UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THE CUPCAKERY, LLC,

Plaintiff,

v.

ANDREA BALLUS, et al.,

Defendants.

Case No. 2:09-CV-0807-KJD-LRL

ORDER

Currently before the Court is Defendant Andrea Ballus' ("Ballus") Motion to Dismiss (#12). Plaintiff The Cupcakery ("Cupcakery") filed a Response in Opposition (#15), to which Defendant Ballus filed a Reply (#16).

I. Background

This case arises from allegations by the Cupcakery that Ballus, a former employee, used trade secrets and information obtained during the course of her employment at the Cupcakery to open a similar, competing, and infringing company Sift: A Cupcakery, ("Sift") in a different location. The Cupcakery owns and operates a business that sells cupcakes to the general public. The Cupcakery began operating its business in January, 2006 and now has three locations in Nevada and Texas.

Ballus worked part-time for the Cupcakery in early 2008, allegedly for two months.[1] Subsequent to leaving her employment with the Cupcakery, Ballus and her husband moved to Northern California, and formed a California limited liability company, Sift, which in March of 2008, began operating a retail cupcake business in Cotati, California.

Plaintiff filed its Compliant against Defendant Ballus, and Sift (collectively referred to as "Defendants") on May 5, 2009, alleging eight claims for relief for: (1) trademark infringement under 15 U.S.C. § 1115(c); (2) unfair competition under 15 U.S.C. § 1125(a); (3) common law trademark infringement; (4) deceptive trade practices under N.R.S. § 598.0903, et seq.; (5) breach of contract; (6) fraud; (7) misappropriation of trade secrets under N.R.S. § 600A.030 et. seq.; and (8) intentional interference with prospective economic advantage.

Defendant Ballus' current Motion seeks that the Court dismiss Plaintiff's claim for common law fraud pursuant to Fed. R. Civ. P. 12(b)(6). Defendant avers that Plaintiff's fraud claim fails because there was no "special relationship" between Plaintiff and Defendant that would give rise to a duty to disclose. Plaintiff, in opposition, avers that in Nevada, an employee/employer relationship constitutes a "special relationship" from which a misrepresentation claim may arise for failure to disclose pertinent information. The Court considers the arguments of both parties below.

II. Standard of Law for Motion to Dismiss

Pursuant to Fed. R. Civ. P. 12(b)(6), a court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the

[1]The Complaint alleges that Defendant was employed at the Cupcakery for a period of two months, yet Plaintiff's Response avers that she worked for the Cupcakery for only four days. (Compl. ¶¶ 12, and 16; Resp. at 4.)

speculative level." Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949 (internal citation omitted).

In Iqbal, the Supreme Court recently clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the Court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. Id. at 1949. Second, the Court must consider whether the factual allegations in the complaint allege a plausible claim for relief. Id. at 1950. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. Id. at 1949. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not shown—that the pleader is entitled to relief." Id. (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, plaintiff's complaint must be dismissed. Twombly, 550 U.S. at 570.

III. Discussion

Plaintiff's fraud claim is based on Ballus' failure to disclose certain information to the Cupcakery prior to, and during the course of her employment. Particularly, Plaintiff avers that Ballus neglected to disclose her intent to move to California; her intent to open a competing cupcake business; and that she had registered Sift as a limited liability company with the California Secretary of State. According to the Complaint, these omissions constitute intentional, material misrepresentations, that would have precluded Plaintiff from hiring Ballus had it known of her intentions. (Compl. ¶¶ 65–67.) In opposition to Defendants' Motion, Plaintiff avers that Nevada recognizes fraud through omission, and although it does not directly address Defendants' argument that a special relationship must exist in order to state a claim for fraud, it does aver that the

confidentiality agreement Ballus signed creates a "special relationship" that would give rise to a misrepresentation claim. (#15 at 2.) The Court addresses both arguments below.

A. Fraud

In order to state a claim for fraud in Nevada, a plaintiff must allege that (1) the defendant made a false representation; (2) the defendant knew or believed the representation to be false; (3) the defendant intended to induce plaintiff to rely on the misrepresentation; and (4) the plaintiff suffered damages as a result of his reliance. Barmettler v. Reno Air, Inc., 114 Nev. 441, 956 P.2d 1382, 1386 (Nev. 1998). While Nevada generally does not recognize an action for fraud based on nondisclosure, this Court has previously held that the tort of negligent misrpresentation by nondisclosure may be upheld in some circumstances due to Nevada's adoption of the Restatement (Second) of Torts in developing its common law governing deceit torts. In re Agribiotech, Inc., 291 F.Supp.2d 1186, 1191 (D. Nev. 2003) (citing Dow Chem. Co. v. Mahlum, 970 P.2d 98, 111–114 (Nev. 1998)) and Epperson v. Roloff, 102 Nev. at 212–13, 719 P.2d at 803 (defendant may be found liable for misrepresentation even when he/she "does not make an express misrepresentation, but instead makes a representation which is misleading because it partially suppresses or conceals information.") Under this line of reasoning, the Nevada Supreme Court, in Epperson v. Roloff, recognized a cause of action for fraud by nondisclosure where a special relationship between the parties imposes a duty to speak. 719 P.2d at 804. Additionally, this Court has previously found that tort liability may be extended to those who negligently fail to disclose material facts where a special relationship imposes a duty to disclose. In re Agribiotech, Inc., 291 F.Supp.2d at 1192.

Here, Defendants aver that an employee/employer relationship—such as the relationship alleged in this case—does not create the "special relationship" required to state a claim for fraud by nondisclosure. Nevada courts have not yet addressed the specific issue of an employer-employee relationship, and Defendants seek that the Court consider decisions from other jurisdiction on this point. The Court does not deem it necessary in this instance however to limit its review of the duty to disclose to that of the employee-employer context only.

Nevada courts have found that a duty to disclose may arise from the relationship existing between parties. Dow Chem. Co. v. Mahlum, 970 P.2d at 110, disagreed with on other grounds by GES, Inc. v. Corbitt, 21 P.3d 11, 15 (Nev. 2001), ("The duty to disclose requires, at a minimum, some form of relationship between the parties."). For example, if parties are involved in a transaction and "the defendant alone has knowledge of material facts which are not accessible to the plaintiff," the defendant has a duty of disclosure. George v. Morton, 2007 WL 4631263 (D. Nev. 2007), citing GES, Inc. v. Corbitt 21 P.3d at 15; see also Nelson v. Heer, 163 P.3d 420, 426 (Nev. 2007) ("The suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist." (quotations omitted)). In Epperson, cited in both parties' pleadings, the Nevada Supreme Court held that home buyers were entitled to present to the jury evidence that the seller "had knowledge of the [water] leakage problem, that the existence of the problem was not apparent to the [buyers] and that [the sellers] therefore had a duty to disclose the problem to them prior to their purchase of the home." Epperson, 719 P.2d at 804; see also George v. Morton, 2007 WL 4631263 at *10.

This Court has also held that a "special relationship" between parties may trigger a duty to disclose, if the plaintiff has access to facts suggesting that a problem exists. Id. In Mackintosh v. Jack Matthews & Co., 855 P.2d 549, 553 (Nev. 1993), the Court found that nondisclosure may become "the equivalent of fraudulent concealment when it becomes the duty of a person to speak in order that the party with whom he is dealing may be placed on an equal footing with him. The duty to speak . . . may arise in any situation where one party imposes confidence in the other because of that person's position, and the other party knows of this confidence ." In Mackintosh , the Nevada Supreme Court concluded that the seller may have been under a duty to disclose based on the "special relationship" between the seller and the buyer, where the seller of the home was also financing the buyers' loan to purchase the home. The Mackintosh court found that the seller's role as both seller and lender created a question of fact as to whether this relationship would have caused a

reasonable buyer to place more confidence and reliance in the seller than in an ordinary seller. See George v. Morton, 2007 WL 4631263 at *10 at 554 (quoting Mancini v. Gorick, 536 N.E.2d 8, 9-10 (Ohio Ct.App.1987)); see also Nev. Power Co. v. Monsanto Co., 891 F.Supp. 1406, 1416 n. 3 (D.Nev. 1995) (citing cases where Nevada has found a "special relationship," such as a real estate agent/vendor-buyer relationship, where the agent has superior knowledge; an insurer-insured relationship; a trustee-beneficiary relationship; and an attorney-client relationship).

In reference to Mackintosh, this Court has stated that "[t]o prove a special relationship exists, the plaintiff must show a reasonable person under the circumstances would impart special confidence and the trusted party reasonably should have known of that confidence." George v. Morton 2007 WL 4631263 at *10 (citing Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 881 (9th Cir. 2007) (applying Nevada law)).

Additionally, other jurisdictions have held that an employer/employee relationship does not meet the special relationship requirement to state a claim for fraud or misrepresentation. Specifically, the Fifth Circuit, applying Texas law in an accounting fraud case, held that "there must be a special relationship that creates a duty to disclose . . . fraud", and that under Texas law "this special relationship does not exist in the employer-employee context." Hamilton v. Segue Software Inc., 232 F.3d 473, 481 (5th Cir. 2000).[2] Similarly, the Eighth Circuit, applying Minnesota law, upheld a ruling that an employer has no duty to disclose to an employee that he has placed complaints and related items in his personnel file, stating that a failure to disclose a material fact may only constitute misrepresentation if a defendant has a duty to disclose, and that no duty to disclose exists absent an "official" or "fiduciary relationship". Piekarski v. Home Owners Sav. Bank, F.S.B.,

[2]While Texas does not recognize the Restatement (Second) or Torts § 551 for misrepresentation as Nevada does, it does however, find that a duty to disclose may arise in four situations: (1) when there is a "confidential or fiduciary relationship"; (2) "when one voluntarily discloses information, he has a duty to disclose the whole truth;" (3) "when one makes a representation, he has a duty to disclose new information when he is aware the new information makes the earlier representation misleading or untrue;" and (4) "when one makes a partial disclosure and conveys a false impression, he has a duty to speak. Highland Crusader Offshore Partners, L.P. v. Lifecare Holdings, Inc., 2008 WL 3925272 *12 (N.D. Tex. 2008). Here, Plaintiff has failed to demonstrate that any of the above factors are present.

956 F.2d 1484 (8th Cir. 1992). Likewise, in Lehner v. Crane Co., the District Court of Pennsylvania found that an employer had no duty to disclose material information to an employee pursuant to the Restatement (Second) or Torts § 151 absent the existence of a fiduciary relationship. 448 F.Supp. 1127, 1131 (D. Pa. 1978) (citing Vargas v. Esquire, 166 F.2d 651 (7th Cir. 1948) ("an employer-employee relationship does not, in and of itself, give rise to a fiduciary relationship from which a duty to disclose could be derived"). Likewise, the Eastern District of Michigan has found that an employee/employer relationship by itself, is insufficient to create a duty to disclose. Holloway v. Doug Fisher, Inc., 865 F.Supp 412 (E.D. Mich. 1997) (dismissing plaintiff's fraud claim for failure demonstrate a "confidential" relationship).

Here, Plaintiff has failed to demonstrate that the relationship between Ballus and Plaintiff, her employer, was such that Ballus's failure to disclose gives rise to a misrepresentation or fraud claim. While Plaintiff avers that Plaintiff signed a confidentiality agreement which may give rise to the creation of a special relationship, Plaintiff has failed to include the language of said agreement, or how this alleged agreement imposed upon Plaintiff a duty to disclose that she intended to move to California, that she had any intention to open a cupcake business, or that she had registered Sift as a limited liability company with the California Secretary of State.

B. Motion to Amend

Plaintiff seeks, should the Court grant Defendants' Motion to Dismiss, the opportunity to Amend the Complaint. Federal Rule of Civil Procedure 15(a)(2) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed R. Civ. P. 15(a)(2). Whether an amendment to a pleading should be permitted is ordinarily a matter within the discretion of the trial court. Caddy-Imler Creations, Inc. v. Caddy, 299 F.2d 79, 84 (9th Cir. 1962). District courts are directed to apply this rule with "extreme liberality." See, e.g., Forsyth v. Humana, Inc., 114 F.3d 1467, 1482 (9th Cir. 1997). However, leave to amend is not absolute. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). Among the factors mitigating against allowing parties to amend their pleadings are

undue delay in litigation, prejudice to the opposing party, and futility for lack of merit. Id. (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). A showing of the factors overcomes the presumption in favor of granting leave to amend. See Eminence Capital, LLC. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

Here, the Court has indicated that a claim for fraud or misrepresentation may arise if a party can demonstrate a duty to disclose based upon the relationship between the parties. Additionally, although as pled, the Court fails to recognize a special relationship between Ballus and the Cupcakery based solely on her status as an employee, it will allow Plaintiff to present additional proof of a special relationship based upon the standards set forth herein and under Nevada law.

IV. Conclusion

Accordingly, **IT IS HEREBY ORDERED** that Defendant Andrea Ballus' Motion to Dismiss (#12) is **GRANTED** without prejudice.

IT IS FURTHER ORDERED that Plaintiff shall have thirty (30) days in which to file an amended complaint.

DATED this 17th day of March 2010.

Kent J. Dawson
United States District Judge