STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

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BARI J. LEE, BRIAN E. CIESLINSKI, MATTHEW MONAGHAN, VICTOR J. TOMASELLI, STEPHEN J. KLEMPA, MICHAEL J. EBERTZ, SEI DESIGN GROUP,INC., and SEI DESIGN GROUP ARCHITECTS PC,

Plaintiff, DECISION AND ORDER

v.

Index #2006/07131

TETRA TECH, INC., and THE THOMAS GROUP OF COMPANIES, INC.,

Defendant.

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Plaintiffs, former employees of defendants, move for summary judgment declaring that they are not subject to a restrictive covenant, and for summary judgment granting a permanent injunction restraining defendants from communicating to others that they are subject to a restrictive covenant.

The parties vigorously dispute whether Thomas Group is the successor in interest to Thomas Associates such that the former succeeded to the latter's 2001 employment contract containing the restrictive covenant relied on by defendants in this litigation. Although plaintiffs make a concerted effort to show that defendants could not have succeeded to the rights of Thomas Associates under the 2001 employment agreement, and defendants appear to admit as much in their Memorandum of Law when they

stated that Thomas Group's 2002 arrangements with Lee could not have impinged on the rights of Thomas Associates in the 2001 agreement, the case may be decided on the simple fact that the unambiguous terms of the 2002 agreement between Thomas Group and Lee provided that she would be, and was thereafter maintained as, an at-will employee. Plaintiffs establish as a matter of law that the contract documents executed in 2002 consisted of the March 26th letter, the Employee Handbook and acknowledgment of at-will status form, the Employee Confidentiality and Invention Assignment Agreement (ECIA), and in particular a fully integrated 2002 Non-competition Agreement. These unambiguously provide for her future at-will status, a status wholly incompatible with any asserted continuing obligation under a prior employment contract containing a similar restrictive covenant but having a different term. Shah v. Wilco Systems, Inc., 27 A.D.3d 169, 174 (1st Dept. 2005)("an employer can change any term in an at-will employment and the employee's continued employment is deemed to be a consent thereto"). As well explained:

> That being the case [i.e., employment status at-will], defendant was free to modify the terms of plaintiff's employment, subject only to plaintiff's right to leave his employment if he found the new terms unacceptable (see, Hanlon v. MacFadden Publs., 302 N.Y. 502, 505-506; General Elec. Tech. Servs. Co. v. Clinton, 173 A.D.2d 86, 88; lv. denied 79 N.Y.2d 759; Waldman v. Englishtown Sportswear, 92 A.D.2d 833, 835; Horowitz v. La France Indus., 274 App. Div. 46). Having remained in defendant's employment, however, plaintiff is deemed to have assented to the modification and, *in effect, commenced employment under a new contract* (see id.).

Bottini v. Lewis & Judge Co., Inc., 211 A.D.2d 1006, 1008 (3d Dept. 1995)(emphasis supplied). It would be entirely anomalous to hold on the one hand that Lee could not enforce the terms of the 2001 employment agreement after she accepted employment with Thomas Group as an at-will employee, which is the practical effect of an at-will status determination, Gebhardt v. Time Warner Entertainment-Advance/Newhouse, 284 A.D.2d 978 (4th Dept. 2001), and yet hold that defendants could enforce the terms of that very agreement after reducing her status to at-will and reducing the terms of her compensation package under that agreement in three significant respects (matching contributions to 401(k) plan according to the 2001 prevailing rate, cutoff of payments for profit sharing, and cutoff of annual bonus without any evidence of a "mutually agreed" "formula" - Elwyn concedes in his affidavit that the determination on the latter issue was unilateral).[1] More importantly, however, and for the reasons

[1] In his affidavit, Elwyn points to the fact that the profit sharing and matching contribution issues were not fixed according to any specific formula under the 2001 agreement, which did not incorporate the November 17, 2000 letter. But the salient point is not that the November letter was not incorporated, but rather is that the terms of Lee's employment changed, from a six year employment contract to one at will, and at a reduced level of compensation, in at least some amount (defendants do not dispute the percentage reduction of the matching contribution alleged by Lee). That alone, and Lee's acceptance of it, extinguishes the old arrangements and ushers in the new under the cases cited above, even without consideration of the 2002 contract documents themselves. That Lee received other favorable treatment by her new employers, including some treatment that might be considered due her if the 2001 agreement was still in effect, is thus of no

stated in my decision granting a preliminary injunction, much of which is reproduced below, a finding that the 2001 restrictive covenant is enforceable after execution of the 2002 contract documents would only be based on evidence made inadmissible under the common law and by the parole evidence rule.

The March 26th letter agreement accepted by Lee on April 4, 2002, together with the other contractual documents identified above, and particularly the execution by the parties of a non-competition agreement effective for only eighteen months from the date of *signing* (the 2001 agreement contemplated an eighteen month period following *termination* of employment), are fully integrated documents, are unambiguous on the issue if Lee's prospective at will status, and thus permit of no supplementation, by extrinsic evidence of any kind, whether it be the 2001 agreement or the conduct or admissions of either party, to discern their terms. The court concludes that defendants' efforts, to avoid a determination that execution of the 2002 agreements substantially modified Lee's employment relationship (i.e., reliance on the notice provisions of the 2001 agreement, failure of consideration because the terms of compensation remained unchanged, no express rescission of the agreement, and

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moment. Nor is it significant that Lee's 2001 agreement was mentioned in one of the merger/acquisition documents; even if defendants succeeded to the rights of Thomas Associates in the agreement, defendants immediately altered it in a way which freed Lee from its burdens.

estoppel by acceptance of full benefits of the 2001 agreement following execution of the 2002 documents), are ultimately unavailing. First, given the fully executed 2002 documents, their terms (which contrary to defendants' arguments are in the language and form of agreement), Lenner v. Globe Bag Co., 154 A.D.2d 862, 863-64 (3d Dept. 1989),[2] the post merger/acquisition context involved, and Gen. Oblig. Law §§5-1003, there can be no substantial question but that the consideration issue is a red herring. Girper, Inc. v. Giacchetta, 211 A.D.2d 682, 684 (3d Dept. 1995); Genner v. Globe Bag Co., Inc., 154 A.D.2d 862 (3d Dept. 1989). In any event, it is difficult to understand

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[2] "The letter expressly and unambiguously sets forth terms . . . which are 'definite and certain' and, by including the invitation to agree and accept, demonstrates the requisite 'willingness to enter into a bargain' of an offer." United States Fidelity and Guaranty Company v. Delmar Development Partners, LLC, 14 A.D.3d 836 (3d Dept. 2005)(quoting Concilla v. May, 214 A.D.2d 848, 849 [3d Dept. 1995]). The letter expressly conditioned continued employment with the new company, Thomas Group, on execution of the letter agreement and associated forms. By its terms, no modification of an earlier agreement for the purpose of retaining previously agreed upon terms, such as a non-competition clause, was attempted: "Should you accept this offer, your employment with the Thomas Group, Inc. will *start* immediately." (emphasis supplied). This reading is supported by the parties' execution of a new non-competition agreement roughly contemporaneous with the 2002 letter agreement containing all essential terms of a restrictive covenant and which had a merger clause. Taken together, and in the virtually contemporaneous context of the merger/acquisition closing, these provisions are unambiguous and complete, thus rendering the proffered parol evidence irrelevant and not admissible. See Greenfield v. Philles Records, 98 N.Y.2d 562, 569-70 (2002); Matter of Bowes & Co. of N.Y. v. American Druggists' Ins. Co., 61 N.Y.2d 750, 751 (1984).

defendants' failure of consideration argument when the 2002 agreement reduced Lee's status to one of an at will employee and they subsequently reduced her 401K and yearly bonus benefits but at the same time materially changed the non-competition period to measure from the date of signing, instead of the date of termination. The series of events concerning the merger/acquisition, coupled with the execution of the 2002 documents lead to the inescapable conclusion that Lee's employment by Thomas Group materially changed. This conclusion can be reached on the basis a fair reading of the 2002 documents executed by the parties themselves, quite without regard to Lee's detailed explanation of the circumstances of their execution and the prior conversations of the parties, at least some of which is disputed by defendants.

As stated, there is no ambiguity with respect to whether the new company hired Lee for a term or at will; the letter agreement unambiguously states that she will be an at will employee. The references defendants rely on to the words "continue" and "As is currently the case" only create some doubt whether the drafter of the March 26th letter/agreement, i.e., defendants, understood that Lee had been something other than an at will employee ***before*** the merger. That mistake about past events, however, cannot create an ambiguity concerning the parties' intentions about her future status, which is clearly that she would be an at will

employee. Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 199 (2001)(omission or mistake does not constitute an ambiguity). See also, R/S Associates v. N.Y. Job Dev. Auth., 98 N.Y.2d 29, 33 (2002)(evidence outside the four corners generally inadmissible to add or vary a writing or to create an ambiguity). Thus the 2001 Employment Contract cannot be used to create an ambiguity which otherwise would not exist from an examination of the four corners of the 2002 documents concerning her future status after the merger/acquisition. Nor can the mere existence of the 2001 agreement create an ambiguity concerning whether the 2002 agreements incorporated the restrictive covenant contained in the 2001 agreement. First, such a reading of the 2002 agreement is foreclosed by the execution of a fully integrated restrictive covenant in 2002 in favor of the new employer, containing a merger clause. Second, the 2002 documents executed by the parties make no reference, indirectly or otherwise, to the 2001 agreement. "Since the . . . [2001 agreement] [is] not referenced in the contractual documents at all, much less 'referred to and described [therein] . . . so as to [be] identif[ied] . . . beyond all reasonable doubt' [citation omitted], the . . . [2001 agreement] cannot be deemed to be incorporated by reference into the . . . [2002 agreements]." Cornhusker Farms, Inc. v. Hunts Point Cooperative Market, 2 A.D.3d 201, 204 (1st Dept. 2003). Compare Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 596 (6th

Cir. 1995)(characterization of letter agreement as an amendment or modification of an employment agreement supported by "specifi[c] references [in] that agreement" and simultaneous or same day execution of both). In short, the executed documents, when considered together, clearly show the manifest intention of defendants to start afresh upon the closing of the merger. If this sophisticated commercial enterprise wished to retain any aspect of the arrangements made under the former regime, they were free to do so in explicit terms. Yet they chose not to do so, and are now bound by that omission.

Defendants' estoppel and fraud arguments fail to establish that they in any measure relied on Lee's conduct to assume the continued existence of the 2001 agreement, or otherwise to their detriment. Plaintiff's moving papers establish as a matter of law the absence of justifiable reliance, particularly in view of the unambiguous alteration of Lee's status immediately after the merger/acquisition, and defendants fail to raise an issue of fact on the reliance issue such that a trial of the fraud claim would be necessary.

The parties earlier dispute whether plaintiffs took confidential information with them when they departed defendants' employ also cannot serve to preclude entry of summary judgment. Defendants contend that plaintiffs are unfairly competing with defendants. Defendants, however, establish by their own first

hand accounts that, although they "took" the spreadsheet and code book while still employed by defendants, they destroyed them or returned them prior to departure. Plaintiffs also establish in support of their motion that they are not using confidential information to unfairly compete with defendants. Defendants fail to raise an issue of fact on the matter, either of asportation of confidential information from defendants' premises or of plaintiffs' claimed current use of confidential or proprietary information. Defendants' "proof" thereof is wholly speculative, conclusory, and otherwise inadmissable in form.

Defendants contend that they never intended to alter Lee's employment status after the merger, and that they sent her the 2002 documents by mistake. To the extent that they succeed in showing that ***they*** made a mistake (and their lack of effort to correct it for 3 years militates strongly against such an inference), defendants fail to sufficiently raise issues of "mutual mistake or fraud [which] may furnish the basis for reforming a written agreement." Chimart Associates v. Paul, 66 N.Y.2d 570, 573 (1986). "The proponent of reformation must "show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." Id. 66 N.Y.2d at 574 (underscoring the "heavy presumption" that the written agreement manifests the true intention of the parties). Execution of the March 26th/April 4th documents shows negotiation

between sophisticated parties represented by counsel (although Lee claims in her reply affidavit that defendants would only let her lawyer participate in a minor portion of the negotiations). Plaintiffs establish the absence of proof, much less the "'high level' of proof in evidentiary form" that would be needed ultimately to sustain . . . [defendant's] counterclaims" for rescission/reformation. Chimart Associates, 66 N.Y.2d at 574. See Seebold v. Halmar Const. Corp., 146 A.D.2d 886, 887 (3d Dept. 1989)("reformation of a contract is allowed only where mutual mistake or fraud is established by proof of the highest order"). See Nicholas J. Masterpol, Inc. v. Travelers Inc. Companies, 273 A.D.2d 817 (4th Dept. 2000)("either a mutual mistake or a unilateral mistake coupled with fraud"). Defendants' efforts to raise an issue of fact of mutual mistake, or of reliance supporting fraud, requires dismissal of the counterclaims.

Defendants refer repeatedly to Lee's effort to enforce aspects of the 2001 agreement in conversation with Lewis fully three years after execution of the 2002 agreements and at a time when the parties were in conflict. If, however, as Lewis maintains in his affidavit Lee was attempting to enforce terms of the November 17, 2000 letter that never became a part of the 2001 agreement, her entreaties to Lewis concerning compensation terms three years later and after annual execution of the at-will acknowledgment forms, could not constitute an admission that the

2001 restrictive covenant was still extant. Moreover, argument of entitlement to prior benefits is no admission of continuing obligation under wholly separate burdens imposed by a prior agreement, especially in the context of a new separately executed agreement covering the same subject matter but for a different and shorter term.

Even if her conversations did constitute admissions, however, admissions of this sort do not raise a triable issue of fact on the interpretation of an unambiguous agreement, and to hold otherwise would violate the Parole Evidence Rule every bit as much as it would violate settled principles of contract interpretation. In this respect, a dictum in Sullivan v. Troser Management, Inc., 34 A.D.3d 1233 (4th Dept. 2006) must be considered. In that case, which reversed a grant of summary judgment on the ground that there were two plausible readings of the contract requiring resolution by a trier of fact, the court stated that, "even assuming, arguendo, that defendant met its burden" to show an unambiguous contract, a moving party's acknowledgment of a differing interpretation in correspondence between the parties raises an issue of fact requiring a trial. Id. The two cases cited to support this proposition, Cook v. Presbyterian Homes of W. N.Y., 234 A.D.2d 906, 655 N.Y.S.2d 701; Wilson v. Haagen-Dazs Co., 215 A.D.2d 338, 627 N.Y.S.2d 41, lv. dismissed 86 N.Y.2d 838, 634 N.Y.S.2d 446, 658 N.E.2d 224,

however, are tort cases in which an accident victim admitted to a differing version of the accident at some time prior to his motion for summary judgment. They have no application to a case involving interpretation of unambiguous contracts, South Road Associates, LLC v. International Business Machines Corporation, 4 N.Y.3d 272, 278 (2005)("extrinsic evidence such as the conduct of the parties may not be considered"); Slatt v. Slatt, 64 N.Y.2d 966, 967 (1985)("no need here to examine the conduct of the parties over the intervening years to ascertain their intent in respect to" an unambiguous contractual provision), citing City of New York v. New York City Ry. Co., 193 N.Y. 543, 549("controlling distinction between the two series of cases is that in one there was an ambiguity in the grant and in the other there was not"), 550("the doctrine is never applied unless the door is opened by an ambiguity, which is the foundation of the principle upon which the doctrine is founded"); Brad H. v. City of New York, 33 A.D.3d 301 (1st Dept. 2006), and the Sullivan v. Troser Mgmt. dictum flatly contradicts prior Fourth Department jurisprudence on the subject. Sullivan v. Sullivan, 81 A.D.2d 1028, 1029 (4th Dept. 1981)("It is only on the determination of the meaning of an indefinite or ambiguous contract that the construction placed upon the contract by the parties themselves as established by their conduct is to be considered by the court and is of importance in ascertaining the contract meaning.") See also,

Surlak v. Surlak, 95 A.D.2d 371, 375 (2d Dept. 1986)(quoting Robinson). The dictum is also contrary to other authority interpreting New York law. International Klafter Co., Inc. v. Continental Cas. Co., Inc., 869 F.2d 96, 100 (2d Cir. 1989)("any conceptions or understandings any of the parties may have had during the duration of the contracts is immaterial and inadmissible"); Metro. West Asset Mgmt., LLC v. Shenkman Capital Mgmt., Inc., 2005 WL 1963943, No. 03-5539, slip opn. at 8 & n.22 (S.D.N.Y. Aug 16, 2005); 11 Richard A. Lord (ed.), Williston on Contracts § 32:14, at 493-94 & cases collected at n.28 (citing the Fourth Department's decision in Robinson v. Robinson, supra) (4th ed. 1999)("the parties' conduct, no matter how probative in the abstract, will not be considered by many and perhaps most courts unless the contract is ambiguous").

Application of these tort cases to an unambiguous contract would violate settled principles of contract interpretation. Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002):

> A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (see, e.g., Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 269-270, 557 N.Y.S.2d 851, 557 N.E.2d 87; Judnick Realty Corp. v. 32 W. 32nd St. Corp., 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131; Long Is. R.R. Co. v. Northville Indus. Corp., 41 N.Y.2d 455, 393 N.Y.S.2d 925, 362 N.E.2d 558; Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 365, 239 N.Y.S.2d 865, 190

> N.E.2d 230). That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses * * * infirmity of memory * * * [and] the fear that the jury will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].) Such considerations are all the more compelling . . . where commercial certainty is a paramount concern.

W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990). Because continued enforcement of the 2001 restrictive covenant would serve to vary the terms of the 2002 restrictive covenant, particularly concerning its term as measured from the date of signing instead of the date of termination, the parole evidence rule is implicated. Cf., Primex Intern. Corp. v. Wal-Mart Stores, Inc., 89 N.Y.2d 594 (1997). Such evidence "might be appropriate in the instance of ambiguity . . . or where there is claimed 'waiver,' none of which is present in this case." Slatt v. Slatt, 64 N.Y.2d at 967. See Robinson v. Robinson, 81 A.D.2d at 1029 ("conduct of the parties, which may be a relevant consideration on the waiver issue, cannot revoke or modify the agreement").

The rationale for this was set forth in this court's decision in Acquavella v. Viola, 13 Misc.3d 1234(A), 2006 WL 3232167, 2006 N.Y. Slip Opn. 52111 (Sept. 25, 2006), decided before the Sullivan v. Troser Mgmt dictum. In Acquavella, this court relied on Judge Learned Hand's famous decision in Eustis Mining Co. v. Bear, Soundheimer & Co., Inc., 239 F. 976 (S.D.N.Y. 1917):

This result the defendant resists, because of evidence dehors the writings. The evidence is of three sorts: First, the admission or declaration arising from the 'Proposed Combination Agreement of April 8, 1915'; second, the contemporaneous negotiations of the parties; third, the general setting in which the contracts were drafted. The first consists of a proposed contract, proffered by the plaintiff, which it is alleged the accompanying correspondence shows to have been intended to subsume the existing contracts. *The defendant's theory is that it may be used as an interpretation of those contracts, certainly to the extent of proving how much of the earlier contract survived, because it is an admission by the plaintiff of what it thought those contracts, taken together, effected.* The defendant does not, of course, suppose that the 'Proposed Combination' could affect any actual obligations of the parties, since it was never accepted; but it asserts that it shows which of the earlier stipulations must have been intended to endure. As articles 5 and 6 are incorporated in the 'Proposed Combination,' with some important modifications, not necessary to consider, the defendant insists that the plaintiff has admitted that they were meant to continue.

This evidence is, I think, *irrelevant* to the issues, for a reason going to the very nature of a contractual obligation. It is quite true that we commonly speak of a contract as a question of intent, and for most purposes it is a convenient paraphrase, accurate enough, but, strictly speaking, untrue. It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation. That obligation the law attaches to his act of using certain words, provided, of course, the actor be under no disability. The scope of those words will, in the absence of some convention to the contrary, be settled, it is true, by what the law supposes men would generally mean when they used them; but the promisor's

> conformity to type is not a factor in his obligation. Hence it follows that no declaration of the promisor as to his meaning when he used the words is of the slightest relevancy, however formally competent it may be as an admission. Indeed, if both parties severally declared that their meaning had been other than the natural meaning, and each declaration was similar, it would be irrelevant, saving some mutual agreement between them to that effect. When the court came to assign the meaning to their words, it would disregard such declarations, because they related only to their state of mind when the contract was made, and that has nothing to do with their obligations.

Id. 239 F. at 984-85 (emphasis supplied). This statement of the rule has been described as "the staunchest objectivist stance," Bach v. Computer Associates International, Inc., 257 F.3d 700, 708 (7th Cir. 2001), but it unquestionably states applicable law in New York. See Duttweiler v. Jacobs, 223 App. Div. 292, 295 (1st Dept. 1928). Our Court of Appeals has consistently followed the objective, or formalist, approach to contract interpretation. South Rose Associates, LLC v. International Business Machines Corp., 4 N.Y.3d 272, 277-78 (2005); Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004); W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162-63 (1990); and especially Joseph Martin, Jr., Delicatessen, Inc. v. Shumacher, 52 N.Y.2d 105, 109 (1981), the latter of which recently was described as "a clear statement of the formalist philosophy." Harold Dubroff, The Implied Covenant of Good Faith in Contract Interpretation and Gap-filling: Reviling a Revered Relic, 80 St. Johns L. Rev. 559, 577 (2006). Accordingly,

evidence of Lee's post contract negotiations concerning benefits she hoped to receive that were either provided in the 2001 contract or alluded to in the November 2000 letter, again fully three years after execution of the 2002 contract documents, like the evidence of negotiations in Eustis Mining, is not admissible so long as the court finds that the contractual provisions in question are unambiguous. To the extent Lee harbored any misconceptions of the relevant 2002 contracts, those misconceptions cannot create a contractual obligation that the 2202 contracts themselves conclusively show did not exist.

Accordingly, plaintiffs' motion for summary judgment declaring that she is no longer burdened by a restrictive covenant, and otherwise declaring the rights of the parties in accordance with the terms of ¶92 of the complaint is granted. The motion for summary judgment dismissing the counterclaims is granted.

With respect to the request for a permanent injunction, defendants oppose the same on the ground that plaintiffs have only established a single instance of false communication in the relevant marketplace that plaintiffs are subject to a restrictive covenant, and that by inadmissible hearsay evidence. Defendants offer to comply with the declaratory judgment ultimately issued by the court without the compulsion of an injunction, and contend that plaintiffs have sown no continuing imminent threat of

irreparable harm or the likelihood that the single instance alluded to will be repeated. Under the circumstances, and particularly in view of the passage of some months after the commencement of the action without evidence of further incident, the request to make the preliminary injunction permanent is denied. Brooks v. Giuliani, 84 F.3d 1454, 1467-68 (2d Cir. 1996) ("There is no finding whatsoever of any 'actual and imminent' threat that the State will renew its attempt to effect an involuntary transfer. The extraordinary remedy of an injunction is unavailable absent such a finding."); Electrolux Corp. v. Val-Worth, Inc., 6 N.Y.2d 556, 565 (1959)("the absence of any indication in the record that defendants intend to resume the practice render an injunction unnecessary and inappropriate"); 1130 President St. Corporation v. Bolton Realty Corporation, 300 N.Y. 63, 69 (1949)("Injunctive relief should be addressed only to acts which are 'threatened and imminent'. See People v. Canal Board of New York, 55 N.Y. 390, 395. No threat of interference with plaintiff's possession has been shown, and if any should develop plaintiff then may seek an appropriate remedy.")

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: February 28, 2007
Rochester, New York