Drennan engaged in a "scheme" to misappropriate MI apparel samples and confidential business information, while Drennan was employed at MI, and the Agreement was terminated because of that scheme, and that Gillz has and continues to use and benefit from MI's proprietary information and assets (Doc 9). Specifically, MI asserts now through its managing member that Gillz persuaded Drennan to leave MI for Gillz, and

that Gillz conspired with Drennan to wrongfully take "Self-Packing Jacket Samples," MI "Woven Shirt Design Samples," and other property of MI, such as CAD designs and proprietary intellectual property assets/information (Doc 24).

**Motion 001: Defendants' motion to dismiss the FAC,
and MI's cross motion for leave to amend the FAC**

In support of its cross motion, MI submits a proposed second amended complaint (SAC) in red-line copy only (Doc 22). The court granted the cross motion at oral argument on September 25, 2018 as limited by the court's decision on the record of that proceeding and this decision and order (Doc 71). At argument, the court addressed defendants' Motion 001 to dismiss the FAC and the MI's cross motion for leave to file a new amended complaint were addressed together; as outlined in this decision and order, MI may file an SAC incorporating the court's rulings, and serve any supplemental summons, in accordance with the CPLR, Commercial Division Rules, the Part 48 Practice Rules, and other applicable authority.

Defendants' Motion 001 and MI's cross motion in Motion 001 are both granted in part as follows, enumerated as identified in MI's proposed SAC (Doc 22):

1. First Cause of Action: breach of the Agreement against Gillz (renewal under the Agreement theory)

The breach of contract claim against Gillz for improperly terminating the Agreement in violation of the renewal provision is not dismissed under MI's theory that the Agreement renewed automatically due to sales goals being met, as supplemented by MI's submissions in support of its cross motion in Motion 001. Factual issues exist as to whether the sales goal was achieved, triggering the automatic renewal provision, and whether Gillz breached the Agreement by terminating early (*see* Docs 25-36 [MI affidavit and exhibits]).

2. Second Cause of Action: alternative breach of the Agreement against Gillz (renewal by operation of law/course of conduct theory)

MI's alternative breach of contract claim alleging the Agreement was renewed, as a matter of law, by the parties' continued business relationship after December 31, 2017 is dismissed (Doc 22).

While a commercial contract can, in certain instances, be renewed by the parties' conduct, it does not apply where the contract expressly provides that the parties intended to be bound for a certain term with explicit provisions for renewal of the contract (*see e.g. Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 177 [2008]). The parties here expressly contemplated the conditions under which the Agreement would automatically renew: if MI met certain sales goals during the first one-year term, the contract would automatically renew for a second, two-year term² (Doc 9). The Agreement further provides unambiguous terms for future renewals, termination, and the parties' obligations with respect to those contingencies/options (*id.*).

Under its plain, unambiguous language, the Agreement would end after the initial one-year term unless it was automatically renewed by MI's satisfaction of the sales requirement. The Agreement does not provide for renewal for a second term by any other manner (Doc 9). If the automatic renewal provision was not triggered by MI's sales, the parties' continued course of conduct alone does not, "without more, mean that all the terms of the expired formal contract continue to apply" (*Computerized Med. Imaging Equip., Inc. v Disonics Ultrasound, Inc.*, 303 AD2d 962, 964 [4th Dept 2003]).

The authority cited by MI involves almost entirely employment law agreements involving individuals, not business entities. While course of conduct can, in certain

² Provided, however, that the second term would be automatically canceled if MI's annual sales goals were insufficient (Doc 9).

instances, renew an annual contract in cases that do not involve employment agreements (e.g. *Cinefot Int'l Corp. v Hudson Photographic Indus.*, 13 NY2d 249, 252 [1963] [automatic renewal doctrine is typically applied in master-servant or landlord-tenant cases]), the authority cited by MI does not compel an alternative result.

The “automatic renewal doctrine” was extended beyond ordinary employment contracts in *Cinefot International Corp.*, which applied the doctrine to a contract for services between two business entities; however, that case contemplated an oral agreement that lacked any terms defining how, if at all, that contract’s one-year term could be renewed (*see generally id.*). Unlike *Cinefot*, the Agreement here is clear as to renewal and future terms. MI’s alternative allegation that the Agreement renewed by course of conduct is dismissed, as a matter of law, because the Agreement reflects the parties’ specific intent to renew under only the express terms in the Agreement (*see Doc 9; see Burrstone Energy Ctr., LLC v Cummins Northeast, Inc.*, 49 Misc 3d 1219(A) [Sup Ct, Nassau County 2015] [renewal is an issue of fact where contract is ambiguous within its four corners]). Here, there is no ambiguity.

3. Third Cause of Action: unjust enrichment against Gillz

MI’s alternative claim that, even if the contract did not renew by any manner, Gillz improperly benefited from MI’s sales services and misappropriation of MI business information and assets, was dismissed at argument, as was MI’s request for punitive damages. MI’s unjust enrichment claim is duplicative of the first claim for standard breach of the Agreement and MI’s fourth claim, breach of covenant of good faith and fair dealing, addressed below.

4. Fourth Cause of Action: breach of the covenant of good faith and fair dealing against Gillz

Gillz contends that the breach of covenant of good faith and fair dealing claim must be dismissed as duplicative of the contract claims and because the conduct alleged occurred after the Agreement expired.

MI responds that its breach of duty of good faith and fair dealing claim is not duplicative because it concerns breaches independent of the allegedly early termination of the Agreement: Gillz's poaching of Drennan and Gillz's misappropriation of MI's business property, including apparel samples.

This claim is not dismissed to the extent that the Agreement was operative after December 31, 2017 (the end-date for the first term). "A party may be in breach of the implied duty of good faith and fair dealing, which is implicit in every contractual arrangement, when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denies or to deprive the other party of the fruit of its bargain" (*Gray & Assoc., LLC v Speltz & Weis LLC*, 22 Misc 3d 1124(A), 2009 WL 416138 at *10 [Sup Ct, NY County 2009]). MI can adequately allege that, after the first term, Gillz secretly executed a scheme to misappropriate MI's property and poach its employee, Drennan, while purporting to act in accordance with the Agreement.

5. Conversion against Gillz and Drennan

The conversion claim is not dismissed to the extent that MI alleges that defendants' misappropriated MI's tangible property.

"Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]); thus, MI can allege a conversion claim against defendants as to the tangible apparel samples purportedly taken or withheld.

As to intangible property, however, the claim is not adequately pleaded absent allegations that MI's rights to its own intangible property were infringed by the purported conversion. For instance, MI does not allege that it was excluded from using its intangible property, such as proprietary business information or designs, regardless of whether such property was taken (*see generally Sporn v McA Records*, 58 NY2d 482, 482 [1983]; *see also Trustforte Corp. v Eisen*, 10 Misc 3d 1064(A), 2005 WL 3501587 at *2 [Sup Ct, NY County 2005] [dismissing conversion claim where plaintiff was not excluded from information]).

6. Sixth Cause of Action: breach of fiduciary duty against Drennan

The court agrees with defendants that, if any fiduciary duty existed between MI and Drennan, the claim is duplicative of that alleging Drennan breached his employment agreement and its confidentiality provisions; the two claims are based on precisely the same allegations (*see Brooks v Key Tr. Co. Nat. Assoc.*, 26 AD3d 628, 630 [3d Dept 2006], *lv dismissed* 6 NY3d 891 [2006]). The breach of fiduciary duty claim against Drennan is dismissed.

7. Seventh Cause of Action: aiding and abetting breach of fiduciary duty against Gillz

As the breach of fiduciary duty claim against Drennan is dismissed, there is no basis for a claim against Gillz for aiding and abetting a breach of fiduciary duty.

8. Eighth Cause of Action: breach of employment contract against Drennan

MI's breach of the employment agreement against Drennan, including MI's allegations that Drennan violated a confidentiality provision and misappropriated MI property, is adequately pleaded and not dismissed.

9. Ninth Cause of Action: breach of employment contract against Alqubat

The claims against Algubat are not presently before the court and are not addressed in this decision.

10. Tenth Cause of Action: breach of implied-in-fact contract against Gillz

MI's alternative claim that, if the Agreement was not renewed by the automatic renewal provision, Gillz breached an implied-in-fact contract—which was created after the Agreement ended—may be asserted only to the extent it is not duplicative of the contract claims not dismissed above.

Motion 002: MI's motion for a preliminary injunction

For injunctive relief under CPLR 6301, the movant must establish: likelihood of success on the merits of the action; the danger of irreparable harm in the absence of a preliminary injunction; and a balance of equities in favor of the moving party (*Gliklad v Cherney*, 97 AD3d 401, 402 [1st Dept 2012]). “A preliminary injunction should not be granted unless the right thereto is plain from the undisputed facts and there is a clear showing of necessity and justification” (*O'Hara v Corporate Audit Co.*, 161 AD2d 309, 310 [1st Dept 1990] [citations omitted]).

MI has not met its burden of establishing its entitlement to a preliminary injunction. MI's motion for a preliminary injunction enjoining defendants from using any misappropriated property is based on the FAC, the only operative pleading in this action at the time Motion 002 was filed. In support of Motion 002, MI relies on claims and assertions in its proposed SAC and does not establish a likelihood of success on the merits as to most of its various underlying claims. Even if MI had established likelihood of success on the merits, Motion 002 must be denied as MI has not demonstrated that it would sustain irreparable harm or that the balance of equities tips in MI's favor.

Moreover, Motion 001 is granted in part, as is the cross motion in that sequence, and MI may serve and file an SAC that comports with this decision and order. Motion 002 is, therefore, denied without prejudice to a new motion if a new amended complaint is filed.

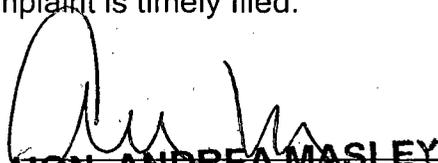
Accordingly, it is

ORDERED that Motion Sequence Number 001 is granted in part, and the first amended complaint, dated 6/5/2018, is dismissed to the extent stated in this memorandum decision; and it is further

ORDERED that the Cross Motion in Motion Sequence Number 001 is granted in part to the extent stated in this memorandum decision, and Plaintiff Mountain & Isles, LLC, may file a second amended complaint within 20 days of entry of this decision and order on NSYCEF or else waived; and it is further

ORDERED that Plaintiff's Motion Sequence Number 002 is denied without prejudice to a new motion if a second amended complaint is timely filed.

3/27/2019
DATE


HON. ANDREA MASLEY, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> GRANTED | | <input checked="" type="checkbox"/> GRANTED IN PART | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | |
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