

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS  
Justice

IA Part 4

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NEW YORK OFFICE SYSTEMS ,INC.,

Plaintiff(s)

-against-

CANON USA, INC.;  
CANON BUSINESS SOLUTIONS INC.,  
CANON FINANCIAL SERVICES, INC.,

Defendant(s)

Index  
Number 10659 2012

Motion  
Date June 5 2012

Motion  
Cal. Number 6

Motion Seq. No. 1

The following papers numbered 1 to 12 read on this order to show cause by New York Office Systems, Inc. (NYOS), for a preliminary injunction and temporary restraining order pursuant to CPLR 6301, et seq, and General Business Law §342, ordering defendants to cease and desist from refusing to sell Canon products to plaintiff on the same terms and conditions as products are sold to other authorized dealers.

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Upon the foregoing papers it is ordered that the order to show cause is denied.

Plaintiff NYOS is a business equipment retail dealer owned by David Kadosh. NYOS entered into a sales and service agreement with defendant Canon, USA ( Canon), which permitted plaintiff to sell and service Canon business equipment. Until January 2012, NYOS operated the business in Long Island City, New York. The sales and service agreement allows termination under certain circumstances. Canon may terminate the agreement when a dealer engages in activity that may adversely affect the reputation or goodwill of the dealer or Canon. Termination is also permitted when the dealer opens a new business without Canon's consent. When NYOS hired an individual who had committed fraud, forgery, misappropriation of funds and conversion of property against Canon while employed with a different equipment dealer, and refused to fire this individual, Canon terminated its dealer sale and service agreement with NYOS. Canon also cited NYOS' opening of a new dealership in New York City without Canon's knowledge or approval, as grounds for the termination.

By the instant order to show cause, NYOS seeks a temporary restraining order and a preliminary injunction to restore to NYOS it's ability to continue selling Canon brand copying machines and to continue purchasing supplies and parts so that NYOS can continue servicing the machines it previously sold. Canon opposes the order to show cause and submits that NYOS cannot demonstrate a likelihood of success on the merits of its claims. Nor can NYOS establish irreparable harm since there are independent sources from which it can acquire spare parts and consumable supplies to provide maintenance and repair services to its customers. According to Canon, NYOS is also free to seek authorization to sell other competing brands of business equipment. Moreover, according to Canon, since Canon USA will suffer further financial and reputation damage if compelled to carry on a business relationship with a dealer that refuses to terminate the employment of a person convicted of fraud in the very business at issue, the balance of equities favor denial of mandatory preliminary injunctive relief altering the status quo.

### Facts

Canon USA is the exclusive United States distributor of Canon-brand products, including Canon-brand business equipment (i.e., copiers, printers, multifunction devices and the like) manufactured by its parent, Canon, Inc. Canon USA does not sell Canon-brand business equipment directly to end-user customers. Instead, it maintains a nationwide network of authorized retail dealers who purchase Canon-brand business equipment (and accessories, consumable supplies and spare parts for such equipment) from Canon USA for resale to end-user customers. The items of business equipment marketed by Canon USA are complex, high-technology electronics products that are service-intensive, meaning that they require regular maintenance and repair services to keep them in good working order. Canon USA does not provide maintenance and repair services directly to end-user customers. Instead, authorized Canon retail dealers are required to maintain Canon-trained service staff

that provide such services to end-users. Usually, at the time an end-user acquires Canon-brand business equipment, the end-user enters into a written service agreement with the authorized Canon retail dealer from whom the end-user acquired the equipment. Such agreements generally obligate the dealer to provide all maintenance and repair services and consumable supplies that the end-user needs to keep its equipment in good working order for the duration of the agreement. Alternatively, some end-users choose to pay authorized retail dealers for service and supplies on an “as needed” basis.

Canon USA enters into written authorized retail dealer agreements with its authorized Canon business equipment retail dealers. Such agreements establish the terms of the parties’ business relationship and, among other things, require that: (a) authorized retail dealers act solely as retailers of Canon-brand business equipment, accessories, consumable supplies and spare parts to end-user customers, and refrain from wholesaling such products to other retail dealers or other parties who are not end-users; (b) operate their business in a manner that promotes and maintains the goodwill of Canon USA and Canon-brand products; (c) market Canon-brand business equipment only from sales locations authorized by Canon USA and meet certain standards established by Canon USA; and (d) comply with the law while acting as an authorized Canon retail dealer.

Steven Hernandez, while acting as a “de facto” principal of a former authorized Canon business equipment retail dealer based in Manhattan, then known as EZ Docs, Inc. d/b/a Office Automations Systems and d/b/a Vista Digital Solutions (EZ Docs), victimized Canon USA, Canon Financial Services, Inc. (CFS), and their customers by commission of fraud, forgery, misappropriation of funds and conversion of property. The fraudulent and illegal activities of Hernandez and his partners at EZ Docs resulted in EZ Docs’ termination as an authorized Canon retail dealer, generated numerous lawsuits by defrauded end-user customers and caused the launching of criminal investigations by law enforcement agencies.

Canon submits that CFS has suffered substantial and ever-increasing damages arising from its having been defrauded by EZ Docs. Among other things, CFS has been damaged by (a) lost revenue arising from lessees who were defrauded by EZ Docs failing to pay off lease agreement obligations to CFS that EZ Docs promised to pay on their behalf; (b) lost revenue arising from lessees who were defrauded by EZ Docs failing to pay lease agreement obligations for new equipment acquired from EZ Docs in connection with EZ Docs’ fraudulent promises relating to other equipment “traded in” for such new equipment; (c) damages arising from its payment to EZ Docs of the purchase price for equipment purportedly acquired by end-users where such equipment was never delivered to such end-users and may not exist; and (d) damages arising from equipment to which CFS owns title having been removed from end-user customer locations by EZ Docs, and (presumably)

having been converted by EZ Docs. Canon submits that such damages are likely to be well in excess of one million dollars (\$1,000,000.00).

In any event, after departing from EZ Docs and its partner Anthony Grimaldi, Hernandez joined New York Office Systems, Inc. (NYOS). Hernandez became very popular with NYOS' principal, David Kadosh, by immediately multiplying NYOS' monthly sales revenue, allegedly by the use of fraud and other intentional misconduct. Following its discovery of Hernandez and Grimaldi's fraud and illegal conduct at EZ Docs, Canon USA determined that it would be unacceptable for any of its authorized retail dealers to employ Hernandez, and thereby provide him with the instrumentality to continue his fraudulent activities under the Canon banner. When Cannon learned that Hernandez had gone to work at NYOS, Canon informed NYOS of Hernandez's past fraudulent activity, including a criminal conviction for business equipment leasing fraud and requested the immediate termination of his employment.

Despite multiple written warnings, over a period of about 40 days, that its continued employment of Hernandez would result in the termination of its authorized Canon dealership, NYOS failed to confirm that it would sever its ties with Hernandez. To make matters worse, Canon USA learned that NYOS had opened an unauthorized sales office in Manhattan to accommodate Hernandez and his "team" of former EZ Docs associates, and refused to provide Canon USA with an explanation for this breach of its dealer agreement. Canon USA subsequently terminated NYOS' authorized retail dealer agreement.

Canon USA's February 24, 2012 letter set forth Canon's basis for terminating NYOS' authorized Canon dealership pursuant to section 14.1 of its Office Imaging Retail Dealer Agreement ("Dealer Agreement"). NYOS' failure to terminate the employment of Hernandez, a "known fraudster" violated section 2.1 of the Dealer Agreement, obligating NYOS "to promote and maintain the goodwill and reputation of Canon USA and [Canon] products". In addition, NYOS' opening of the Manhattan office without Canon's approval allegedly to function as a launching pad for Hernandez's fraudulent schemes, and its failure to close the Manhattan office after being confronted by Canon about its unauthorized opening, violated section 1.3 of the Dealer Agreement, obligating NYOS to "sell [Canon] products only from the sales locations" authorized by Canon USA and reflected in the Dealer Agreement's Schedule A. Canon submits that these violations constituted independent material breaches of the Dealer Agreement, giving Canon the contractual right to terminate the Agreement pursuant to Section 14.1.

### Discussion

To obtain a preliminary injunction, a movant must establish, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary

injunction, and (3) a balancing of the equities in the movant's favor ( *see* CPLR 6301; *Arthur J. Gallagher & Co. v Marchese*, 96 AD3d 791 [2012]; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Dover Gourmet Corp. v Nassau Health Care Corp.*, 89 AD3d 979, 979 [2011]; *S.J.J.K. Tennis, Inc. v Confer Bethpage, LLC*, 81 AD3d 629, 629–630 [2011]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court ( *see* *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Dover Gourmet Corp. v Nassau Health Care Corp.*, 89 A.D.3d at 979; *Arcamone–Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2011]).

Preliminary injunctive relief is a drastic remedy which will not be granted “unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of such showing an undisputed right rests upon the movant” (J.S. Anand Corp. v Aviel Enterprises, 148 AD2d 496 [1989], citing *First Nat. Bank of Downsville v Highland Hardwoods*, 98 AD2d 924, 926 [1983]; *Nalitt v City of New York*, 138 AD2d 580, 581 [1988]). Based upon a review of the record, the plaintiff did not satisfy its burden of proving a “clear right” to preliminary injunctive relief. Here, the plaintiff makes only conclusory allegations and failed to point to any imminent and non-speculative harm that would befall it in the absence of a preliminary injunction ( *see* *Family Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738, 739-740 [2010]; *Golden v Steam Heat, Inc.*, 216 AD2d 440 [1995]; *Golden v Steam Heat*, 216 AD2d at 442). Moreover, it failed to demonstrate that any harm it would suffer would not be compensable by money damages ( *see* *EdCia Corp. v McCormack*, 44 AD3d 994 [2007]).

NYOS’ claims of irreparable injury rest entirely upon factually unsupported contentions of Kadosh that are not only bare and conclusory but also self-serving and not credible. Kadosh insists that NYOS will perish unless Canon is ordered to sell it spare parts and consumable supplies. Kadosh claims that NYOS cannot obtain such spare parts and supplies elsewhere. The record reveals that this is not true. Kadosh does not dispute that spare parts and supplies compatible with Canon-brand business equipment are available from independent third-party sources. Indeed, large independent companies such as Katun Corporation and others manufacture and market spare parts and supplies compatible with Canon-brand business equipment; and some authorized Canon retail dealers have also chosen to purchase spare parts and supplies from those companies rather than from Canon.

NYOS also cannot dispute that there are many independent business equipment service providers, not affiliated with Canon, that compete with NYOS and authorized Canon retail dealers to provide service and supplies to end-user customers. Such service providers cannot purchase spare parts and supplies from Canon; their only option is to acquire them from independent sources. The fact that such independent service providers exist and

compete with authorized Canon dealers belies Kadosh's contention that NYOS' cannot survive without the ability to obtain spare parts and supplies from Canon.

Significantly, a business equipment retail dealer's loss of affiliation with one brand of equipment does not necessarily mean the end of the business. Canon submits that the business equipment industry is intensely competitive and features numerous competing brands of equipment. Dealers who lose the opportunity to purchase and resell one brand of equipment have the opportunity to continue in business by becoming authorized retail dealers of other brands of equipment. For example, the record indicates that EZ Docs, now known as Divinum Technologies, Inc., remains in business despite the fact that its authorized Canon retail dealership was terminated in October 2011, and it has been unable to purchase Canon-brand equipment, spare parts or supplies since its termination. Instead, EZ Docs now operates as an authorized retail dealer of two competing brands of business equipment – Sharp and Muratec. NYOS has presented no compelling reason why it too could not stay in business by making a similar switch to one or more other competing brands.

The defendant also has a legitimate interest in enforcing the business agreement. In the absence of a sufficient showing by the plaintiff that enjoining the defendants from enforcing the agreement would result in irreparable injury to it, the balance of the equities favor the defendants. Hernandez's convictions, which involve crimes of dishonesty involving his business, and NYOS' failure to comply with the agreed-upon and reasonable terms of the dealer agreement, justify termination. The court will not force Canon to continue its business relationship with NYOS, whose employee convictions adversely affect Canon's reputation and violate the dealer sales and service agreement. Further, requiring the business relationship to continue after NYOS' decisions to continue the employment of Hernandez and the unauthorized opening of the Manhattan store would eviscerate material provisions of the contract to which NYOS agreed and put this court in the business of regulating business relationships without respect to reasonable business expectations.

Furthermore, it is well-established that "economic loss, which is compensable by monetary damages, does not constitute irreparable harm" (*Family-Friendly Medica, Inc. v Recorder Television Network*, 74 AD3d at 739-740; *EdCia Corp v McCormick*, 44 AD3d 991 [2007]). If Kadosh's contention about it going out of business if the court does not grant the preliminary injunction is correct, there can be no question that such loss is compensable as monetary damages, i.e., a monetary valuation of NYOS' worth.

Absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment (*see St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 348-349 [2003]). In addition, mandatory preliminary injunctions are not favored and should not

be granted absent extraordinary or unique circumstances, or where the final judgment may otherwise fail to afford complete relief, especially if the status quo would be disturbed (*see St. Paul Fire & Mar. Ins. Co. v York Claims Serv., supra; Rosa Hair Stylists v Jaber Food Corp.*, 218 AD2d 793 [1995]; *Xerox Corp. v Neises*, 31 AD2d 195 [1968]; *see also* 67 NY Jur 2d, Injunctions § 55).]]

Accordingly, the Court exercises its discretion in denying the order to show cause for a preliminary injunction.

Dated: **AUG - 6 2012**



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MARGUERITE A. GRAYS  
J.S.C.