

SALES STRATEGIES GROUP, INC.,

Plaintiff,

v.

DECISION AND ORDER

INDEX No. 2005/13343

PATRICK FENTON, BRIAN BAILEY, and  
MONEY TREE TRAINING GROUP,

Defendant.

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Defendants move for summary judgment dismissing the complaint which alleges (1) improper use of trade secrets and breach of alleged fiduciary duty, (2) copyright infringement, and (3) a claim in prima facie tort. The copyright infringement claim was dismissed by order dated January 5, 2006.

SSG was incorporated in the State of Idaho on January 5, 2005, and retained defendants Fenton and Bailey as independent contractors for the purpose of performing "front-end" speaking engagements at free half-day seminars held exclusively for realtors. They did not have an employment agreement or other non-compete or non-disclosure agreements, nor did they become subject to a restrictive covenant of any kind. The object of the free half-day seminars was to encourage those in attendance to attend a \$425 all-day workshop. According to Fenton and Bailey

in their affidavits, they came to realize that what they were promising at the front-end half-day speaking engagements was not being provided by SSG at the all-day workshops. The Rochester Business Journal published an article identifying complaints against SSG's predecessor, JD Real Estate Group, Inc., which was in an identical business and owned and operated by the same individual, Joseph DiLeo. When Fenton and Bailey resigned from SSG in March and June 2005, respectively, and opened up a similar business and company, co-defendant Money Tree Training Group, which targeted the mortgage lending industry, not realtors, plaintiff sued.

In support of their summary judgment motion, defendants establish that they did not physically take anything from the plaintiff, that DiLeo admitted in his deposition that he has no knowledge that defendants physically took anything when they departed SSG ("I don't know that he's got hard copy, but it certainly obviously is in his head."), that the alleged trade secret in question, to the extent it can be seen to include a business formula for attracting and selling to customers, is given away at no charge to anyone who attends the free half-day presentations together with the scripts for the free presentations and the scripts used to solicit sponsors, that the presentations themselves are not secret because anyone who attends them hears both the words spoken and the manner in which

the words are delivered, and that the alleged trade secrets have no value.

Accordingly, in the circumstances, what plaintiff claims is a trade secret is not a formula, pattern, device or compilation "which is used in one's business, and which gives . . . [plaintiff] an opportunity to obtain an advantage over competitors who do not know or use it." Eagle Comtronics, Inc. v. Pico, Inc., 89 A.D.2d 803 (4<sup>th</sup> Dept. 1982) (quoting Restatement, Torts §757, comment b). Given the formula of Ashland Management, Inc. v. Janien, 82 N.Y.2d 395, 407 (1993), by any measure what plaintiff claims is a trade secret in this case quite plainly is not. Plaintiff's CEO, DiLeo, conceded in his deposition that the business model in question is used by others, and could only claim that plaintiff used it with more skill and to a greater degree than any other business. Furthermore, plaintiff took no steps to protect the secrecy of its business formula or model because they presented it repeatedly during the free half-day seminars, thereby establishing that no trade secret protection exists for information which easily can be acquired by others and duplicated. JAD Corp. of Am. v. Lewis, 305 A.D.2d 545 (2d Dept. 2003); Eagle Comtronics, Inc., 89 A.D.2d at 804. See also, Nadle v. Play-By-Play Toys & Novelties, Inc., 208 F.3d 368, 380 (2d Cir. 2000) ("the law does not protect against the use of that which is free and available to all").

Defendants also establish that the so-called business model allegedly protected was not physically expropriated from plaintiff if it exists in physical form at all, Falco v. Parry, 6 A.D.3d 1138 (4<sup>th</sup> Dept. 2004) and that, in DiLeo's own words, it only exists in the individual defendants' "head." Accent Stripe, Inc. v. Taylor, 204 A.D.2d 1054 (4<sup>th</sup> Dept. 1994) (mere knowledge of business intricacies acquired while working for former employer not protected as trade secret or confidential information). Furthermore, "[t]he scripts are sales pitches, and once they have been used, sales pitches are not treated as trade secrets." In re Providian Credit Card Cases, 96 Cal. App. 4<sup>th</sup> 292, 305 (1<sup>st</sup> Dist. 2002). To the same effect is American Exp. Travel Related Services Co., Inc. v. Accu-Weather, Inc., 849 F. Supp. 233, 242 (S.D.N.Y. 1994), aff'd. 105 F.3d 863 2d Cir. 1997).

DiLeo admitted in his deposition that the half-day presentations, and their script, were based on published material by such authors as Napoleon Hill, Brian Tracy, Pete Ziegler, and Tony Robbins, and that by reason thereof there could not, in these circumstances, be any theft of an idea that was novel or original. Ring v. Estee Lauder, Inc., 702 F.Supp. 76, 77 (S.D.N.Y. 1988). The plaintiff's contention that what it seeks to protect in this action is a trade secret was persuasively laid to rest in Micro Strategy Inc. v. Business Objects, S.A., 331 F.

Supp.2d 396, 422-23 (E.D. Va. 2004) ("method of selling was readily ascertainable by any interested party") ("selling method employed . . . was made public each time it was utilized") (no restriction on attendees or "prospect[s] . . . [that they were] unable to discuss the type of sales pitch employed"), affirmed in relevant part, 429 F.3d 1344, 1358 (Fed. Cir. 2005). That case acknowledged that "[s]ales techniques can constitute trade secrets even if such techniques are generally known, providing the combination of such techniques is sufficiently novel and secret," id. 331 F. Supp.2d at 422, but defendants establish as a matter of law on this motion that the techniques in question in this case were not novel<sup>1</sup> nor were they secret. Plaintiff "cannot take common sense from the public domain of ideas and preserve it as a trade secret for its exclusive use." Mo-Kan Cent. Recovery Co. v. Hedenkamp, 671 S.W.2d 396, 400-01 (Mo. App. W.D. 1984). Nor can plaintiff prevent defendants from "carry[ing] with them their 'faculties, skills and expertise' that they learned in their former position." Fredrick Chived & Co. v. Mardall Leemay & Co., 279 F.Supp. 913, 918 (S.D.N.Y. 1968) (quoting Clark Pager & Mfg. Co. v. Stenacher, 236 N.Y. 312

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<sup>1</sup> The use of the term novel in this context should be distinguished from its use in the patent law sense. McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F.Supp. 1232, 1256 (E. D. Mich. 1978) ("Secrecy, in the context of trade secrets, implies at least minimal novelty.") (citing Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1973)).

(1923)). In other words, plaintiff could not enjoin defendants from using "intangible procedures and techniques that defendants learned while employed by plaintiff." Frederick Chusid & Co. v. Marshall Leeman & Co., 279 F.Supp. at 918.

In opposition to this showing, plaintiff fails to raise an issue of fact. Much of DiLeo's affidavit contradicted his deposition testimony, especially his invocation of a concept of "hidden details" or "know-how," an aspect not mentioned in his deposition testimony. Martin v. Savage, 299 A.D.2d 903, 904 (4<sup>th</sup> Dept. 2002). Given the questions posed to DiLeo at his deposition, he would have been expected to reveal much of what he now claims in his affidavit in his deposition answers. See Schuster v. Dukarm, \_\_\_ A.D.3d \_\_\_, 2007 WL 778601 (4<sup>th</sup> Dept. March 16, 2007) (Hurlbutt and Smith, J.J., dissenting) (statements on motion "merely an attempt to avoid the implications of her prior testimony by raising a feigned issue"); Richter v. Collier, 5 A.D.3d 1003, 1004 (4<sup>th</sup> Dept. 2004) (same). In any event, what details might have been hidden were assuredly revealed once the presentations were made. The work books were routinely given away at the presentations, and there is no allegation that defendants removed anything plaintiff alleges was kept under lock and key. It must be remembered that there was no attempt to prevent dissemination by those attending the presentations via confidentiality agreement or otherwise, either of the written

materials or of the oral presentation or the manner of its delivery. That no recordings were permitted does not raise an issue of fact on the secrecy issue. Similarly, that training was involved and that the presenters had to memorize the script only underscores that defendants only took with them what plaintiff concedes was "in their head."

The third cause of action in prima facie tort is dismissed on defendants' showing that they had other valid motives for their conduct than the disinterested malice that must be the sole motivation to sustain that claim, and the failure of plaintiff to raise an issue of fact that the prohibited motive was the only motive. Great American Trucking Co., Inc. v. Swiech, 267 A.D.2d 1068 (4th Dept. 1999).

The motion to compel is denied as academic. The motion to amend is also denied. Counsel's letter of September 15, 2006 betrays his professed understanding that a motion was not required. It states: "it appears that we may have to make a motion to amend the pleadings to add causes of action and parties" and that "we will do so before the October 1, 2006 deadline." Counsel's selective quotation from this letter in ¶11 of his affirmation is not well taken. The current motion ignores the CPLR (see ¶5 of counsel's affirmation), the scheduling order, the order of October 19, 2007, and quite frankly takes a disturbing tone both on its face and particularly when considered

in light of the history of plaintiff's tardy manner of presentation of its case on the motion for a preliminary injunction. It makes no sense from a case management perspective to permit a party to steamroll through an amendment in the fashion employed here. The scheduling order cannot confer rights on a party not permitted by the CPLR, and to hold otherwise would fully deny defendants the due process specifically afforded them by the CPLR to oppose the proposed amendment in response to a duly filed motion. Cf., Mahopac Ophthalmology, P.C. v. Tarasevich, 21 A.D.3d 351, 799 N.Y.S.2d 568 (2d Dep't 2005) (issuance of conditional order of preclusion and ultimate dismissal of complaint held to be improper where plaintiff did not have an opportunity to oppose the request for such sanctions); Basch v. Greenwald, 16 A.D.3d 1123, 791 N.Y.S.2d 777, 778 (4th Dep't 2005) ("[defendant] should have been given an opportunity to submit responding papers and present oral argument on the issues raised in plaintiff's motion [for discovery sanctions]"); Fraracci v. Lasouska, 283 A.D.2d 735, 724 N.Y.S.2d 218 (3d Dep't 2001) (holding that the court abused its discretion when it granted the plaintiff's request to strike the answer based on the defendants' failure to attend a deposition where the request was made orally at the status conference without any prior notice that such relief would be sought; the motion should have been on notice); Postel v. New York University Hosp., 262

A.D.2d 40, 691 N.Y.S.2d 468 (1st Dep't 1999) (the court should not have granted the defendant's oral request made at the compliance conference to dismiss the complaint for discovery defaults). Accordingly, even if the scheduling order could be read to have granted an unmade but required motion to amend, which it assuredly cannot, counsel's professed understanding of it, even if credited, was entirely unreasonable.

In any event, in view of the grant of summary judgment to defendants in this order, the proposed amendments would appear to lack merit. The motion for a stay pending appeal is denied as academic.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: April 2, 2007  
Rochester, New York