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OF THE COMMITTEE ON OPINIONS

TECHNOLOGY DYNAMICS INC. d/b/a NOVA BATTERY SYSTEMS, Plaintiff, vs. ANWAR MASTER, WALTER BERINGER, LORRAINE HARA, EMERGING POWER INC. and TARADAN, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-4328-16 CIVIL ACTION OPINION

Argued: **August 4, 2017**
Decided: **August 9, 2017**

Honorable Robert C. Wilson, J.S.C.

Jed Marcus, Esq. counsel for the Defendants Anwar Master and Walter Beringer (from the law offices of Bressler, Amery & Ross).

As this Motion was unopposed, no oral argument was held.

FACTUAL BACKGROUND

This action originated in the Chancery Division pursuant to a Complaint filed by the Plaintiff Technology Dynamics, Inc. d/b/a/ Nova Battery Systems (hereinafter, "NBS") on or about December 22, 2015. NBS alleges that Beringer, a former employee of NBS, and Master, NBS' general manager, chief engineer and chief operating officer, conducted an unlawful scheme to steal customers, employees, and the goodwill of NBS for NBS' direct competitor Emerging Power Inc. (hereinafter, "EPI"). In response, Master and Beringer filed an answer, counterclaim and affirmative defenses, where they claimed that they were never bound by any non-compete agreement.

NBS filed an Order to Show Cause in the Chancery Division on or about March 10, 2016 seeking injunctive relief to prevent irreparable harm to its business and goodwill, as well as to prohibit Beringer and Master from the alleged misappropriation and use of NBS' confidential information and trade secrets. The Chancery Division denied this injunctive relief on April 11, 2016. The matter was subsequently transferred to the Law Division on June 6, 2016 pursuant to a Motion filed by NBS. Defendants Beringer and Master have since moved for summary judgment on or about June 29, 2017.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under N.J.S.A. § 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on N.J.S.A. § 4:37-2(b) or N.J.S.A. § 4:40-1, or a judgment notwithstanding the verdict under N.J.S.A. § 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of N.J.S.A. § 4:46-2." Id. at 540.

RULE OF LAW AND DECISION

1. There Is No Enforceable Agreement among Beringer, Master and NBS Regarding Confidentiality.

A party bringing a claim of breach of contract has the burden of proving all elements of its cause of action. Cumberland Cnty. Improvement Auth. v. GSP Recycling Co., 358 N.J Super. 484, 503 (App. Div. 2003). Under New Jersey law, a plaintiff must plead and prove the following elements for a valid breach of contract claim: "(1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations." Frederico v. Home Depot, 507 F.3d 188, 203 (3d Cir. 2007).

An enforceable bilateral agreement requires an offer, an acceptance, consideration and a meeting of the minds upon all the essential terms of the agreement. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). The terms "must be sufficiently definite that performance to be rendered by each party can be ascertained with reasonable certainty." Id. at 435 (holding that buyer and broker did not enter into an enforceable agreement because they had not agreed on essential terms). Therefore, "where the parties do not agree to one or more essential terms … courts generally hold that the agreement is unenforceable." Id. (citing Heim v. Shore, 56 N.J. Super. 62, 72-73 (App. Div. 1959)).

Here, NBS has neither pled nor shown facts demonstrating that an enforceable contract, written or oral, existed among the parties. In fact, it is undisputed that Master and Beringer did not sign a written agreement preventing them from competing or soliciting customers. Even if there was an enforceable agreement, there was no agreed upon definition of "confidential information and/or data." To the extent that this so-called promise purports to prohibit a former employee from divulging "any information" with respect to the employer's business, such a promise would be unenforceable. Hudson Foam Latex Prods., Inc. v. Aiken, 82 N.J. Super. 508,

516 (App. Div. 1964) (holding postemployment covenant unenforceable; reasoning that restricting former employee from divulging any information, whether secret or not, learned, or using any knowledge gained, in the course of his employment was tantamount to prohibiting employee from ever using in another job experience he obtained during employment).

Due to the lack of an agreement, NBS' claim for breach of the implied warranty of good faith and fair dealing fails because there is no such warranty under New Jersey law in the absence of a contract. Noye v. Hoffmann-La Roche, Inc., 238 N.J. Super. 430, 434 (App. Div. 1990). Even if there was a contract, the implied warranty of good faith and fair dealing is inapplicable to employment at will situations. Specifically, the Appellate Division noted:

> Since Plaintiff was working without a contract as an at-will employee, his argument that every contract imposes a duty of good faith and fair dealing is irrelevant. One cannot read terms into a non-existent contract. Defendant had an absolute right to terminate Plaintiff without cause.

McQuitty v. General Dynamics Corp., 204 N.J. Super. 514, 520 (App. Div. 1985).

Therefore, NBS' claims for breach of the implied warranty of good faith and fair dealing and breach of contract fail because there was no enforceable contract between Master and Beringer as at will employees of NBS.

2. There Is No Genuine Issue As to Any Material Fact, Nor Is There Any Evidence of Monetary Damages Produced.

While NBS' attorney has withdrawn as counsel on July 21, 2017, the Court still considered the courtesy copy of NBS' opposition filed by NBS' former counsel. Nevertheless, there is no genuine issue of material fact present in the matter. It is undisputed that certain "PC board designs" that Beringer and Master shared with EPI are available on the Internet. NBS is not entitled to the protection of non-patented information available in the public domain. Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609, 637 (1988). Furthermore, there is no evidence produced during discovery

that shows that NBS took precautions to maintain the secrecy of alleged confidential trade secrets. One such example of this is the lack of a mandatory confidentiality agreement for NBS' employees. United Bd. & Carton Corp. v. Britting, 63 N.J. Super. 517, 524-25 (Ch. Div. 1959).

It is also undisputed that any agreements between NBS and its candidates, customers, employees, clients and/or consultants were terminable at will by either party. As such, NBS made no showing that Master and Beringer tortiously interfered with its agreements with such customers. In fact, it is undisputed that several customers left NBS because of their preexisting relationships with Master and Beringer and due to their dissatisfaction with NBS.

Furthermore, NBS has not produced evidence of any monetary damages suffered. It is well-settled that "[c]onjecture and speculation cannot be used as a basis for damages." Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 11 (App. Div. 2001). An essential element for a claim of lost profit damages is proof of the relevant costs or expenses that must be set-off from the gross revenues. Specifically,

> To recover lost profits, a party must show that profits were lost as a result of the actionable conduct complained of. "Lost Profits" signifies the difference between gross income and the costs or expenses which had to be expended to produce the income. Proof of relevant costs or expenses is not a matter of mitigation. It is part of the damage case of the party seeking to recover lost profits.

Cromartie v. Carteret Savings & Loan, 277 N.J. Super. 88, 103 (App. Div. 1994).

During the discovery period, which ended on April 15, 2017, NBS produced no information substantiating its claim of lost profits. Therefore, NBS' claims fail as it cannot prove monetary damages. Any non-monetary relief must also fail as this relief was denied by the Chancery Division, which prompted NBS to seek a transfer of this matter to the Law Division.

As such, and for the aforementioned reasons, Beringer's and Master's Motion for Summary Judgment is hereby **GRANTED**.

It is so ordered.