

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

**MOTION DATE: 8-18-11
SUBMITTED: 8-18-11
MOTION NO.: 002-MOT D
003-XMG**

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**TOWN TOTAL FARMINGDALE LLC, TOWN
TOTAL NUTRITION INC. and JOHN
NAVARRA,**

Plaintiffs,

**PATRICK J. BLISS, ESQ.
Attorney for Plaintiffs
399 Knollwood Road, Suite 204
White Plains, New York 10603**

-against-

**ALBERT DOSSANTOS, JOHN CIVITELLO,
31ST & 3RD PHARMACY, INC. and ISLAND
CARE PHARMACY, INC.,**

Defendants.

**KALB & ROSENFELD, P.C.
Attorneys for Defendants Alberto Dossantos
s/h/a Albert Dossantos, 31st & 3rd Pharmacy,
Inc. and Island Care Pharmacy, Inc.
283 Commack Road, Suite 210
Commack, New York 11725**

**LAW OFFICES OF DAVID A. DAY, P.C.
Attorney for Defendant John Civitello
11 Grace Avenue, Suite 408
Great Neck, New York 11021**

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Upon the following papers numbered 1-41 read on this motion and cross-motion for summary judgment ; Notice of Motion and supporting papers 1-13 ; Notice of Cross Motion and supporting papers 25-30 ; Answering Affidavits and supporting papers 14-23; 31-40 ; Replying Affidavits and supporting papers 24; 41 ; it is,

ORDERED that the motion by the defendants Albert Dos Santos; 31st & 3rd Pharmacy, Inc.; and Island Care Pharmacy, Inc., for summary judgment dismissing the complaint insofar as it is asserted against them is granted in part and denied in part; and it is further

ORDERED that the cross motion by the defendant John Civitello for summary judgment dismissing the complaint insofar as it is asserted against him is granted.

The plaintiff Town Total Farmingdale, LLC (“Town Total”), is a specialty pharmacy located in Melville, New York, owned by the plaintiff John Navarra (“Navarra”) and

his son, Joseph. The defendant Albert Dos Santos was the supervising pharmacist at Town Total from 2002 until October 2009. On September 27, 2002, Town Total and Dos Santos entered into member and operating agreements, which gave Dos Santos a minority interest in Town Total. The member agreement contained restrictive covenants enjoining Dos Santos from engaging in a competing business, disclosing any confidential information, and soliciting any of Town Total's customers during the term of the agreement and for a period of time thereafter. In September 2009, Dos Santos sold his membership interest in Town Total to Navarra for \$375,000 pursuant to a stock sale agreement.¹ Navarra, as the purchaser, agreed to release and discharge Dos Santos from any liability arising in connection with his membership interest in Town Total from the date of his acquisition thereof through the date of the closing and to waive any claims arising in connection with his execution of the Town Total member and operating agreements. Dos Santos, as the seller, agreed not to solicit the then active customers, accounts, or personnel of Town Total for a period of two years from the date on which his employment at Town Total ended. Dos Santos executed the covenant not to solicit on October 7, 2009, and he ceased working for Town Total approximately four weeks later in November 2009.

In August and September 2009, Dos Santos and the defendant John Civitello, a salesman for Town Total, formed the defendant Island Care Pharmacy, Inc. ("Island Care"). Dos Santos also purchased the shares of the defendant 31st & 3rd Pharmacy, Inc. ("31st & 3rd"), which enabled him to immediately transfer the license and registration to a new location in Plainview, New York, and shortened the time required to enroll as a Medicare and Medicaid provider. The closing took place on October 6, 2009. The following day, certificates for 80 and 20 shares of common stock in 31st & 3rd were issued to Dos Santos and Civitello, respectively. Dos Santos and Civitello subsequently began operating a specialty pharmacy in Plainview under the trade name "Island Care Pharmacy." Civitello left Town Total's employ on or about November 13, 2009.

The plaintiffs commenced this action against Dos Santos, Civitelli, 31st & 3rd, and Island Care in July 2010. The complaint contains causes of action for breach of contract, conversion, breach of fiduciary duty, and unfair competition, among others. The gravamen of the complaint is that the defendants improperly solicited the plaintiffs' active customers, accounts, and personnel, inter alia, in violation of the covenant not to solicit. The defendants answered, and Dos Santos counterclaimed to compel Navarra to deliver the waiver and releases that he had agreed to provide in the stock sale agreement. Navarra subsequently provided the following waiver on behalf of himself and Town Total:

[Navarra], both individually and on behalf of [Town Total], hereby forever waives any claims arising in connection with any breach or asserted breach on the part of [Dos Santos] arising in connection

¹The \$375,000 purchase price also included Dos Santos' minority interests in Town Total Health Newark, LLC, and Town Total Albany, LLC, which are not parties to this lawsuit.

with [Dos Santos'] execution of the Operating Agreement and Member Agreement, each dated September 27, 2002 or otherwise arising in connection with [Dos Santos'] membership interest in [Town Total].

Discovery is now complete. Dos Santos, 31st & 3rd, and Island Care (collectively, the "Dos Santos defendants") move for summary judgment dismissing the complaint insofar as it is asserted against them, and Civitello cross moves for the same relief.

In support of their motion for summary judgment, the Dos Santos defendants rely on the aforementioned waiver to argue that the plaintiff's claims cannot be based on the restrictive covenants in the member agreement. The plaintiffs fail to address the waiver issue in their opposition papers.

The member agreement contained restrictive covenants enjoining Dos Santos from engaging in a competing business, disclosing any confidential information, and soliciting any of Town Total's customers during the term of the agreement and for a period of time thereafter. Moreover, the stock sale agreement contained a covenant not to solicit the then active customers, accounts, or personnel of Town Total for a period of two years from the date on which Dos Santos' employment at Town Total ended. Pursuant to paragraph 10 of the stock sale agreement, that agreement superseded the member agreement. Paragraph 10 provides as follows:

This instrument sets forth the entire agreement between the parties relating to the membership interest and supersedes all prior agreements and understandings of the parties in connection therewith.

Thus, the covenant not to solicit, which is annexed to the stock sale agreement, supersedes the restrictive covenants contained in the member agreement. Additionally, Navarra and Town Total waived any claims arising out of Dos Santos' membership interest in Town Total or any breach of the member agreement. The court finds that, under these circumstances, the Dos Santos defendants are entitled to summary judgment dismissing the plaintiffs' claims against them insofar as those claims are based on purported violations of the restrictive covenants contained in the member agreement.

The Dos Santos defendants contend that there is no evidence in the record that Dos Santos solicited the then active customers, accounts, or personnel of Town Total in violation of the covenant not to solicit. On a motion for summary judgment, the party opposing the motion is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties (**Nicklas v Telden Realty Corp.**, 305 AD2d 385, 386). Giving the plaintiffs the benefit of every favorable inference, the court finds that there is sufficient evidence in the record that Dos Santos solicited at least one of Town Total's then active customers or accounts, Dr. Palmer, in violation of the covenant not to compete. Although

such evidence is hearsay, hearsay may be considered in opposition to a motion for summary judgment and may be sufficient to defeat the motion (*see*, **Ratut v Singh**, 186 Misc 2d 350, 352 [and cases cited therein]). The court finds that Navarro's testimony regarding his conversation with Dr. Palmer is sufficient to defeat the Dos Santos defendants' summary judgment motion (**Id.**). Accordingly, the motion is otherwise denied.

Turning to the cross motion, the record is devoid of any evidence that Civitelli solicited any of Town Total's customers or accounts in violation of the employment and noncompetition agreement purportedly executed by him. While the evidence supports a finding that Civitelli and Dos Santos formed Island Care and purchased 31st & 3rd while still in Town Total's employ, such conduct, without more, does not constitute actionable employee disloyalty (*see*, **American Print. Converters v JES Label & Tape**, 103 AD2d 787, 788; **Maritime Fish Prods. v World-Wide Fish Prods.**, 100 AD2d 81, 88). The plaintiffs have failed to produce any evidence that Civitelli used Town Total's time, facilities, or proprietary secrets to build a competing business (**Id.**, *see also*, **Feiger v Iral Jewelry**, 41 NY2d 928, 929; **Bon Temps Agency v Greenfield**, 212 AD2d 427, 428), and the plaintiffs' speculation that the results of future discovery may uncover additional facts is patently inadequate to establish a factual issue requiring a trial (**Zuckerman v City of New York**, 49 NY2d 557, 563; **Waterman v Yamaha Motor Corp.**, 184 AD2d 1029, 1030). Accordingly, the cross motion is granted, and the complaint is dismissed insofar as it is asserted against Civitelli.

Dated: November 17, 2011

J.S.C.