24 Misc.3d 1235(A)
(Table, Text in WESTLAW), Unreported Disposition
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Samy and Irina, Inc. v. Berezentseva
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N.Y.Sup. 2009.

24 Misc.3d 1235(A)899 N.Y.S.2d 63, 2009 WL 2462649, 2009 N.Y. Slip Op. 51752(U)

Samy and Irina, Inc., et al., Plaintiffs,
v.
Irina Berezentseva, Defendant.
20726/07

Supreme Court, Kings County

Decided on August 4, 2009

CITE TITLE AS: Samy & Irina, Inc. v Berezentseva

ABSTRACT

Employment Relationships
Restrictive Covenant in Employment Contract

Corporations
Officers and Directors
Breach of Fiduciary Duty

Samy & Irina, Inc. v Berezentseva, 2009 NY Slip Op 51752(U). Employment Relationships—Restrictive Covenant in Employment Contract. Corporations—Officers and Directors—Breach of Fiduciary Duty. (Sup Ct, Kings County, Aug. 4, 2009, Demarest, J.)

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OPINION OF THE COURT

Carolyn E. Demarest, J.

In this action by plaintiffs Samy and Irina, Inc., Junior Brokerage Corp., and Samy Khalil (collectively, plaintiffs) against Irina Berezentseva (defendant), defendant moves for summary judgment dismissing all of plaintiffs' claims in their complaint. Defendant's motion is granted in part and denied in part.

BACKGROUND

Junior Brokerage Corp. was an insurance brokerage firm incorporated in or about 2001 by Samy Khalil's nephew, Sammy Khalil, Jr. Defendant was an employee of Junior Brokerage Corp. for many years. When defendant allegedly advised Sammy Khalil, Jr. of her intention to leave the business, she was given an interest in Junior Brokerage Corp. Pursuant to a board meeting held on December 13, 2005, Junior Brokerage Corp. conveyed 30% of its shares to defendant. According to defendant, this interest was given to her in exchange for her bringing 90% of the clients to the office (Defendant's Dep. Transcript at 50). The remaining 70% of the shares of Junior Brokerage Corp. were divided between Mahmoud Mashaal, who held 30% of its shares, and Samy Khalil, who held 40% of its shares. Defendant and Mahmoud Mashaal were solely responsible for the day-to-day operations of Junior Brokerage Corp. Samy Khalil, although a 40% owner of the shares of Junior Brokerage Corp.,

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did not participate in its day-to-day operations.

It is alleged that, at a board meeting of Junior Brokerage Corp. held on March 6, 2006, Samy Khalil, Mahmoud Mashaal, and defendant agreed to dissolve Junior Brokerage Corp. and create two ***2** new corporations - Samy and Irina, Inc. and M & S International Brokerage, Inc. (M & S), which were to operate within the same premises and under the same conditions as Junior Brokerage Corp. Samy Khalil was given 51% of the shares of Samy and Irina, Inc. and defendant was given the remaining 49% of its shares. Effective May 1, 2006, Junior Brokerage Corp. ceased operation as an independent corporation. In its place, Samy and Irina, Inc. assumed management of all business pertaining to the private and commercial insurance that had been done under Junior Brokerage Corp. and M & S was to manage all business pertaining to the limousine and car service insurance, formerly done by Junior Brokerage Corp.

The agreement reached during the March 6, 2006 meeting was reduced to writing in the minutes of the meeting which were executed by Samy Khalil, defendant, and Mahmoud Mashaal (the "Minutes"). Defendant, as the managing agent of Samy and Irina, Inc., and Mahmoud Mashaal, as the managing agent of M & S, were to be responsible for paying Samy Khalil $1,300 weekly, with each of them paying one-half of this amount, i.e., $650. Of this sum, Samy Khalil was to forward $700 to Sammy Khalil, Jr. "in payment of his share [of] the sale of Junior Brokerage," and was to keep $600 for himself. Defendant was to be solely responsible for managing the day-to-day operations of Samy and Irina, Inc., and would be entitled to receive all of the operating profits of Samy and Irina, Inc., except for the $600 (or $650) per week that she was required to pay to Samy Khalil. The same arrangement was made between Samy Khalil and Mahmoud Mashaal with respect to M & S.

Paragraph 2 of the March 6, 2006 Minutes, under "General Agreement and Restrictions," provided:

"The parties are prohibited from contacting, transferring directly or indirectly, or taking clients from Samy [and] Irina Brokerage Inc. or from M & S . . . This provision is enforceable by injunctive relief."

Paragraph 3 of the Minutes, under "General Agreement

and Restrictions," provided:

"Stockholders are restricted from opening their individual offices for the same purpose or similar purposes as Junior Brokerage Inc. within a 5 mile radius of the current location at 7110 13th Ave., Brooklyn, NY 11228. The restriction also includes any immediate zip codes surrounding the above location."

Paragraph 4 of the Minutes, "under General Agreement and Restrictions," provided:

"In the event of a breach of this agreement the parties agree that the individual responsible for the breach will forfeit his shares and rights to the company. A punishment of 1,000 dollars shall be imposed for each client transferred directly or indirectly to another brokerage firm."

Pursuant to paragraph 5 of the "General Agreement and Restrictions" of the March 6, 2006 Minutes, defendant and Mahmoud Mashaal were given "full responsibility for all deposits and withdrawals" for Samy and Irina, Inc. and M & S, respectively. Paragraph 6 of the "General Agreement and Restrictions" of the March 6, 2006 agreement provided that "Samy Khalil ha[d] no right to access the . . . corporate bank accounts." However, other then general terms and conditions, there is no evidence presented by either side that Samy and Irina, Inc. was ever formed - no articles of incorporation, no named directors or officers and no agreements among the shareholders of Samy and Irina, Inc. have been presented on this motion.

Plaintiffs allege that in or about March 2007, when Samy Khalil left for Spain for several months, defendant surreptitiously formed Irina's Brokerage,

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Inc., a business intended to directly compete with Samy and Irina, Inc., and proceeded to funnel the good will, customer base, and other assets of Samy and Irina, Inc. into this new corporation. Plaintiffs allege that between February and June 2007, in violation of the General Agreement contained within the Minutes, defendant ***3** transferred approximately 200 clients from Samy and Irina, Inc. to Irina's Brokerage, Inc. The office of Irina's Brokerage, Inc. is located 1.7 miles away from the office of Samy and Irina, Inc.

On June 11, 2007, plaintiffs filed this action against defendant. On June 14, 2007, the court issued a temporary restraining order to plaintiffs as against defendant, and by order dated July 19, 2007, the court granted a motion by plaintiffs for a preliminary injunction to the extent that defendant was barred from initiating any contact with customers of Samy and Irina, Inc., on the condition that plaintiffs file with the court a bond of $200,000 by July 23, 2007. Due to plaintiffs' failure to file the bond, the preliminary injunction did not take effect and the temporary restraining order was vacated.

Plaintiffs assert that since June 2007, defendant has continued to transfer clients of Samy and Irina, Inc. to Irina's Brokerage, Inc. In addition, plaintiffs claim that in August 2007, defendant transferred at least six clients of Samy and Irina, Inc. to other companies that were controlled by her, including Blackstone Brokerage and Mercury Insurance.

Plaintiffs' amended complaint, dated June 24, 2008, [FN1] alleges causes of action for breach of contract, breach of fiduciary duty, fraud, conversion, unfair competition, tortious interference with contract, breach of the covenant of good faith and fair dealing, and seeks the imposition of a constructive trust.

Plaintiffs' amended complaint alleges that in addition to transferring clients from Samy and Irina, Inc. to Irina's Brokerage, Inc., defendant has stolen computer data files and other proprietary information from Samy and Irina, Inc. Plaintiffs' amended complaint also alleges that defendant wrongfully transferred and/or withdrew cash from Samy and Irina, Inc.'s corporate account and deposited this cash into her personal account, and that she utilized the cash taken from the corporate accounts of Samy and Irina, Inc. to purchase the assets of NY 1 Brokerage and then absorbed the good will and customer base of NY 1 Brokerage into Irina's Brokerage, Inc.[FN2] It further alleges that defendant used a total of $30,000 in business account checks of Samy and Irina, Inc. to purchase office and computer equipment, security and alarm equipment, and office furniture and supplies for use in Irina's Brokerage, Inc., and diverted assets of Samy and Irina, Inc. to pay the personal electricity bills of her family members by adding these family members to Samy and Irina, Inc.'s Con Edison account. Samy Khalil admits, however, that he received $600 a week up until the time that defendant left Samy and Irina, Inc. (Samy Khalil's Dep. Transcript at 21).Plaintiffs' amended complaint seeks a judgment that defendant has forfeited all shares and rights in Samy and Irina, Inc., closing and dissolving Irina's Brokerage, Inc. and any other entities controlled directly or indirectly by her to which she transferred Samy and Irina, Inc.'s assets, good will, and/or customers, enforcing the non-competition clause set forth in the March 6, 2006 agreement, directing the return of all of the assets, good will, and customer base of Samy and Irina, Inc. and awarding at least $500,000 in damages.

Defendant, in her answer, has interposed a counterclaim, asserting that Samy Khalil and Mahmoud Mashaal opened Atlantic Pyramids Insurance, a company doing business in direct competition with Samy and Irina, Inc., a few blocks from the office of Samy and Irina, Inc. and that because of this, she advised Samy Khalil that she was leaving Samy and Irina, Inc. Defendant further claims that Samy Khalil closed the business account of Samy and Irina, Inc., took all the ***4** funds, and opened an account with himself as the signatory of Samy and Irina, Inc., in violation of the agreement of March 6, 2006.

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In addressing defendant's motion, it is initially noted that, with respect to Junior Brokerage Corp.'s claims, the March 6, 2006 agreement provided that, effective May 1, 2006, Junior Brokerage Corp. would cease operation as an independent corporation and all of its business would be divided between the successor corporations of Samy and Irina, Inc. and M & S. Thus, since Junior Brokerage Corp. was no longer a viable business at the time the alleged claims arose, it could not have sustained any damages. Dismissal of its claims as against defendant, therefore, must be granted, (*see**Schaler v Feder*, 16 Misc 2d 668, 669 [Sup Ct NY Co 1959]; *Cohen v Dana*, 83 NYS2d 412, 414 [Sup Co Kings Co 1947]; 15 NY Jur 2d, Business Relationships § 1245).

With respect to the remaining plaintiffs, the court notes that many of the causes of action asserted in plaintiffs' amended complaint are substantially predicated on the restrictive covenant contained in the March 6, 2006 agreement of the shareholders of Junior Brokerage, Inc., which is vigorously disputed by defendant. Plaintiffs' first cause of action for breach of contract alleges that defendant breached the March 6, 2006 agreement by contacting and transferring clients from Samy and Irina, Inc. to Irina's Brokerage, Inc. and by opening her own individual office for the same purpose as Junior Brokerage Corp. within a five-mile radius of 7110 13th Avenue, in Brooklyn.

As set forth above, the March 6, 2006 agreement restricted the stockholders from opening individual offices in competition with Samy & Irina, Inc. within a five-mile radius of its office, including any immediate zip codes surrounding that location. It also prohibited the parties from transferring clients from Samy and Irina, Inc., and imposed a penalty of forfeiture of shares in the company and $1,000 for each client transferred directly or indirectly to another brokerage firm.

“Generally, a stockholder of a corporation is not precluded from engaging in a business similar to, or in competition with, that conducted by the company” (14A NY Jur 2d, Business Relationships § 844). A corporation, though, may make it a condition that no shareholder can engage in business as a competitor of the corporation (*see Simons v Fried*, 302 NY 323, 326 [1951];*Matthews v Associated Press of State of NY*, 136 NY 333, 341-342 [1893]). A shareholder, however, cannot be bound forever by such a condition, and cannot remain prohibited from competing with the corporation forever even after he or she leaves the corporation (*seegenerally Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [1977]. Furthermore, restrictive covenants are generally disfavored by law (*see id.;JAD Corp. of Am. v Lewis*, 305 AD2d 545, 545 [2d Dept 2003]). A restrictive covenant will only be enforced to the extent that it is reasonable as to time and geography [FN3] (*see BDO Seidman v Hirshberg*, 93 NY2d 382, 389 [1999];*Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976];*Maxon v Franklin Traffic Serv.*, 261 AD2d 830, 832 [4th Dept 1999]). Thus, “[a]n otherwise valid [restrictive] covenant will not be enforced if it is unreasonable in time, space or scope” (*American Broadcasting Cos. v Wolf*, 52 NY2d 394, 403-404 [1981];*see also Columbia Ribbon & Carbon Mfg. Co.*, 42 NY2d at 499;*Reed, Roberts Assoc.*, 40 NY2d at 307).

Here, the restrictive covenant contains no time limitation whatsoever. In fact, Samy Khalil admitted, at his deposition, that it was his position that there was no time limit on the restrictive covenant (Samy Khalil's Dep. Transcript at 18). Indeed, Samy Khalil acknowledged, during his deposition, that the restrictive covenant would go on for 50 years if the company was going to exist for 50 years (*id.).*

Furthermore, the geographic limitation in the restrictive covenant is unclear and ambiguous since it “includes any immediate zip codes surrounding” the former location of Junior Brokerage and there is no definition of the term “immediate” or “surrounding.” It also fails to state whether or not ***5** any of these additional zip codes are within or outside of the five-mile radius. Thus, this restrictive

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covenant, if enforced according to plaintiffs' interpretation, would forever bar defendant from acting as an insurance broker in a five-mile radius and an unspecified surrounding area of the 7110 13th Avenue location. Such a covenant is unenforceable as a matter of law. Other allegations contained in the first cause of action do, however, state a claim on behalf of the corporate plaintiff. Accordingly, only that portion of the first cause of action for breach of contract which is premised upon the contractual restrictive covenant is dismissed.

Plaintiffs' second cause of action for breach of fiduciary duty alleges that, as a principal of Samy and Irina, Inc., defendant owed a fiduciary duty to Samy and Irina, Inc. and Samy Khalil, and that she breached this fiduciary duty by converting the assets, good will, and customer base of Samy and Irina, Inc. to her own use to the exclusion and financial harm of Samy and Irina, Inc. and Samy Khalil. "[A] fiduciary relationship exists when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge" (*Robare vFortune Brands, Inc.*, 39 AD3d 1045, 1046-1047 [3d Dept 2007] [internal citations and quotation marks omitted]; *see also Dimsey v Bank of New York*, 14 Misc 3d 1205[A],2006 NY Slip Op 52418[U], *2 [Sup Ct, NY County 2006]). "[A] cause of action for breach of fiduciary duty may survive, for pleading purposes, where the complaining party sets forth allegations that, apart from the terms of the contract, [the plaintiff] and [the defendant] created a relationship of higher trust than would arise from the [contract] alone" (*EBC I, Inc.v Goldman Sachs & Co.*, 5 NY3d 11, 20 [2005]). Furthermore, a director or officer stands in a fiduciary relationship to a corporation and owes undivided loyalty to the corporation. He or she may not engage in personal interests that are incompatible with the interests of the corporation or divert corporate opportunities for the personal benefit or to the detriment of the corporation. (*Yu Han Young v Chiu*, 49 AD3d 535, 536 [2d Dept 2008]). While "participation in a business similar to that of the corporation is not precluded by an officer or director, conduct that cripples or injures the corporation is impermissible," and may constitute a breach of fiduciary duty (*Howard v Carr*, 222 AD2d 843, 845 [3d Dept 1995]).

Defendant argues, in support of her motion, that Samy Khalil was only entitled to $600 weekly and that she was entitled to all of the profits of Samy and Irina, Inc. and could use those profits as she deemed appropriate, including making the "same payable to herself." Samy Khalil admitted that defendant purchased NY 1 Brokerage with her own funds (Samy Khalil's Dep. Transcript at 22) and that all of the profits (except the $600 weekly which was paid to him) were the property of defendant (*Id*. at 22, 26). However, these admissions are not dispositive of the fiduciary duty claim. The relevant inquiry is whether defendant's alleged waste and funneling of corporate assets for her own benefit crippled Samy and Irina, Inc. and constituted a breach of fiduciary duty. (*Howard v Carr*, 222 AD2d at 845). Defendant has not, in her motion, refuted plaintiffs' allegations that she utilized $30,000 in business account checks of Samy and Irina, Inc. to purchase office and computer equipment, security and alarm equipment, and office furniture and supplies for use in Irina's Brokerage, Inc. and diverted assets of Samy and Irina, Inc. to pay the personal electricity bills of her family members by adding these family members to Samy and Irina, Inc.'s Con Edison account. Defendant merely argues, in support of her motion, that she was basically entitled to do whatever she wanted with the corporation. Plaintiffs' unrefuted allegations that defendant has effectively looted the corporation of all of its customers and assets to the detriment of the corporation and in violation of her duty to manage it, unquestionably states a claim on behalf of the corporate plaintiff. (*See Howard*, 222 AD2d at 845;*see also Yu Han Young*, 49 AD3d at 536).

As a general principle, an agent may not divert or exploit for his own benefit the assets of his or her principal (*American Baptist Churches of Metropolitan New York v Galloway*, 271 AD2d 92, 99 [1st

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Dept 2000]). It has been held that "[a]n employee may create a competing business prior to leaving his employer without breaching any fiduciary duty unless he makes improper use of the employer's time, facilities or proprietary secrets in doing so" (*Schneider Leasing Plus v Stallone*, 172 AD2d 739, 741 [1991]) as plaintiffs allege. It is not possible upon this record to determine defendant's legal position in plaintiff corporation as none of the corporate documents have been provided. If defendant was an officer, her duty to the corporation is clear. However, this suit ***6** appears to be predicated upon an agreement among the individual shareholders of the now defunct Junior Brokerage Corp. It is therefore possible that the relationship between plaintiff Samy Khahil and defendant is that of partners, in which case, defendant's fiduciary fidelity would be owed to plaintiff Khahil. (*see Birnbaum v Birnbaum*, 73 NY2d 461, 465 [1989]). By aiming solely to invalidate the covenant not to compete in the March 6, 2006 agreement, defendant has failed to meet her burden to show that plaintiffs' fiduciary duty claim can be dismissed as a matter of law. (*See Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).Defendant's motion to dismiss the second cause of action is denied.

Plaintiffs' seventh cause of action for breach of the covenant of good faith and fair dealing is redundant and duplicative of plaintiffs' breach of contract cause of action (*see Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 [2d Dept 2008]; *R. I. Is. House, LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890, 896 [2d Dept 2008]). Dismissal of this cause of action is, therefore, warranted (*see* CPLR 3212 [b]).

As to the remaining causes of action, the motion to dismiss is denied as defendant has failed to raise specific challenges to these causes of action in her motion, contending, erroneously, that all claims are based upon the unenforceable restrictive covenant and relying exclusively upon her contention that she was entitled to divert the assets of Samy and Irina, Inc. to argue that plaintiffs have sustained no damages.

It is finally noted that, in opposing defendant's motion, plaintiffs have failed to submit an affidavit of a party, but rely exclusively on an attorney's affirmation which argues that the motion is untimely as having been filed beyond the time constraints set forth in the Preliminary Conference Order. However, as the Note of Issue date has since been extended, the time in which to make a dispositive motion has also been extended by at least 30 days in compliance with the CPLR. (CPLR 3212; *see also Kampf v Bank of New York*, 259 AD2d 439 [1st Dept 1999]). Thus, the motion is not untimely.

The motion is not accompanied, however, by a 19-A Statement as required by the Rules of the Commercial Division. (*See* 22 NYCRR 202.70, Rule 19-a). Had such a statement been created, perhaps the parties to this litigation would have recognized the lack of merit to some of the contentions set forth in the motion. The Court, *sua sponte*, assesses a sanction of $500 against defendant movant, for the failure to comply with this rule. 22 NYCRR 130-1.2.

In opposing, plaintiffs' counsel argues that defendant's answer should be stricken for failure to provide discovery. However, no cross-motion for such relief has been made. As defendant correctly points out, plaintiffs' attorney's affirmation is not a competent response to a motion for summary judgment (*See Spearman v Times Square Stores, Corp.*, 96 AD2d 552 [2d Dept 1983]).[FN4] However, defendant has supplied only a perfunctory affidavit in support of her motion, essentially adopting the legal arguments set forth by her attorney and failing to dispute the allegations of the complaint. To award defendant the relief she requests, dismissal of the complaint, upon the papers submitted would be a travesty of justice in light of the allegations, which she appears to admit. While she boldly asserts that she was entitled to "all of the net profits of the corporation," this statement is not born out by the terms of the March 6, 2006 agreement, as suggested.

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Defendant's motion for summary judgment dismissing the complaint is granted as to all claims brought by Junior Brokerage Corp. and is otherwise denied except as to the seventh cause of action and that portion of the first cause of action which relies upon the unenforceable contractual restrictive covenant.***7**

The case is set down for a final conference on September 23, 2009. All counsel and parties must appear in Commercial Part I, Room 756 at 9:45 am on that date. The failure of any party to appear will be deemed a default resulting in the dismissal of the complaint or striking of the answer and entry of judgment.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.

FOOTNOTES

FN1. This amended complaint was apparently accepted by defendant and is annexed to her motion as the basis for her argument, but it is not listed as having been filed with the County Clerk.

FN2. It is undisputed that defendant purchased the brokerage accounts of NY 1 Brokerage, another insurance brokerage, for Samy and Irina, Inc., using $25,000 of her own funds, and that 100 clients from that brokerage were transferred to Samy and Irina, Inc. (Samy Khalil's Dep. Transcript at 24).

FN3. Defendant also argues that it would be inequitable to enforce the restrictive covenant since Samy Khalil breached the covenant not to compete by being actively involved with Atlantic Pyramids Insurance (*see Plancher v Katz*, 14 Misc 3d 1218 [A],2005 NY Slip Op 52328 [U], *2 [2005]).

FN4. It is noted that plaintiffs' attorney attempted to hand up a “sur-reply,” which was rejected by the court at oral argument. Sur-reply papers are not permitted under CPLR 2214, and the court cannot properly consider plaintiffs' “sur-reply.” (*see*CPLR 2214; *Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009]; *Boockvor v Fischer*, 56 AD3d 405, 406 [2d Dept 2008]; *Graffeo v Paciello*, 46 AD3d 613, 615 [2d Dept 2007]).

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