2019 IL App (1st) 182012-U
No. 1-18-2012
September 3, 2019

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MARTHA-JANE FOREMAN-DAITCH,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellant,	)	
	)	No. 15 L 7926
v.	)	
	)	The Honorable
GROUPON, INC.,	)	Jerry A. Esrig,
	)	Judge Presiding.
Defendant-Appellee.	)	

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce in the judgment.

ORDER

¶ 1 *Held:* When parties sign no written agreement and reach no oral agreement on essential terms for a partnership, they have not formed a partnership. An allegation that a defendant used an idea that does not qualify as a trade secret fails to state a cause of action for unjust enrichment.

¶ 2 Martha-Jane Foreman-Daitch sued Groupon, Inc., seeking a share of Groupon's profits from Groupon Getaways. Her complaint included counts for breach of a partnership agreement, breach of fiduciary duties, and unjust enrichment. The circuit court dismissed the

count for unjust enrichment and entered summary judgment on the other claims. On appeal, Foreman-Daitch argues that she stated a claim for unjust enrichment, and a jury should decide whether she entered into a partnership with Groupon and whether Groupon breached its fiduciary duties. We hold that the evidence cannot support a finding that the parties formed a partnership. Because Foreman-Daitch has not alleged that Groupon misappropriated a novel idea in which Foreman-Daitch had a proprietary interest, she has failed to state a claim for unjust enrichment. Accordingly, we affirm the circuit court's judgment.

¶ 3 I. BACKGROUND

¶ 4 Eric Lefkofsky, who co-founded Groupon, knew Foreman-Daitch socially, through his wife. Foreman-Daitch asked to meet with Lefkofsky to discuss an idea she had. When she went to Lefkofsky's office on January 13, 2010, she suggested that Groupon should offer prepackaged travel deals through its website, under the separate heading of "Travelon." Lefkofsky brought Darren Schwartz, head of sales, into the meeting to discuss business possibilities. After the meeting, Foreman-Daitch reached out to several persons and corporations in the travel industry, but she did not find anyone willing to offer deals through Groupon.

¶ 5 In July 2011, Groupon, with its partner Expedia, launched Groupon Getaways, offering on Groupon's website discounted travel deals. Groupon reported substantial revenues from Getaways.

¶ 6 In August 2015, Foreman-Daitch sued Groupon for breach of a partnership agreement, breach of implied contract, unjust enrichment, recovery in *quantum meruit*, and breach of

fiduciary duties either as a partner or as a joint venturer. The circuit court granted Groupon's motion to dismiss the count for unjust enrichment, finding that Foreman-Daitch failed to state a claim for relief. Groupon filed a motion for summary judgment on the remaining counts, supporting its motion with depositions of Foreman-Daitch, Lefkofsky, Schwartz, and others.

¶ 7 Foreman-Daitch testified that before she met with Lefkofsky, she knew other websites, including Jetsetter and Travelzoo, already offered discounted prepackaged travel deals. She admitted that the Travelon idea "was a similar concept *** with a Groupon partnership." She testified that Lefkofsky "seemed to be intrigued." When Lefkofsky called Schwartz into the office, Lefkofsky said, "She has a great idea. Get this done. She knows everybody." Foreman-Daitch testified that in the meeting she repeated several times that she sought to partner with Groupon to create Travelon. She admitted that Lefkofsky never expressly agreed to enter into a partnership with her, discussed what percentage of the partnership she would own, how they would account for the disproportionate capital contributions of the partners, how they would split losses, or how and when they would make distributions to the partners.

¶ 8 Foreman-Daitch testified that Groupon executives approved the correspondence she sent to several persons in the travel industry. In that correspondence she introduced Groupon and said, "I am working with Groupon to develop a similar site dedicated strictly to travel. Our objective is to do a test market with the built in Groupon subscriber base. We intend to offer a handful of diverse properties/travel options. Contrary to the Groupon deal of the day this 'Travelon' deal will be available for several days."

¶ 9 In April 2010, Schwartz asked Foreman-Daitch to meet with Michael Dalesandro about his website, named "Where I've Been." She spoke with Dalesandro and reported back to Groupon that his website was not similar to her idea for Travelon. Schwartz also asked Foreman-Daitch to talk to Bruce Mitchell, who told Foreman-Daitch that Groupon hired him to start their website for travel deals. Mitchell asked Foreman-Daitch for her resume. She sent it and never heard back from Mitchell.

¶ 10 Mitchell and Dalesandro largely corroborated Foreman-Daitch's accounts of their brief discussions. Dalesandro added that Foreman-Daitch wanted to join as a "50/50 partner[]" with Dalesandro, based on her idea of "[s]elling travel deals." Dalesandro said, "it was already being done by Jetsetter, it was already being talked about by us to do, and we already had nine million members. So I didn't understand her value add."

¶ 11 Only one of Foreman-Daitch's mailings on behalf of Groupon produced a response. David Rosenberg of Preferred Hotel Group met with Foreman-Daitch and another representative of Groupon on February 12, 2010. Preferred Hotel Group never reached any agreement with Groupon.

¶ 12 Foreman-Daitch admitted that in late February or early March 2010, she "want[ed] to make [the] relationship concrete" with Groupon. When she received no favorable response from Groupon by April 2010, she stopped contacting travel companies on Groupon's behalf. Foreman-Daitch admitted that she never disclosed the partnership on her tax returns, and in a personal statement submitted to a bank in June 2010, she did not mention a partnership with Groupon.

¶ 13 Foreman-Daitch named James McGovern as her expert on damages. McGovern admitted in his deposition that he had no opinion as to whether Foreman-Daitch had a protectable property interest in her idea for a website dedicated to discount travel packages. McGovern assumed Foreman-Daitch and Groupon had a partnership agreement, and used Groupon's documents to calculate the value of the partnership. He also offered damage calculations based on an assumption that Groupon might pay Foreman-Daitch royalties or compensate Foreman-Daitch with a sales representative's percentage of all sales made through Getaways. He did not offer any opinion as to whether Foreman-Daitch "was instrumental to the development of Getaways."

¶ 14 Groupon filed a motion to bar McGovern's testimony. The circuit court granted the motion in part, limiting McGovern's opinion to the value of a 50/50 partnership with Groupon in Getaways.

¶ 15 The circuit court subsequently granted Groupon's motion for summary judgment on all counts except for *quantum meruit*. Foreman-Daitch voluntarily dismissed the *quantum meruit* claim. Foreman-Daitch now appeals.

¶ 16 II. ANALYSIS

¶ 17 Foreman-Daitch argues on appeal that the circuit court erred (1) by entering summary judgment in favor of Groupon on the counts based on either a partnership or a joint venture; (2) by dismissing Foreman-Daitch's unjust enrichment claim; and (3) by limiting McGovern's opinion.

¶ 18 A. Partnership

¶ 19 We review *de novo* the circuit court's decision to enter summary judgment in favor of Groupon on the counts based on a partnership or joint venture. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

> "If what is contained in the papers on file would constitute all of the evidence before a court and would be insufficient to go to a jury but would require a court to direct a verdict, summary judgment should be entered. [Citation.] However, in determining the existence of a genuine issue of material fact on a motion for summary judgment, the trial court should construe pleadings, depositions, admissions, exhibits, and affidavits strictly against the movant and liberally in favor of the respondent. [Citations].
>
> Inferences may be drawn from undisputed facts (citation), but an issue should be decided by the trier of fact and summary judgment denied where reasonable persons could draw divergent inferences from the undisputed facts." *Pyne*, 129 Ill. 2d at 358.

¶ 20 The circuit court found that the evidence could not support a finding that Groupon entered into a partnership with Foreman-Daitch. "A partnership is a contractual relationship and must stem from mutual consent of the alleged partners." *In re Estate of Goldstein*, 293 Ill. App. 3d 700, 709 (1997). "An essential element for the formation of a contract is the manifestation of agreement or mutual assent by the parties to the terms thereof. [Citation.] A person may thus not be subjected to contractual obligations unless the obligation is clearly fixed by an express or implied agreement." *Lal v. Naffah*, 149 Ill. App. 3d 245, 248 (1986).

"[I]n order for an oral contract to be binding and enforceable, its terms must be definite and certain." *Vandevier v. Mulay Plastics, Inc.*, 135 Ill. App.3d 787, 791 (1985).

¶ 21 "The burden of proving a partnership exists rests on the party asserting it. [Citation.] In determining the existence of a partnership, the trial court should consider the following factors: how the alleged partners have dealt with each other; how each of the alleged partners have dealt with third persons; whether the alleged partners have advertised using a firm name; and whether the alleged partners have shared profits." *Goldstein*, 293 Ill. App. 3d at 709-10. Groupon executives spoke with Foreman-Daitch on several occasions and asked her to meet with two persons involved in travel websites. Foreman-Daitch, in some correspondence with third persons, said she was "working with Groupon to develop a similar site dedicated strictly to travel." Groupon never held itself out as a partner with Foreman-Daitch, never filed "a certificate setting forth the name of the partnership," (*Olson v. Olson*, 66 Ill. App. 2d 227, 233 (1965)), and never shared the profits of the alleged partnership.

¶ 22 Foreman-Daitch emphasizes that in her meeting with Lefkofsky, when she repeatedly asserted she wanted to partner with Groupon, Lefkofsky said to Schwartz, "Get this done." Foreman-Daitch sought "to make [the] relationship concrete" later, implicitly acknowledging that the parties had not agreed to terms for formation of a partnership. One might infer from Foreman-Daitch's testimony that Lefkofsky intended to start the process of forming a partnership, but "the mere agreement to form a partnership does not of itself create a partnership. [Citation.] Rather, a partnership arises only when the parties actually join together to carry on a venture for their common benefit." *Kennedy v. Miller*, 221 Ill. App. 3d 513, 521 (1991). Foreman-Daitch admitted that the parties have no written agreement. They

never discussed how to split losses or profits, account for the disproportionate capital contributions, or what percentage of the partnership each would own. "The absence of a meeting of the minds relating to such critical terms leads irresistibly to the conclusion that the parties did not have the intent necessary to create a partnership." *McCorkle v. Tyler Reporting Co.*, 159 Ill. App. 3d 62, 69 (1987). The evidence cannot support a finding that the parties entered into a partnership.

¶ 23 Foreman-Daitch suggests in the alternative that the parties formed a joint venture. "A joint venture is a form of partnership, with the business of the partnership limited to a single, although often large, transaction or project." *Kennedy*, 221 Ill. App. 3d at 521. Just as the evidence cannot support a finding that the parties agreed to terms essential to the formation of a partnership, the evidence cannot support a finding that the parties entered into a joint venture. Accordingly, we affirm the decision to grant summary judgment in favor of Groupon on the counts for breach of the alleged partnership agreement and the counts for breach of fiduciary duties, which relied on Foreman-Daitch's argument that Groupon had fiduciary duties as her partner or as a joint venturer.

¶ 24 B. Unjust Enrichment

¶ 25 Foreman-Daitch contends that she properly pled a cause of action for unjust enrichment by alleging that Groupon stole her idea for a travel website. In *Pope v. Alberto-Culver Co.*, 296 Ill. App. 3d 512 (1998), the court said "unjust enrichment is preempted by the Illinois Trade Secrets Act" because "[u]njust enrichment is essentially a claim for restitution." See 765 ILCS 1065/8 (West 2010). Foreman-Daitch argues that the Trade Secrets Act does not

apply because she did not claim that her idea qualified as a trade secret. She admitted that her Travelon idea bore substantial similarity to Jetsetter and Travelzoo.

¶ 26 "[I]n order for a property right in an idea to be protected, it must be shown to be novel and original. [Citation.] Matters of public or general knowledge in an industry or the community cannot be appropriated since they are not novel." *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill. App. 3d 784, 789 (2002). "Illinois has abolished all common law theories of misuse of such information. [Citation.] Unless defendants misappropriated a (statutory) trade secret, they did no legal wrong." *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1265 (7th Cir. 1992).

¶ 27 Foreman-Daitch does not suggest a legal basis for claiming a cause of action for theft of an idea that does not qualify as a trade secret. One commentator has recommended that courts should allow a cause of action for misappropriation of "confidential information," which he defines as information that does not count as a trade secret, but which many persons in the relevant industry do not know. Robert Unikel, Bridging the "Trade Secret" Gap: Protecting "Confidential Information" Not Rising to the Level of Trade Secrets, 29 Loy. U. Chi. L.J. 841, 844, 852–54 (1998). But even his proposed change in the law would leave unprotected ideas "known to substantially all persons in a particular industry." *Id.* at 850. Illinois has not adopted Unikel's proposal, but even if it did, Foreman-Daitch would not have stated a cause of action against Groupon for its use of ideas substantially similar to the well-known ideas used by Jetsetter and Travelzoo.

¶ 28 Foreman-Daitch cites *Hecny Transportation, Inc. v. Chu*, 430 F.3d 402, 404 (7th Cir. 2005), where the court said, "it is unimaginable that someone who steals property, business

opportunities, and the labor of the firm's staff would get a free pass just because none of what he filched is a trade secret." Foreman-Daitch has not alleged that Groupon stole her computers or other property; she has not alleged that Groupon poached her staff; she has not alleged that Expedia would have partnered with her if Groupon had not usurped that business opportunity. Foreman-Daitch has alleged only use of her idea, an idea in which she shows no basis for claiming a proprietary right. The circuit court correctly dismissed her claim for unjust enrichment.

¶ 29 C. Expert Witnesses

¶ 30 Finally, Foreman-Daitch argues that the court should not have limited McGovern's opinion on damages. Because we affirm the judgment entered in favor of Groupon on all counts of the complaint, we need not address this issue.

¶ 31 III. CONCLUSION

¶ 32 Foreman-Daitch's testimony establishes that she did not enter into a partnership or joint venture agreement with Groupon. Foreman-Daitch also had no protected property right to her idea, so she cannot recover on a theory of unjust enrichment. Accordingly, we affirm the circuit court's judgment.

¶ 33 Affirmed.