STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CREATIVE COLLECTIONS OF NEW YORK, INC.

Plaintiff

vs.

MEMORANDUM DECISION

Index No. 12455/06

JAMES DIBLASI, JR., DENISE DIBLASI, JASON KNOBLOCH AND INNOVATIVE RECOVERY GROUP, INC.

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **Blair & Roach**
Attorneys for Plaintiff
Larry Kerman, Esq., of Counsel

Myers & Quinn, LLP
Attorneys for Defendant
James I. Myers, Esq., of Counsel

CURRAN, J.

Plaintiff has moved for an Order granting a preliminary injunction enjoining the defendants from contacting, soliciting or engaging in business transactions with or on behalf of any entity or individual which was a customer of the plaintiff during the individual defendants' employment by plaintiff. Plaintiff also seeks an Order enjoining the defendants from continuing to retain certain personal property belonging to the plaintiff.

By Order granted November 14, 2006, the Court temporarily restrained defendants from contacting or calling upon any entity or individual that was a customer of the

plaintiff during the defendants' employment, and from using any documents or other information taken from or copied from plaintiff. Additionally, the Court directed the defendants to furnish to plaintiff's counsel a detailed inventory of all property taken by any defendant from plaintiff. Defendants have moved for an Order vacating the temporary restraining order and for other relief which is now moot. The Court conducted an evidentiary hearing concerning the pending motions on January 16, January 17, January 18, 2007, February 2, February 5, February 6, March 19 and March 21, 2007. During the hearing, the parties admitted various exhibits and offered the testimony of a variety of witnesses. At the conclusion of the hearing, the parties waived any further submissions.

FINDINGS

Plaintiff was formed in 1997 by James Bialous ("Bialous"). Bialous formed plaintiff after working in the commercial collections industry for approximately the previous ten years. Bialous' idea was unique in that plaintiff was to focus primarily on the repossession of heavy construction equipment which would necessitate thorough skip tracing functions. Plaintiff started with three (3) employees, including defendant James DiBlasi, Jr. ("DiBlasi"). DiBlasi also was experienced in the collections industry. DiBlasi's spouse, defendant Denise DiBlasi ("Denise"), began as a part owner of the plaintiff but ultimately relinquished her ownership interest in the plaintiff in 1999 to Bialous in exchange for Bialous assuming all of the plaintiff's indebtedness. Denise continued to work thereafter as an employee doing bookkeeping.

Between the time Denise relinquished her ownership interest and the time this action was commenced in late 2006, plaintiff's business grew significantly and, as of 2006,

plaintiff employed twelve (12) people. While Bialous owned the business, DiBlasi was the operations manager and perceived himself as Bialous' partner.

The parties agree that the repossession portion of plaintiff's business is by far the most valuable in terms of the revenues and profits it produces. The other portion of plaintiff's work involves typical commercial collections which was not the subject of much testimony before the Court. The record reflects that the repossession portion of the business generated about seventy percent (70%) to eighty percent (80%) of plaintiff's revenues. As of 2006, four (4) of the twelve (12) people employed by plaintiff did repossession work exclusively.

Defendant, Jason Knobloch ("Knobloch"), was hired in 2003. He had no prior experience in the collections business. He was hired by virtue of his acquaintance with DiBlasi. As of 2006, Knobloch served as plaintiff's sales manager.

During 2006, DiBlasi and Knobloch developed concerns over plaintiff's handling of certain key customer accounts and brought their concerns to Bialous' attention. Because they were unsatisfied with his reaction to their concerns, DiBlasi and Knobloch began to formulate their plan to start a competing business. DiBlasi had been thinking about leaving plaintiff's employ for approximately two to two and one-half years. As of September 2006, DiBlasi had decided to leave plaintiff's employ. DiBlasi promptly enlisted Knobloch to join him in the new venture. DiBlasi instructed Knobloch to begin making arrangements to take with them two key customers of the plaintiff, Gehl Finance ("Gehl") and Schneider. Knobloch thereupon spoke to both Gehl and Schneider about the plans to leave the plaintiff and start a competing repossession collections business. As part of these arrangements, Knobloch and DiBlasi traveled to Wisconsin to meet with both Gehl and Schneider. While Bialous was aware

that Knobloch was going to Wisconsin to meet with Gehl ostensibly to further the relationship with that customer, Bialous was unaware that DiBlasi had joined Knobloch. DiBlasi also never told Bialous. While on this trip, DiBlasi and Knobloch approached both Gehl and Schneider to start doing business with them rather than the plaintiff. The trip to Wisconsin was largely paid for by plaintiff.

At approximately this same time in November of 2006, DiBlasi and Knobloch began approaching their fellow repossession employees concerning leaving the plaintiff and starting a new competing business. One of the repossession employees, Jim Pyne, was told that this would be an amicable departure and that Bialous was consenting to the repossession work being spun off to a new company to be formed by DiBlasi and Knobloch. Bialous had no such knowledge and gave no such consent.

DiBlasi formed defendant, Innovative Recovery Group, Inc. ("Innovative"), in November of 2006. He also rented space for the business. He did all of this without telling any of his plans to Bialous. None of the other defendants told Bialous either. DiBlasi specifically requested each of them not do so and that they should all keep their plans to themselves.

Once everything was in place with respect to the new office space, the formation of the new corporate entity, and expressions of interest by Gehl and Schneider to follow them, DiBlasi and Knobloch proceeded to finalize their plan by converting assets belonging to the plaintiff to their own use. Specifically, without any prior knowledge or consent by Bialous, DiBlasi and Knobloch went to plaintiff's offices over the weekend of November 30, 2006. They removed four (4) computers, all of the equipment and furnishing in Denise's bookkeeping office, the conference room table, and four (4) file cabinets containing client and personnel

files. Defendants commenced their new business on Monday, December 1, 2006, with these assets and client files taken from plaintiff without plaintiff's consent. The record reflects that the defendants immediately started contacting Gehl and Schneider, along with Citi Capital, another major repossession client of the plaintiff. Additionally, credible evidence reveals that defendants began substituting themselves into on-going projects presumably arranged between plaintiff and its customers.

Pyne testified that DiBlasi told him all of this was being done with Bialous' consent and it is for this reason that he showed up for work at Innovative as instructed by DiBlasi on December 1, 2006. Pyne immediately realized that the situation was not an amicable one and that the customers were confused. Pyne worked for Innovative for three days and observed the file cabinets full of files, the computers being put to use, and his fellow employees actively working Gehl accounts which were previously being worked on by the plaintiff. Pyne returned to work for the plaintiff three days later and reported that computer files, customer e-mail addresses and customer e-mails had been deleted from his computer and that there were client files missing from plaintiff's offices. Pyne confirmed that this significantly hampered his ability to do his job for the plaintiff.

The testimony further shows that DiBlasi arranged through Denise to procure advance payroll checks for all of the employees that would be leaving with him. This was done without Bialous' knowledge and consent. Pyne was one of the employees who was assured that he would be paid by Innovative and that he would be carried through the process of transition.

Shortly after the defendants commenced business through Innovative, plaintiff started legal action and communicated with defendants' counsel. As a result of these

communications, some of the assets were returned but not all. The assets which defendants still retain are two metal cabinets, hard copies of client files, and the flat panel monitor and silver case computer which was the main computer. The testimony reflects that this main computer contained the "Camis" software which was specifically designed by an outside contractor for use by the plaintiff in connection with its repossession business. Defendants do not dispute that they now possess Camis and are using it.

The temporary restraining order directed the defendants to furnish plaintiff's counsel with a detailed inventory of all property taken by the defendants from the plaintiff. Defendants have not made any such inventory because they claim that any such property has now been fully returned. The record demonstrates that this statement is not accurate because the defendants still possess the Camis software, client files, and hard assets belonging to the plaintiff. Defendants also continue to possess computerized client information which belongs to the plaintiff and which has not been returned. Overall, the evidence shows that the defendants sought to take the repossession business being run by the plaintiff without paying for it and without giving Bialous the opportunity to prevent it.

CONCLUSIONS

A motion for a preliminary injunction is addressed to the sound discretion of the trial court (*Watnet, Inc. v Robinson*, 116 AD2d 998, 998 [4th Dept 1986]). In order to obtain a preliminary injunction, the movant must establish: (1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balance of the equities in the movant's favor (*W. T. Grant Co. v Srogi*, 52 NY2d 496 [1981]; *Chernoff Diamond & Co. v Fitzmaurice, Inc.*, 234 AD2d 200, 201 [1st Dept 1996]); *Gambar*

Enterprises, Inc. v Kelly Services, Inc., 69 AD2d 297, 306 [4th Dept 1979]). To procure a preliminary injunction, the movant must establish a clear legal right thereto (*Armbruster v Gipp*, 103 AD2d 1014 [4th Dept 1984]).

Plaintiff relies upon theories premised on concepts of unfair competition, breach of the duty of loyalty by an employee and breach of a restrictive covenant. These theories are articulated in the third, fourth and sixth causes of action of the complaint. In determining whether there is a likelihood of success on these causes of action, the Court need not finally determine the merits of the action and should focus on the *likelihood* of success rather than a showing based on the *certainty* of success (*see Tucker v Toia*, 54 AD2d 322, 325-326 [4th Dept 1976]; *Sutton, DeLeeuw, Clark & Darcy v Beck*, 155 AD2d 962, 963 [4th Dept 1989]).

It is appropriate to issue a preliminary injunction against former employees even without a restrictive covenant where they have breached trust or stolen the employer's proprietary information (*Hecht Foods, Inc. v Sherman*, 43 AD2d 850, 850-851 [2d Dept 1974]; *Props for Today, Inc. v Kaplan*, 163 AD2d 177 [1st Dept 1990]; *Churchill Communications Corp. v Demyanovich*, 668 F Supp 207 [US Dist Ct, SDNY 1987]). Furthermore, "if there has been a physical taking or studied copying, the Court may in a proper case enjoin solicitation, not necessarily as a violation of a trade secret, but as an egregious breach of trust and confidence" by an employee (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 391-92 [1972]; *McLaughlin, Piven, Vogel, Inc. v W. J. Nolan & Co., Inc.*, 114 AD2d 165 [2d Dept 1986]). Injunctive relief is appropriate under such circumstances to prevent the offending former employees from "reaping the fruits of their improper conduct" (*Pace Sec., Inc. v Pollack*, 157 AD2d 557, 558-559 [1st Dept 1990]). Essentially, the rule to be applied by courts of equity:

> If honesty, integrity, and ethics are to prevail in commercial enterprise, a court of equity must disapprove of any attempt to exploit information obtained as a result of a breach of trust and confidence.

(*Thal v Polumbaum,* 196 Misc 897 [Sup Ct, New York County 1949], *affd* 277 AD 1115 [1st Dept 1950], citing *Allen-Qualley Co. v Shellmar Products Co.*, 31 F2d 293 [US Dist Ct, ND Ill 1929], *affd* 36 F2d 623 [7th Cir 1929]).

While the disloyalty of the defendant employees might ultimately be remedied, at least in part, through an award of damages (*Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138 [1936]; *Harry R. Defler Corp. v Kleeman*, 19 AD2d 396, 403 [4th Dept 1963], *affd* 19 NY2d 694 [1967]; *Town & Country House & Home Service, Inc. v Newberry*, 3 NY2d 554, 560 [1958]), the misappropriation of the plaintiff's business information and goodwill is not something that can be adequately remedied at law. The Courts have recognized the need for an injunction under such circumstances (*Defler*, 19 AD2d at 403; *Town & Country*, 3 NY2d at 560; *Laro Maintenance Corp. v Culkin*, 255 AD2d 560 [2d Dept 1998]; *Velo-Bind v Sheck*, 485 F Supp 102 [US Dist Ct, SDNY 1979]; *Ingredient Tech. Corp. v Nay*, 532 F Supp 627 [US Dist Ct, EDNY 1982]; *Webcraft Tech., Inc. v McCaw*, 674 F Supp 1039 [US Dist Ct, SDNY 1987]; *Business Intelligence Services, Inc. v Hudson*, 580 F Supp 1068 [US Dist Ct, SDNY 1984]; *Integrated Cash Mgt. v Digital Transactions, Inc.*, 920 F2d 171, 174 [2d Cir 1990]).

Based on the record before the Court, even in the absence of a restrictive covenant, defendants must be preliminarily enjoined from directly or indirectly soliciting any entity or individual that was a customer of plaintiff during the defendants' employment and must be further enjoined from using any document or information taken from or copied from

plaintiff. This restriction shall remain in effect for a period of one (1) year from the date of defendants' departure from plaintiff (December 1, 2006). The Court concludes based on the evidence that this one-year period represents the requisite amount of time for plaintiff to be able to fairly compete against the defendants and to restore its position in the marketplace. This time period also reasonably approximates the time it would have taken the defendants to position themselves in the marketplace to *fairly* compete.

Plaintiff relies on the written restrictive covenant purportedly executed by DiBlasi to request that the defendants not be permitted to do business with any of plaintiff's customers for a period deemed reasonable by the Court. DiBlasi contests this contract on the basis that it is a forgery and therefore cannot be enforced due to its illegality. Defendant bears the burden of proof on this issue.

Defendants have submitted DiBlasi's testimony wherein he denied ever executing such a covenant and the testimony of an expert who opined to a "high degree" that the signature on the restrictive covenant is not one belonging to DiBlasi. However, upon cross-examination, the expert acknowledged that DiBlasi signs his name in a variety of different ways, including in a scribbled fashion such as on the restrictive covenant. Moreover, on cross-examination, the expert admitted that she only reviewed those samples specifically submitted by DiBlasi's counsel. Further, Bialous testified that he and DiBlasi executed the restrictive covenants at the same time and that they witnessed each other's signatures. Because the Court concludes that the expert's testimony was insufficient, and that Bialous' credibility far outweighs DiBlasi's lack of candor, the Court concludes that the defense of illegality has not been established to defeat relief premised on the written covenant. Defendants have not met

their burden of proof on this defense and it is therefore unnecessary to consider their request for a missing witness charge, as plaintiff is not required to contradict or explain facts which are insufficient to establish a defense to its claim (see *Shotwell v Dixon*, 163 NY 43, 53-54 [1900]; *Milio v Railway Motor Trucking Co.*, 257 AD 640 [1st Dept 1939]; *Sasmor v Vivaudou, Inc.*, 200 Misc 1020 [Sup Ct, New York County 1951]; PJI3d 1:75 [2007]). Nevertheless, the Court concludes that even if it were to apply the missing witness charge as requested, no different result is required, as the evidence remains insufficient to establish the defense of illegality.

Restrictive covenants in the collections industry have been enforced (*Stanley Tulchin Assocs., Inc. v Vignola*, 186 AD2d 183 [2d Dept 1992]; *Trans-Continental Credit & Collection Corp. v Foti*, 270 AD2d 250 [2d Dept 2000]; *Central Adjustment Bureau, Inc. v Ingram Assocs., Inc.*, 622 SW2d 681 [Ky 1981]; *Trans-American Collections v Continental Account Servicing House, Inc.*, 342 F Supp 1303 [US Dist Ct, UT 1972]). Here, while the Court concludes that the restrictive covenant is enforceable to protect the legitimate business interests of the plaintiff, the language of the contract is overbroad and must be tailored to fit the facts presented to the Court. The testimony reflects that the most significant customers in the repossession business at issue here are Gehl, Schneider and Citi Capital. Therefore, in order to narrowly craft appropriate relief, the Court will limit the restriction against DiBlasi doing business with plaintiff's customers to these three entities. DiBlasi is therefore prohibited from doing any business, directly or indirectly, with Gehl, Schneider or Citi Capital for a period of one (1) year from the date of his departure (December 1, 2006), or until further Order of the Court. Defendants also are enjoined from diverting business from any of these three clients to

any other entity (*see Defler*, 19 AD2d at 402; *People's Coat, Apron & Towel Supply Co. v Light*, 171 AD 671 [2d Dept 1916], *affd* 224 NY 727 [1918]).

In the absence of injunctive relief, plaintiff will have no adequate remedy of law to restore its goodwill and to level the competitive playing field with the defendants. Defendants sought to take the repossession business from plaintiff without paying for it and did so in such a way as to maximize the plaintiff's inability to defend against such inappropriate behavior. Defendants have given themselves an unfair and unlawful "head start" in the competitive marketplace by misappropriating to themselves the plaintiff's confidential business information and otherwise converting plaintiff's assets to their own inequitable use. Equity therefore must be invoked to restore the status quo which existed prior to defendants' improper actions. Under all of these circumstances, the balancing of the equities also clearly favor plaintiff and injunctive relief should therefore issue. The cross-motion is denied.

Plaintiff's counsel is directed to settle the Order on notice with defense counsel. Pursuant to CPLR 6312, the present undertaking in the amount of $20,000.00 shall remain in place. Additionally, a preliminary conference for purposes of issuing a Scheduling Order shall be conducted on May 31, 2007 at 2:30 p.m.

DATED: April 24, 2007

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HON. JOHN M. CURRAN, J.S.C.