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From the Courts

# Discrimination and Non-Competition Developments in New York

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This column discusses a number of recent employment discrimination cases and cases involving complaints stemming from non-competition agreements. All of the decisions analyzed in this column are by New York courts – federal and state. The courts' decisions have broad applicability and illustrate key principles about federal and state employment discrimination laws as well as the enforceability of non-compete agreements under New York law.

## *Federal Court Dismisses Plaintiff's Complaint Alleging Discrimination in Violation of the ADA*

The U.S. District Court for the Eastern District of New York has dismissed a complaint filed by a former employee of the New York City Department of Education alleging employment discrimination in violation of the Americans with Disabilities Act ("ADA").

### *The Case*

In November 2020, the plaintiff in this case filed a lawsuit under the ADA against her former employer, the New York City Department of

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Education, alleging employment discrimination. In drafting her complaint, the plaintiff used the court's employment discrimination form and checked off boxes to indicate the discriminatory conduct to which she allegedly had been subjected: termination of her employment, unequal terms and conditions of her employment, and retaliation.

The plaintiff alleged that after she had suffered a concussion while working, her employer started harassing her and had given her an unsatisfactory performance evaluation. The plaintiff contended that she had been suspended twice and that she had received a letter from her employer accusing her of "child neglect."

The plaintiff sought damages and the removal of the suspensions from her work record.

## *The Court's Decision*

The court dismissed the plaintiff's complaint for failure to state a claim.

In its decision, the court explained that, to establish a case of discrimination under the ADA, a plaintiff must demonstrate that:

(1) The employer is subject to the ADA;

(2) The plaintiff is disabled within the meaning of the ADA or perceived to be so by her employer;

(3) The plaintiff was otherwise qualified to perform the essential functions of the job with or without a reasonable accommodation;

(4) The plaintiff suffered an adverse employment action; and

(5) The adverse action was imposed because of the plaintiff's disability.

The court added that although a discrimination complaint need not allege facts establishing each element of a discrimination case to state a claim, it must at a minimum assert nonconclusory facts sufficient to "nudge" its claims "across the line from conceivable to plausible" to permit the lawsuit to proceed.

The court then ruled that, in this case, the plaintiff's complaint did not allege facts suggesting that she was disabled within the meaning of the ADA or that she was perceived to be so by her employer. The court noted that the interpretive guidelines issued by the Equal Employment Opportunity Commission ("EEOC") listed a concussion as an example of a short-term impairment that did not rise to the level of a disability.

In addition, the court continued, the plaintiff's complaint did not allege facts supporting an inference that her former employer had taken adverse actions against her based on her disability. Indeed, the court pointed out, the plaintiff had not been subjected to any adverse employment action until approximately seven months after her concussion and she had not been terminated until approximately 20 months after her concussion.

The case is *Zelasko v. New York City Department of Education*, No. 20-CV-5316 (RRM) (LB) (E.D.N.Y. June 25, 2021).

## *Federal Court Dismisses Title VII Discrimination Lawsuit as Prematurely Filed*

The U.S. District Court for the Eastern District of New York has dismissed an employment discrimination lawsuit brought under Title VII of the Civil Rights Act of 1964, ruling that it had been "prematurely filed."

### *The Case*

On April 19, 2019, the plaintiff in this case filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). In the charge, the plaintiff alleged that she had suffered sex discrimination and retaliation, in violation of Title VII, in connection with her employment at Hillside Auto Mall, Inc.

Ninety-one days later, on July 19, 2019, the EEOC issued the plaintiff a "notice of right to sue." The notice stated that it had been "[i]ssued on request" from the plaintiff by a district director. The district director marked a box on the form acknowledging that "[l]ess than 180 days have passed since the filing of this charge," but stating that the district director had determined "that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge." The notice also stated that "[t]he EEOC is terminating its processing of this charge."

On September 25, 2019, the plaintiff filed an employment discrimination lawsuit in federal district court in New York. The lawsuit alleged that the defendants had discriminated against her in violation of Title VII's prohibitions on sex and pregnancy discrimination. The plaintiff also raised claims under the New York State Human Rights Law and the New York City Human Rights Law.

The defendants moved to dismiss the complaint, arguing that the plaintiff's lawsuit was premature because the EEOC had not dismissed her charge or considered the charge for 180 days before issuing her a right-to-sue letter. The defendants also argued that the district court

should decline to exercise supplemental jurisdiction over the plaintiff's state law claims.

The plaintiff responded that she was entitled to file her lawsuit because the EEOC had sent her a letter designated a "notice of right to sue" based upon a determination "that it is probable that the [EEOC] will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge."

## *The Court's Decision*

The court granted the defendants' motion to dismiss.

In its decision, the court explained that Title VII requires the EEOC to notify a person who has filed a discrimination charge when either of two events occurs:

- If a discrimination charge filed with the EEOC is dismissed by the EEOC, or

- If, within 180 days from the filing of the charge, the EEOC has not filed a civil action or has not entered into a conciliation agreement to which the person who filed the discrimination charge is a party.

Upon either of those events, as provided in Title VII, the EEOC "shall" notify the person who filed the discrimination charge and within 90 days after the giving of that notice "a civil action may be brought . . . by the person claiming to be aggrieved."

Thus, the court observed, Title VII specifies the conditions under which a Title VII suit may be brought: namely, notice that the EEOC has dismissed a charge, or that it has not filed a civil action or entered into a conciliation agreement within 180 days.

The court then ruled that because the plaintiff had not received either of these notices by the time she filed her lawsuit, she had filed her suit prematurely.

The court was not persuaded by the plaintiff's contention that she was entitled to file suit because she had received a letter designated a "notice of right to sue" from the EEOC, reasoning that Congress has "unambiguously" prescribed the type of notice that was a precondition to a Title VII suit.

The court acknowledged that some courts have allowed plaintiffs to bring suit after receiving the type of notice the plaintiff had received in this case. Those courts reason that although Title VII describes two circumstances in which the EEOC must issue a right-to-sue letter, it "does not bar the conclusion" that even when neither

of the two conditions had occurred, the EEOC still may issue a notice of right to sue.

In rejecting that reasoning, the court in this case said that Title VII requires that the EEOC provide notice about two events and that other notices "cannot authorize the filing of a lawsuit." The court emphasized that by providing that the EEOC must "so notify" a person who filed a discrimination charge when one of two events had occurred, and that the plaintiff may file a lawsuit within 90 days of receiving "such notice," Congress "made clear that the only notices that create a right to sue are the notices described in the statute."

Accordingly, the court dismissed the plaintiff's complaint. It also directed the EEOC to reopen the plaintiff's discrimination charge and stated that the plaintiff could renew her complaint once the EEOC acted within the requirements of the statute.

The case is *Stidhum v. 161-10 Hillside Auto Ave, LLC*, No. 19-CV-5458 (RPK) (VMS) (E.D.N.Y. June 25, 2021).

## *Federal Court Dismisses Title VII Suit That Failed to Allege Former Employer Took Adverse Action Based on Plaintiff's Protected Characteristic*

The U.S. District Court for the Southern District of New York has dismissed an employment discrimination lawsuit filed under Title VII of the Civil Rights Act of 1964 after finding that the plaintiff had not alleged facts suggesting that her former employer had taken any "adverse action" against her based on any "protected characteristic" of the plaintiff.

### *The Case*

The plaintiff in this case, an African American woman, filed an employment discrimination lawsuit under Title VII of the Civil Rights Act of 1964, alleging that her former employer, the New York City Department of Education, had discriminated against her based on her national origin.

The plaintiff alleged that an administrator with New York City's Department of Education had conspired with others in using the plaintiff's national origin "as a motive to make intentionally fraudulent statements" against the plaintiff and to forge her signature on evaluations to cover up her "discontinuance."

According to the plaintiff, the defendants had "willfully" discriminated against her because the hearings to appeal discontinuances were "rigged in favor of the New York City Department of Education." The plaintiff also asserted that the administrator and others had "continued to retaliate and discriminate by making numerous fraudulent claims to a state agency

(New York City Department of Labor Division of Unemployment).” The plaintiff’s complaint added that the administrator and others had issued “a problem code” on the plaintiff’s personnel/galaxy account although the plaintiff had “committed no criminal act,” and that the problem code prevented the plaintiff “from being employed within any division of the New York City Department including third party vendors.”

The plaintiff, who attached to her complaint a right to sue notice that she had received from the Equal Employment Opportunity Commission (“EEOC”), sought to have the court order the defendants to “remove the problem code off [her] personal/Galaxy record, and compensate [her] for lost salary and benefits.”

### *The Court’s Decision*

The court dismissed the plaintiff’s complaint.

In its decision, the court explained that at the pleading stage of an employment discrimination action, a plaintiff “must plausibly allege” that (1) the employer took adverse employment action against the plaintiff, and (2) the plaintiff’s race, color, religion, sex, or national origin was a motivating factor in the employment decision. A plaintiff may do so, the court continued, “by alleging facts that directly show discrimination or facts that indirectly show discrimination by giving rise to a plausible inference of discrimination.”

Here, the court decided, the plaintiff’s allegations of discrimination were “insufficient to state claims under Title VII.”

The court reasoned that the plaintiff had not alleged facts suggesting that her employer had taken “any adverse action” against her based on any protected characteristic of hers.

The court granted the plaintiff an opportunity to amend her complaint but stated that if she did so, she would have to allege facts suggesting that the defendants “took adverse employment action against her *because of* an impermissible factor.” The court concluded that, essentially, an amended complaint must explain, “who violated her federally protected rights and how; when and where such violations occurred; and why [the plaintiff] is entitled to relief.”

The case is *Williams v. N.Y. City Department of Education*, No. 21-CV-0520 (LTS) (S.D.N.Y. June 7, 2021).

## *Trial Court Finds That Parties’ Non-Solicitation Provision was a “Reasonable Restriction”*

A trial court in New York has ruled that a referral agreement was more analogous to a contract for the sale of a business than to an employment contract and, therefore, that the non-solicitation provision in the referral agreement was a “reasonable restriction” on the defendants.

## *The Case*

Global credit card and debit card payment-processing companies EVO Payments International, LLC ("EVO Payments"), and its wholly owned subsidiary, EVO Merchant Services, LLC ("EVO Merchant," and together with EVO Payments, "EVO"), were the plaintiffs in this case.

As the court explained, on July 5, 2018, EVO Merchant entered into a referral agreement with R.B.C.K. Enterprises, Inc. ("RBCK") in which RBCK agreed to refer customers to EVO for payment processing in exchange for a referral fee (the "Referral Agreement"). The Referral Agreement provided that, during the period of time that the agreement was in effect and for a period of three years after its termination, RBCK would not solicit EVO's customers or take any action that would cause EVO's customers to terminate their relationships with EVO (the "Non-Solicitation Provision"). The Referral Agreement also provided that all data belonging to or relating to the business of the other party, including the list of merchants referred to EVO, was confidential.

EVO and RBCK entered into a confidentiality and non-disclosure agreement on the same date (the "Confidentiality Agreement") in which they agreed not to use the confidential information of the other, including information about customers and business relationships, for their own purposes.

Many of the customers that RBCK referred to EVO were pool and spa merchants. According to the plaintiffs, approximately 688 pool and spa merchants in RBCK's portfolio had active accounts with EVO as of September 2019 (the "Pool Merchants"). RBCK contacted EVO in September 2019 seeking to modify the Referral Agreement by eliminating the Non-Solicitation Provision upon termination of the Referral Agreement. EVO refused to modify the Referral Agreement.

In October 2019, RBCK entered into an asset purchase agreement with RB Retail & Services Software LLC ("RB") and Fullsteam Operations LLC ("Fullsteam"). RB was owned by Fullsteam, which was a direct competitor of EVO.

Then, in a letter to EVO dated December 11, 2019, RBCK terminated the Referral Agreement. According to EVO, between September 2019 and May 2020, approximately 114 Pool Merchants closed their accounts with EVO and another 33 ceased all processing activity with EVO.

EVO filed suit for breach of contract against RBCK, RB, and Fullsteam. EVO alleged that the defendants had used its confidential information for their own financial gain by soliciting the Pool Merchants and causing them to cease using EVO's services in violation of the Referral and Confidentiality Agreements. EVO sought to impose liability on RB and Fullsteam by imposing successor liability on them.

The plaintiffs alleged that the sale of RBCK's assets to RB was a de facto merger and a fraudulent attempt by RBCK to avoid its obligations under the Referral and Confidentiality Agreements. In support, the plaintiffs

alleged that, shortly after the asset sale, RBCK had ceased it business operations; that RBCK and RB had common shareholders, officers, directors, and employees; that RBCK and RB had substantially similar names; that RBCK and RB sold and operated the same software; that RBCK and RB had the same office address, telephone number, and email address; and that RB acknowledged on its website that it was the same entity as RBCK.

The plaintiffs moved by order to show cause for a preliminary injunction enjoining the defendants from soliciting or contacting EVO's customers, including the Pool Merchants.

The trial court signed the order to show cause, with a temporary restraining order enjoining RBCK, pending further order of the court, from soliciting customers of EVO who had become customers of EVO or its affiliates under the terms of the Referral Agreement. In addition, the court directed the defendants to maintain all records of any transactions with EVO's former customers.

Thereafter, the court granted the plaintiffs' motion for a preliminary injunction and enjoined the defendants from soliciting customers of the plaintiffs or their affiliates who had become customers of the plaintiffs under the terms of the Referral Agreement.

RB and Fullsteam moved for an order modifying the preliminary injunction to the extent of releasing them from its obligations. RB and Fullsteam contended that, to comply with the injunction, they had requested from EVO a list of the customers referred to it by RBCK. RB and Fullsteam contended that the customer list produced by EVO contained only the names and mailing addresses of the customers referred to EVO and the ID numbers given to them by EVO. Relying on cases involving restrictive covenants in employment contracts, RB and Fullsteam contended that, because the list was devoid of any confidential or propriety information, injunctive relief was not necessary.

## *The Court's Decision*

The court denied the motion by RB and Fullstream.

In its decision, the court pointed out that the Referral Agreement specifically provided that, "This Agreement, *the list of persons constituting Referred Merchants hereunder*, and all payments and reports delivered hereunder constitute the Confidential Information of EVO." (Emphasis added.) Thus, the court explained, the parties had agreed that the list of customers referred to EVO under the Referral Agreement would be confidential. The court added that the parties also had agreed that RBCK would not solicit those customers or take any action that would cause them to terminate their relationship with EVO during the period of time that the Referral Agreement was in effect and, as provided

in the Non-Solicitation Provision, for a period of three years after its termination.

The court was not persuaded by the cases involving restrictive covenants in employment contracts relied on by RB and Fullsteam to support their contention that the Non-Solicitation Provision was unenforceable. The court reasoned that restrictive covenants in employment contracts were subject to more exacting scrutiny than those in contracts for the sale of a business or ordinary commercial contracts because public policy favored economic competition and individual liberty and sought to shield employees from the superior bargaining position of employers.

By contrast, the court continued, a restrictive covenant in a contract for the sale of a business limited the seller's right to launch a new enterprise that competed with the business sold. The court said that those covenants were "routinely enforced" because the buyer bargained for the good will of the seller's customers. If a seller was permitted to initiate a competing enterprise that presumably would attract the patronage of the seller's former customers, the buyer would not receive the full benefit of its bargain, the court observed.

The court then ruled that the Referral Agreement was more analogous to a contract for the sale of a business than an employment contract. "Like the buyer of a business, what EVO bargained for was the good will of the customers referred to it by RBCK during the term of the Referral Agreement and for a period of three years after its termination," the court said.

The court reasoned that the Non-Solicitation Provision was part of the bargain negotiated by the parties for which RBCK had been paid referral fees. "To allow RB and Fullsteam to solicit EVO's customers prior to the expiration of the three-year period would deprive EVO of the benefit of its bargain," the court held.

Accordingly, the court concluded that the Non-Solicitation Provision was "a reasonable restriction protecting EVO's legitimate interest in keeping the customers for which it paid a fee."

The case is *EVO Merchant Services, LLC v. R.B.C.K. Enterprises, Inc.*, 71 Misc. 3d 1228(A) (Sup. Ct. Suffolk Co. 2021).

## *Appellate Court Affirms Trial Court Decision Denying Motion to Dismiss Law Firm's Suit Against Former Associate over Noncompetition Agreement*

The Appellate Division, First Department, has affirmed a trial court's decision refusing to dismiss a lawsuit alleging that a former associate at a law firm had breached various provisions of his employment agreement.

## *The Case*

A law firm specializing in immigration law sued a former associate attorney, alleging that he had breached the terms of the employment agreement he had signed with the law firm.

According to the law firm, the employment agreement included a requirement that the former associate maintain as confidential customer lists or other customer information, a noncompetition agreement, and a nonsolicitation agreement. The law firm asserted that the employment agreement prohibited the former associate from engaging in any business that conducted the same or similar business as the law firm for a period of 36 months, within 90 miles of New York City or in the Israeli community.

The employment agreement also purported to prohibit the former associate from directly or indirectly soliciting any business from the law firm's customers or clients for a period of 36 months within 90 miles of New York City or in the Israeli community or from advertising on Israeli/Hebrew websites, television, or newspapers.

The law firm alleged that the former associate had breached the terms of his employment agreement by opening his own immigration law firm in New York City and by soliciting the law firm's clients.

The former associate moved to dismiss the complaint, arguing that the employment agreement was null and void under Rule 5.6(a)(1) of the New York Rules of Professional Conduct as it barred him from representing clients and performing legal work within 90 miles of New York City. He argued that the noncompete clause should not be saved by partial severance to bring it into compliance with Rule 5.6(a)(1) because it was so overly broad that it constituted anticompetitive conduct. In addition, he argued that he had not solicited the law firm's clients, but that they had sought him out after they had learned that he was no longer with the law firm.

The trial court denied the defendant's motion to dismiss, finding issues of fact as to the enforceability of the employment agreement and whether or to what extent the former associate had solicited the law firm's clients. In addition, the trial court found that the parties' submissions presented issues of credibility for a jury to determine.

The former associate appealed.

## *The Appellate Court's Decision*

The appellate court affirmed the trial court's decision denying the former associate's motion for summary judgment, although it also dismissed the law firm's claim for punitive damages.

In its decision, the appellate court ruled that the trial court had properly denied the former associate's motion for summary judgment in that

there were issues of fact as to whether the nonsolicitation clause was enforceable and whether the former associate had solicited the law firm's clients or had disclosed confidential client information in violation of his employment agreement.

Significantly, the appellate court pointed out that Rule 5.6(a)(1) of the New York Rules of Professional Conduct barred lawyers from "participat[ing] in offering or making a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship," except under certain limited circumstances. The appellate court then ruled that, to the extent the noncompete provision in the employment agreement that the former associate had signed with the law firm sought to prevent him from "conducting business activities that are the same or similar" to those of the law firm within 90 miles of New York City or in the Israeli community, it was "void and unenforceable."

The appellate court added, however, that the noncompete clause "may be enforceable" to the extent that it prohibited the former associate from soliciting the law firm's clients. In the appellate court's view, the former associate failed to establish that the nonsolicitation clause was unenforceable as an undue restriction on his ability to practice law or that he had not solicited the plaintiff's clients in violation of his employment agreement, which "would be actionable."

The appellate court concluded that the plaintiff's claim for punitive damages should have been dismissed, as "there can be no separate cause of action for punitive damages."

The case is *Feiner & Lavy, P.C. v. Zohar*, 195 A.D.3d 411 (1st Dep't 2021).

## *New York Appellate Court Reinstates Suit over Noncompete Clause*

An appellate court in New York has reinstated a lawsuit over a noncompete clause that had been dismissed at the trial level, finding that questions remained over the proper interpretation of the noncompete clause.

### *The Case*

The case arose after the plaintiff in this case, a physician specializing in emergency medical services, signed a contract with the defendant, a company in the business of providing hospitals with staffing and management in emergency medicine. The contract provided that the plaintiff would provide services to hospitals that had contracted with the defendant.

Under the contract between the plaintiff and the defendant together with a separate contract between the defendant and Eastern Niagara Hospital, Inc. ("ENH"), the plaintiff provided emergency medical services at ENH. After the contract between ENH and the defendant was terminated and ENH began receiving emergency medical services from another provider, the defendant terminated its contract with the plaintiff.

The contract between the plaintiff and the defendant contained a noncompete clause with a duration of one year, and the plaintiff filed a lawsuit against the defendant seeking, among other things, a declaration that he would not be in breach of the contract if he continued to provide emergency medical services to ENH.

The defendant answered and asserted counterclaims for, among other things, breach of contract and a declaration that the noncompete clause in its contract with the plaintiff was valid and enforceable such that it prevented the plaintiff from continuing to work with ENH.

The plaintiff moved for summary judgment seeking the dismissal of the defendant's counterclaims and a declaration that his continuing to provide services to ENH would not constitute a breach of the plaintiff's contract with defendant.

The trial court granted the plaintiff's motion, and the defendant appealed.

## *The Appellate Court's Decision*

The appellate court reversed the trial court's decision in favor of the plaintiff, finding that the trial court had erred in granting the plaintiff's motion with respect to whether his continuing to provide services to ENH constituted a breach of his contract with the defendant.

In its decision, the appellate court pointed out that the noncompete clause in the plaintiff's contract with the defendant provided that the plaintiff "agrees during the terms of this Agreement or any extension of it and for a one . . . year period after termination, regardless of the cause of such termination, to refrain from directly or indirectly . . . practicing Emergency Medicine . . . at the Hospitals or other medical institutions to which [the defendant] provides services."

The appellate court added that the term "Hospitals" was defined in the contract as "any and all hospitals where [the plaintiff] provides professional emergency medical services . . . as set forth on Exhibit A," and that ENH was a hospital listed in Exhibit A.

The appellate court rejected the plaintiff's contention that the noncompete clause should be interpreted to mean that the plaintiff could not work at hospitals where the defendant currently provided services and that, because the defendant no longer provided services to ENH, the

noncompete clause did not prevent the plaintiff from practicing emergency medicine at ENH.

Rather, the appellate court said, the plaintiff's interpretation of the noncompete clause ignored the contract's definition of the term "Hospitals" to include the facilities listed on Exhibit A – that is, including ENH.

Thus, the appellate court ruled, the provision in the noncompete clause that the plaintiff had to refrain from working at the "Hospitals or other medical institutions to which [the defendant] provides services" could be reasonably interpreted to mean that the plaintiff shall refrain from working at "[ENH] or other medical institutions to which [the defendant] provides services."

According to the appellate court, inasmuch as the plaintiff failed to establish that his interpretation of the noncompete clause was the only reasonable interpretation, summary judgment in his favor was inappropriate.

The appellate court concluded that the trial court also should not have dismissed the defendant's counterclaims, given the need to interpret the noncompete clause.

The case is *Kowalak v. Keystone Medical Services of New York, P.C.*, No. 336 CA 20-00558 (App. Div. 4th Dep't Aug. 26, 2021).

## *New York Appellate Court Modifies Plaintiff's Judgment Stemming from Alleged Diversion of Business*

The Appellate Division, Second Department, has reversed portions of a judgment in favor of a clothing and apparel distributor against a former employee who allegedly diverted business and assets away from the plaintiff.

### *The Case*

Stuart's, LLC, a clothing and apparel distributor, filed a lawsuit arising from what it alleged was a diversion of assets and business from Stuart's to another clothing and apparel distributor, Level 8 Apparel, LLC. In its complaint, Stuart's alleged, among other things, that Michael Hong had been an employee of Stuart's until February 24, 2009, that he also was a principal of Level 8, and that he, along with several other individual defendants, had wrongfully diverted business and assets away from Stuart's to Level 8.

The plaintiff's complaint asserted claims for, among other things, tortious interference with contract, tortious interference with business relations, and unfair competition.

Following a nonjury trial, the trial court found that the defendants had:

- Tortiously interfered with a contract between Stuart's and Tumi, Inc., damaging Stuart's in the amount of $173,375;

- Tortiously interfered with Stuart's business relationship with Aeropostale, Inc., damaging Stuart's in the amount of $543,689; and

- Engaged in unfair competition with Stuart's, damaging Stuart's in the amount of $719,064.

The court entered a judgment in favor of Stuart's and against Hong in the principal sum of $1,436,128, and Hong appealed.

## *The Appellate Court's Decision*

The appellate court modified the judgment in two respects but otherwise affirmed.

First, the appellate court deleted the provision awarding Stuart's $543,689 against Hong as damages for tortious interference with business relations and, instead, dismissed that cause of action.

Second, the appellate court deleted the provision awarding Stuart's $719,064 against Hong as damages for unfair competition and, instead, dismissed that cause of action, too.

In its decision, the appellate court first turned to the claim by Stuart's for tortious interference with contract. The appellate court explained that, to succeed on such a claim, a plaintiff must prove the existence of a valid contract with a third party, the defendant's knowledge of that contract, the defendant's intentional and improper procurement of a breach of that contract, and damages.

In this case, the appellate court found that the facts that had come out at trial warranted the trial court's finding that Hong had tortiously interfered with Stuart's contract with Tumi. Specifically, the appellate court said, the trial record reflected:

- The existence of a valid licensing agreement between Stuart's and Tumi;

- Hong's knowledge and awareness of the licensing agreement Stuart's had with Tumi;

- Hong's intentional procurement of Tumi's breach of that agreement without justification by Hong's actions in conspiring with several defendants to transfer the licensing agreement with Tumi from Stuart's to Level 8; and

- Damages to Stuart's as a direct result of the aforementioned conduct.

The appellate court then turned to the claim by Stuart's for tortious interference with business relations. The appellate court said that, for a party to prevail on such a claim, it must prove:

- That it had a business relationship with a third party;

- That the defendant knew of that relationship and intentionally interfered with it;

- That the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and

- That the defendant's interference caused injury to the relationship with the third party.

The appellate court added that although a cause of action for tortious interference with business relations was "closely akin" to one for tortious interference with contract, the cause of action for tortious interference with business relations "requires proof of more culpable conduct" on the defendant's part than is necessary to demonstrate tortious interference with contract.

The appellate court then ruled that the trial court's determination that Hong had tortiously interfered with Stuart's business relations with Aeropostale "was not warranted by the facts." The appellate court noted that the trial court had made no specific findings of fact or credibility determinations concerning this cause of action and Hong individually, and it ruled that there was "a lack of incriminating evidence" that Hong had used "wrongful means" to interfere with Stuart's business relationship with Aeropostale.

Furthermore, the appellate court continued, to the extent that the trial court had tacitly concluded that Hong's conduct had harmed Stuart's business relationship with Aeropostale, any such conduct would presumably have been motivated by Hong's economic self-interest, and could "not be characterized as solely malicious." Therefore, the appellate court ruled, the trial court should have dismissed the cause of action for tortious interference with business relations asserted by Stuart's against Hong.

Finally, the appellate court analyzed the claim by Stuart's for unfair competition. It explained that, to establish a cause of action for relief based on unfair competition, a plaintiff must demonstrate that the defendant had wrongfully diverted the plaintiff's business to itself. The appellate court added that, in the absence of a restrictive covenant, an

employee "may freely compete with a former employer unless trade secrets are involved or fraudulent methods are employed." Unfair competition, the appellate court said, encompasses the principle that "one may not misappropriate the results of the skill, expenditures and labors of a competitor."

The appellate court decided that the trial court's determination that Hong had engaged in unfair competition was not warranted by the facts. It said that the trial record did not demonstrate that Hong had acted wrongfully in allegedly diverting Stuart's business to Level 8. The appellate court noted that Tumi's representative had testified that Hong never had any discussion or involvement with Tumi concerning the transfer to Level 8 of any assets or rights belonging to Stuart's, and that Hong's only involvement with Tumi pertained to issues concerning product and/or design. Moreover, the appellate court continued, testimony from Aeropostale's representative evidenced no involvement by Hong in Aeropostale's severing of its business ties to Stuart's, nor any involvement by Hong in Aeropostale's entering into any agreements with Level 8.

Thus, the appellate court declared, any implicit finding by the trial court that Hong had acted wrongfully was not warranted by the facts, and the trial court should have dismissed the cause of action alleging unfair competition as asserted by Stuart's against Hong.

The case is *Stuart's, LLC v. Edelman*, No. 2018-12893 (App. Div. 2d Dep't July 28, 2021).

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