STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

LUMARC COMPUTER CORPORATION,

Plaintiff, DECISION AND ORDER

v. Index # 2004/9762

MICHAEL McCABE,

Defendant.

The plaintiff moves for preliminary injunctive relief against the defendant, a former employee. Specifically, plaintiff seeks an order enjoining defendant from purchasing, or attempting to purchase, computer equipment from Dion Podgurney (Podgurney), or offering to purchase computer equipment from any source that the defendant discovered during his employment with the plaintiff, and finally, from attempting to sell computer equipment to any customer which the plaintiff became aware of while employed by the plaintiff.

In sum and substance, the plaintiff is contending that the plaintiff acquired specific information regarding potential or pending business deals while employed by the plaintiff, and immediately upon leaving his employ, tried to secure or "steal" those deals for himself. Plaintiff points to two deals in particular. First, defendant is alleged to have engaged in self dealing while employed with plaintiff in connection with the Reston Auction. Defendant's responsibilities with plaintiff

included preparing it for the auction by making up a spreadsheet of all items to be sold at the auction together with a price that plaintiff would bid to purchase the items. When defendant announced that he would resign effective the day before the auction, plaintiff asked defendant to deliver his work on the Reston Auction to another of plaintiff's employees. Defendant did so by providing that employee with the spreadsheet. Plaintiff alleges, however, that defendant also emailed a similar spreadsheet to his home with higher prices on it that defendant intended to bid, that defendant participated in the Reston Auction for his own benefit, and outbid plaintiff on many items. Plaintiff's proposed injunction does not address the Restion Auction issue.

Second, plaintiff alleges that, in June 2004, plaintiff sent defendant to Houston to meet Dion Podgurney, one of plaintiff's used computer equipment suppliers, to investigate a potential "find." Podgurney kept his client's name confidential, but allegedly told defendant, then in plaintiff's employ, that a large quantity of used computer equipment worth some $250,000 - $500,000 would be involved. Plaintiff alleges further that defendant reached an agreement with Podgurney on the prices plaintiff would pay for the equipment and that pricing of this nature is "extremely confidential" in the trade. According to plaintiff, however, defendant told Podgurney while in Houston

that he planned to leave plaintiff and form his own business in competition with plaintiff. Plaintiff seeks an injunction preventing defendant from dealing with Podgurney in connection with this discreet transaction with Podgurney's confidential client, and from dealing with any other source (or customer) of computer equipment defendant discovered during his employment with plaintiff.

The defendant responds by saying that he left plaintiff because of differences with its CFO, that plaintiff was not paying defendant full commissions, that plaintiff unilaterally reduced the percentage of his commissions, and that plaintiff eliminated certain of the customary bonuses paid to defendant. Defendant points out that he was not subject to any employment contract or restrictive covenant, that he was in the business of buying and selling used computers long before beginning employment with plaintiff, that customers and suppliers in the trade are readily identified on at least three non-confidential web-sites, that he learned of no customer or source while employed with plaintiff that could not be learned by anyone from these internet sources, that plaintiff's poor financial condition last summer caused it to be too cautious in its bidding at the Reston Auction, that plaintiff ultimately bid only on-line and after the deadline for such bids, that the winning bidder was a large concern in Utica which could not be outbid even if

defendant tried, that defendant successfully bid on only a few pieces costing some $3,000 - $4,000, that plaintiff's version of the Podgurney deal is false, and that, in any event, the Podgurney deal has fallen through.

In order for a party to obtain a preliminary injunction, the party must establish that (1) there is a likelihood of ultimate success on the merits, (2) that there is a prospect of irreparable harm if the relief is not granted, and (3) that the balance of equities favor the moving party. Doe v. Axelrod, 73 N.Y.2d 748 (1988). It is also a general rule that a preliminary injunction is a drastic remedy and should be issued cautiously. Uniformed Firefighters Assn. of Greater New York v. City of New York, 79 N.Y.2d 236 (1992).

Initially, there is no showing that this case "involve[s] a confidential customer list, proprietary business information [except in connection with pricing] or a covenant not to compete." Elpac Ltd. v. Keenpac North America Ltd., 186 A.D.2d 893, 894 (3d Dept. 1992). Second, the court is not persuaded that plaintiff has met its burden to show a wrongful diversion of the Reston or Podgurney deals, or that, even if wrongful, they "would give defendan[t] an unfair competitive edge in connection with subsequent orders from the same . . . [supplier]." Id. 186 A.D.2d at 895. To be sure, the Complaint asserts causes of action in breach of fiduciary duty, breach of employee's duty of

loyalty, fraud in the preparation of the Reston Auction prices, and misappropriation of corporate opportunity in connection with the Podgurney deal. See generally Gomez v. Bicknell, 302 A.D.2d 107, 113 (2d Dept. 2002). But a "court will not enjoin a former employee's use of an employer's customer [or supplier] list where, as here, the customers [or suppliers] are all openly engaged in business and where their names and addresses can be found by those engaged in the trade merely by reviewing public documents, including telephone directories [read here, web-sites]." Price Paper and Twine Co. v. Miller, 182 A.D.2d 748, 749 ((2d Dept. 1992). See Savannah Bank, N.A. v. Savings Bank of the Finger Lakes, 261 A.D.2d 917, 918 (4th Dept. 1999); Walter Kark, Inc. v. Wood, 137 A.D.2d 22, 27-29 (2d Dept. 1988).

To the extent plaintiff is concerned about pricing information, the facts are sharply in dispute about how plaintiff, after leaving plaintiff's employ, used pricing information he developed while employed with plaintiff, and in any event courts will not enjoin the use of "mer[e] recollections of the employee." Id. 182 A.D.2d at 750. Although CPLR 6312[c] was amended to, in effect, make it an abuse of discretion to deny a motion for a preliminary injunction when plaintiff presents a prima facie case for one, Town of Tully v. Valley Realty Dev. Co., Inc., 254 A.D.2d 835 (4th Dept. 1998); but see Gagnon Buss Co., Inc. V. Vallo Transportation, LTD, 13 A.D.3d 334 (2d Dept.

2004)("likelihood of success on the merits based on undisputed facts"); Dental Health Assoc. V. Zangeneh, 267 A.D.2d 421 (2d Dept. 1999)("Where the facts are in sharp dispute, a temporary injunction will not be granted."), here plaintiff fails to make that prima facie showing with respect to the Podgurney deal or other currently unknown opportunities. "While a physical taking or studied copying of the employer's client information may result in a court enjoining solicitation based not on a trade secret violation but as an egregious breach of trust and confidence," Battenkill Veterinary Equine P.C., v. Cangelosi, 1 A.D.3d 856, 859 (3d Dept. 2003)(citing Silfen, Inc. v. Cream, 29 N.Y.2d 387, 391-92 (1972)), on this motion plaintiff's only allegations in this regard which extend beyond defendant's mere recollections, Arnold K. Davis & Co. v. Ludeman, 169 A.D.2d 614, 615 (1st Dept. 1990)("use of information . . . which is based on casual memory . . . is not actionable"), quoted in Falco v. Perry, 6 A.D.3d 1138, 1138-39 (4th Dept. 2004), concern the Reston Auction spreadsheets which have no relevance to the Podgurney deal or other unknown opportunities which plaintiff now seeks to enjoin. H. Meer Dental Supply Co. v. Commisso, 269 A.D.2d 662 (3d Dept. 2000). Plaintiff requests no injunctive relief in connection with the auction.

Moreover, the plaintiff cannot establish that, absent this injunctive relief, he will be irreparably harmed. In the present

case, the plaintiff is asking for monetary damages and, if they exist, they should be readily discernible from the evidence. Since monetary damages could be calculated without great difficulty, the plaintiff has an adequate remedy of law and injunctive relief is both unnecessary and unwarranted. Elpac Ltd. v. Keenpac North America Ltd., 186 A.D.2d at 895; Price Paper and Twine Co. v. Miller, 182 A.D.2d at 749; Main Evaluations, Inc. v. State of New York, 296 A.D.2d 852 (4th. Dept 2002).

Therefore, since the plaintiff failed to establish all of the prerequisites required in order to gain injunctive relief, the motion for a preliminary and permanent injunction is denied in all respects.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: February 9, 2005
Rochester, New York