

Docket: 1784CV00427-BLS2

Date: January 16, 2018

Parties: AGENUS, INC. V. JANIS McCOURT

Judge: /s/Kenneth W. Salinger

MEMORANDUM AND ORDER DENYING DEFENDANTS MOTION TO DISMISS

Janis McCourt used to be employed by Agenus, Inc. In its complaint, Agenus asserts claims that: (i) when McCourt left she took and later used confidential information belonging to Agenus and thereby breached a non-disclosure agreement, breached a fiduciary duty of loyalty, tortuously misappropriated confidential information or trade secrets, and converted Agenus's property; and (ii) McCourt provided services to at least three competitors of Agenus and thereby breached the non-competition covenant contained in the parties' Change of Control Plan agreement. McCourt has moved to dismiss all claims against her, based in part on alleged connections between the claims by Agenus in this action and claims for unlawful discrimination asserted by McCourt against Agenus in a separate Middlesex Superior Court action.

The Court concludes that it must DENY McCourt's motion to dismiss for the following reasons.

First, the anti-SLAPP statute is not implicated here because none of Agenus's claims are based solely on petitioning activity within the meaning of G.L. c. 231, § 59H.

McCourt argues that the non-disclosure, misappropriation, and related claims are based on her retention and use of Agenus documents to support her employment discrimination claims. The Court is not convinced.

These claims do not implicate § 59H because they are based at least in part on allegations that McCourt acted unlawfully by taking away documents that belonged to Agenus. The Appeals Court has held that a claim based at least in part on conduct undertaken to investigate a potential claim or report to the government is not protected by the anti-SLAPP statute, even if that conduct later informs some kind of

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effort to petition for government aid or relief. See *Brice Estates, Inc. v. Smith*, [76 Mass. App. Ct. 394](#), 396 (2010) (claim based in part on alleged trespass to investigate possible wetlands violation, which informed petitioning activity of submitting observation form to state agency's endangered species program); *Maxwell v. AIG Domestic Claims, Inc.*, [72 Mass. App. Ct. 685](#), 694-695 (2008) (claim based in part on allegedly inadequate investigation, which informed petitioning activity of report to insurance fraud bureau); *Garabedian v. Westland*, [59 Mass. App. Ct. 427](#), 433 (2003) (claim based in part on gathering video evidence, which informed petitioning activity to State and local officials regarding private airfield). "[W]here the underlying conduct involves both petitioning activity and activity not considered petitioning," a claim is not subject to dismissal under § 59H. *Brice Estate*, *supra*. Even if these claims are based in part on petitioning activity by McCourt, they are also based in large part on alleged misconduct that occurred before any petitioning activity. As a result they do not implicate the anti-SLAPP statute, just like the claims in *Brice Estate*, *Maxwell*, and *Garabedian*.

The claim against McCourt under the non-competition provision of the Change of Control Plan does not implicate the anti-SLAPP statute either. The Supreme Judicial Court has held that a claim for violation of a non-disclosure agreement necessarily has a substantial basis other than defendant's petitioning activity, and therefore does not implicate § 59H. See *Duracraft Corp. v. Holmes Products Corp.*, [427 Mass. 156](#), 168 (1998). It follows that a claim for violation of a non-competition agreement is

similarly not barred by the anti-SLAPP statute.

Second, the Court is not convinced that Agenus waived its claims in this case because it failed to assert them as counterclaims in the prior Middlesex case in which McCourt had asserted her claims of unlawful employment discrimination. The claims asserted here by Agenus were not compulsory counterclaims in the prior action because they did not arise from the same alleged transaction or occurrence as the claims asserted by McCourt. See Mass. R. Civ. P. 13(a).

Third, McCourt's assertions (raised for the first time at oral argument) that the non-competition and non-disclosure agreements no longer applied to her because she had been demoted cannot be resolved on a motion to dismiss. Agenus has alleged

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facts plausibly suggesting that McCourt remained bound by those contracts. Nothing more is required to survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6). See, e.g., *Lopez v. Commonwealth*, [463 Mass. 696](#), 701 (2012) (although facts alleged in complaint must plausibly suggest entitlement to relief, "detailed factual allegations are not required").

ORDER

Defendant's motion to dismiss is DENIED.

/s/Kenneth W. Salinger

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