



Hospitality Update

Lawsuit Serves Up Lessons For Restaurateurs

By Risa Boerner and Brent Cossrow

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Employee Defection And Trade Secrets At Issue

A decision issued this summer by a federal district court in New York provides important lessons for professionals in the food services and restaurant industry regarding employee defection and trade secrets issues.

The litigation arose out of a dispute between BLT Restaurant Group and its accomplished executive chef Laurent Tourondel. BLT was formed in 2004 and operated 18 restaurants across the United States and internationally. BLT hired Tourondel as its Executive Chef and incorporated Tourondel's name and initials into the branding of the BLT restaurants, hence the acronym: Bistro Lourent Tourondel. One of the restaurants in the BLT family was BLT Burger.

On February 28, 2010, Tourondel left BLT. Shortly thereafter, he opened a new restaurant named "LT Burger." BLT sued Tourondel, a colleague of his who left with him, and LT Burger, and alleged that the LT Burger menu copied the BLT menu "almost exactly" and was based on BLT's confidential and proprietary information. BLT also claimed that LT Burger and Tourondel used the same proprietary recipes at LT Burger as were used at BLT Burger and that LT Burger misappropriated elements of BLT's marketing strategy by promoting Tourondel through similar media as were used by BLT.

In addition to violating Tourondel's contractual confidentiality and non-disclosure obligations, Tourondel breached his duty of loyalty to BLT and engaged in unfair competition, according to the lawsuit. LT Burger and Tourondel asked the court to dismiss the case. Their request was granted in part and denied in part, and the court's opinion is instructive for aspiring restaurateurs.

Analyzing The Ruling

The court turned first to the unfair competition claims, which had been filed under both federal and state law. As to the federal law, BLT claimed that the contents of the BLT Burger menu were entitled

to legal protection as an identifying mark, and that "[t]he dining experience at BLT Burger is built around a unique menu." Tourondel argued that BLT's menu was not entitled to such protection because BLT's menu "played a functional role in the BLT dining experience and lack[ed] distinctiveness."

The court rejected these arguments, holding that this was a factual issue that could not appropriately be decided at the outset of the case on a motion to dismiss. Most interesting for industry professionals, the court also observed that Tourondel "failed to articulate a controlling or persuasive legal basis for a *per se* finding that the contents of the BLT Burger Menu cannot as a matter of law satisfy the requirements for trademark protection." Stated more simply, the court found that the menu could potentially be entitled to trademark protection. Citing these reasons, the court denied Tourondel's motion in part and allowed the federal unfair competition claims to proceed.

The court reached the opposite conclusion regarding the state law portion of the unfair competition claims, which were evaluated under a different standard. The New York state law unfair competition claims prohibit deceptive acts or practices by competitors. Here, BLT Burger alleged that LT Burger's use of its menu and promotional models was deceptive. The court noted that in order for the state law unfair competition claims to survive Tourondel's motion, BLT Burger had to allege "a specific and substantial injury to the public interest over and above ordinary trademark infringement or dilution."

But the only injury identified by BLT Burger in its Complaint was consumer confusion over the menus, which the court held was insufficient as a matter of law, reasoning that even if customers were confused about LT's relationship to BLT, that would not necessarily injure those consumers, and would not constitute harm to the public at large. The court reached the same conclusion regarding LT Burger's use of promotional models, which related solely to alleged consumer confusion and an alleged injury suffered by BLT Burger, not the public. For these reasons, the court granted Tourondel's motion and dismissed the state law unfair competition claims.

The court also dismissed BLT Burger's claims for unjust enrichment. Seeking restitution or the return of money or property unjustly or improperly conferred on Tourondel, BLT Burger alleged that through unfair competition, the deceptive use of BLT Burger's menu and promotional model and breach of contract, money was unjustly conferred upon Tourondel.

In dismissing these claims, the court cited the rule that the existence of a valid and enforceable agreement ordinarily precludes recovery under legal theories like unjust enrichment for events arising out of the same subject matter covered in the agreement between the parties. Here the agreement between BLT Burger and Tourondel explicitly addressed all of the same facts and events that formed the basis of BLT Burger's unjust enrichment claim, so those claims were dismissed.

BLT Burger also alleged that Tourondel breached his contract with BLT Burger by using and disclosing BLT Burger's confidential and proprietary information in launching LT Burger. According to BLT Burger, this information consisted of BLT Burger's proprietary business models, financial and contractual information, "know-how," the development of the BLT Burger menu, the use of BLT Burger's proprietary recipes, and the promotion of Tourondel and LT Burger through a magazine used by BLT Burger to promote itself.

Tourondel argued that these claims should be dismissed because all of the information – except for the recipes – cannot be a trade secret as a matter of law. Notably, Tourondel conceded that the proprietary recipes could serve as the basis of a breach of contract claim. Focusing on this

concession by Tourondel, the Court concluded that Tourondel was using the motion as a method to limit the scope of BLT's breach-of-contract claim, which was improper at this stage of the litigation. For this reason, the court denied Tourondel's motion to dismiss the breach-of-contract claims.

Similarly, the court allowed BLT Burger's breach-of-fiduciary-duty claims to proceed. BLT Burger alleged that a fiduciary relationship existed between itself and Tourondel as a result of certain contractual provisions that required Tourondel to provide consulting services to BLT Burger even after Tourondel left that restaurant. The court held that these allegations were sufficient to go forward, and again noted that Tourondel did not "articulate[e] any *per se* rules that would preclude Plaintiff from stating a claim."

Some Lessons To Be Learned

The Tourondel case is now in its discovery phase, and it will be interesting to see the outcome of BLT Burger's breach of fiduciary duty, breach of contract, and federal unfair competition claims. But there are some important lessons for restaurateurs and those investing in or launching restaurants, even at this early stage of litigation:

1. Make sure that agreements address confidentiality and non-disclosure obligations of key talent in the kitchen. These individuals can constitute a competitive threat if they leave, which makes it important that they agree at the outset not to disclose the restaurant's confidential and proprietary information. Such agreements can also help to support claims for special or emergency injunctive relief, such as a temporary restraining order, in the event a case requires some speedier action by a court.
2. Use employee policies that also define confidential and proprietary information and the ethical and permissible uses of such information. While the court in *Tourondel* did not discuss the existence of an employee manual, it can be an important tool to establish an employee's knowledge and understanding of what types of information are confidential and proprietary. This, in turn, can support claims for breach of contract and fiduciary duty.
3. Ensure the proper protection of confidential information by limiting access to that information and securing it on the premises. To the extent your restaurant has confidential or proprietary recipes or unique business methods and strategies, be sure to disclose them only on a "need to know" basis, and implement and enforce policies that strictly prohibit employees from copying or distributing the information or physically or electronically removing it from the restaurant for any reason.

For more information contact the authors: rboerner@laborlawyers.com, bcossrow@laborlawyers.com, or call (610) 230-2150.