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SHORT FORM ORDER

INDEX No. 25110/12

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL I.A.S. PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/25/13
ADJ. DATES
Mot. Seq. # 002 - MD
PC Scheduled: 3/29/13
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RBR MELVILLE CONTRACTORS, LLC Plaintiff, -against- PATRICK FEEHAN, PROFESSIONAL SNOW MANAGEMENT, LLC and BUILDING CONCEPTS, INC., Defendants.	NEIL H. GREENBERG & ASSOC. Atty. For plaintiff 900 Merchants Concourse Westbury, NY 11590 JOHN W.C. MAHONEY, ESQ. Atty. For Defendants 4 Fairview Meadow Dr. Brewster, NY 10509

Upon the following papers numbered 1 to 7 read on this motion for preliminary injunctive relief ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5-7 ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the plaintiff for preliminary injunctive relief is denied; and it is further

ORDERED that a preliminary conference shall be held in this action on Friday, **March 29, 2013** at 9:30 am in the courtroom of the undersigned located in the Supreme Court Annex Building of the courthouse at One Court Street, Riverhead, New York, 11901.

The plaintiff has long been engaged in the snow removal business at commercial premises and multi-unit residential communities. Defendant, Patrick Feehan, was a long-time employee of the plaintiff until July of 2012, when he resigned. According to the plaintiff, defendant Feehan served as the plaintiff's sales manager for the six last years of his ten year tenure with the plaintiff. The plaintiff claims that Feehan formed defendant, Professional Snow Management, LLC (hereinafter "PSM"), in June of 2012, prior to his departure from the employ of the plaintiff. When Feehan abruptly left the plaintiff in July of 2012, he allegedly took with him coveted, confidential information and documents regarding pricing, customer lists, contracts, renewals and lists of customer contacts and subcontractors. That PSM directly competes with the business of the plaintiff, is indisputable.

In August of 2012, the plaintiff commenced this action against defendant Feehan and his newly formed, co-defendant, limited liability company. Also named as a defendant is Building Concepts, Inc., whose only connection to the case is its alleged role as financier of PSM In the complaint served, the plaintiff advances four causes of action. In the first, the plaintiff charges all defendants with conversion of certain of its contracts with its customers, former customers and others, for which money damages are demanded. The second cause of action targets only defendant Feehan who is therein charged with breaching fiduciary duties owing to the plaintiff while in its employ, for which money damages are also demanded. In the third cause of action, all defendants are charged acts of unfair competition, while the fourth cause of action is dedicated to the recovery of injunctive relief.

By order to show cause dated January 11, 2013, the plaintiff interposed this motion for preliminary injunctive relief restraining and enjoining the defendants from: 1) continuing to solicit and "steal" the plaintiff's customers; 2) interfering with its contractual relationships; and 3) using confidential information to gain an unfair competitive advantage. The plaintiff also demands mandatory injunctive relief in the form of a judicial directive requiring the defendants to return all customer contracts, contract solicitations, price lists, customers lists, subcontractors lists and contact lists. The motion is supported by an affidavit of the plaintiff's president, an affirmation of counsel, the pleadings and other documentary exhibits.

The motion is opposed by the defendants in papers consisting of counsel's affirmation and an affidavit of defendant Feehan. In his affidavit, Feehan avers that his departure from the plaintiff in July of 2012 was precipitated by a May 2012 notification from the plaintiff that Feehan's full time, non-seasonal employment would terminate shortly. In response, Feehan sought the assistance of business associates with respect to forming a new snow removal company. As the plaintiff's sales manager for six years, Feehan regularly had personal contact with many of the plaintiff's customers in connection with the solicitation, preparation and renewal of contracts and the preparation of pricing estimates which he compiled from his on-site measurements of customer premises. In addition, Feehan oversaw the performance of the plaintiff's snow removal services. Defendant Feehan's non-personal interface with customers was usually conducted via cell phone and e-mail accounts that were personally maintained by him. Feehan's personal phone number and e-mail address were listed on business cards prepared and distributed by the plaintiff. Defendant Feehan expressly denies that he took any documents or confidential information belonging to the plaintiff upon his departure in July of 2012. Following his resignation, he advertised his newly formed company via an e-mail blast to those personally known to him. Defendant Feehan never signed, nor was asked to sign, a covenant not to compete nor any non-solicitation agreement during his employ with the plaintiff. These factual averments have gone unchallenged, as the court is without reply papers from the plaintiff.

Upon due consideration of the papers submitted in support of and in opposition to the instant motion, the court denies this motion by the plaintiff.

It is well established that to prevail on a motion for a preliminary injunction, the movant must demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see* ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 862, 552 NYS2d 918 [1990]; ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, 886 NYS2d 41 [2d Dept 2009]; ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, 778 NYS2d 516 [2d Dept 2004]). The decision to grant a preliminary injunction is

committed to the sound discretion of the court (*see* ***Tatum v Newell Funding, LLC,*** 63 AD3d 911, 880 NYS2d 542 [2d Dept 2009]; ***Bergen-Fine v Oil Heat Inst., Inc.***, 280 AD2d 504, 720 NYS2d 378 [2d Dept 2001]). Because this provisional remedy is considered to be a drastic one (*see* ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]), a clear legal right to relief which is plain from undisputed facts must be established (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, *supra*; ***Gagnon Bus Co., Inc. v Vallo Transp., Ltd.***, 13 AD3d 334, 786 NYS2d 107 [2d Dept 2004]; ***Blueberries Gourmet v Avis Realty***, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]). The burden of showing such an undisputed right rests with the movant (*see* ***Omaakaze Sushi Rest., Inc. v Ngan Kam Lee***, 57 AD3d 497, 868 NYS2d 726 [2d Dept 2008]; ***Doe v Poe***, 189 AD2d 132, 595 NYS2d 503 [2d Dept 1993]).

Factors militating against the granting of preliminary injunctive relief include: 1) that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***306 Rutledge, LLC v City of New York***, 90 AD3d 1026, 935 NYS2d 619 [2d Dept 2011]; ***DiFabio v Omnipoint Communications, Inc.***, 66 AD3d 635, 636–637, 887 NYS2d 168 [2d Dept 2009]; ***Mar v Liquid Mgt. Partners, LLC,*** 62 AD3d 762, 880 NYS2d 647 [2d Dept 2009]); 2) that the granting of the requested injunctive relief would confer upon the plaintiff the ultimate relief requested in the action (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*** 65 AD3d 1051, *supra*; ***SHS Baisley, LLC v Res Land, Inc.***, 18 AD3d 727, 795 NYS2d 690 [2d Dept 2005]); or 3) that an alteration rather than a preservation of the *status quo* of the parties or the res at issue would result from a granting of the injunction (*see* ***Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.***, 50 AD3d 1072, 857 NYS2d 648 [2d Dept 2008]; ***Matter of 35 New York City Police Officers v City of New York,*** 34 AD3d 392, 826 NYS2d 22 [1st Dept 2006]). Moreover, a preliminary injunction will not issue in cases wherein the irreparable harm claimed is remote or speculative or purely economic in nature (*see* ***Rowland v Dushin,*** 82 AD3d 738, 917 NYS2d 702 [2d Dept 2011]; ***Family-Friendly Media, Inc. v Recorder Tel. Network,*** 74 AD3d 738, 903 NYS2d 80 [2d Dept 2010]; ***Quick v Quick***, 69 AD3d 827, 892 NYS2d 769 [2d Dept 2010]; ***EdCia Corp. v McCormack***, 44 AD3d 991, 845 NYS2d 104 [2d Dept 2007]). Finally, mandatory injunctive relief is not available absent "extraordinary circumstances" as such relief generally confers upon the movant the ultimate relief to which he or she would be entitled if successful on the merits or it disturbs the status quo (*see* ***Board of Mgrs. of Wharfside Condominium v Nehrich***, 73 AD3d 822, 900 NYS2d 747 [2d Dept 2010]; ***SHS Baisley, LLC v. Res Land, Inc.***, 18 AD2d 727, *supra*; ***St. Paul Fire & Mar. Ins. Co. v York Claims Serv.***, 308 AD2d 347, 349, 765 NYS2d 573 [1st Dept 2003]).

In cases involving a claim of unfair competition, appellate case authorities have long recognized that, in the absence of a restrictive covenant not to compete, an employee is free to compete with his or her former employer unless trade secrets are involved or fraudulent methods are employed and where remembered information as to specific needs and business habits of particular customers is not confidential (*see* ***Reed, Roberts Assoc. v Strauman***, 40 NY2d 303, 386 NYS2d 677 [1976]; ***Island Sports Physical Therapy v Burns***, 84 AD3d 878, 923 NYS2d 156 [2d Dept.,2011]; ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, *supra*; ***Falco v Parry***, 6 AD3d 1138, 775 NYS2d 675 [2d Dept 2004]). That which constitutes a trade secret has been defined as a secret formula, pattern, device or compilation of information which is used in one's business and which gives the owner an opportunity to obtain an advantage over competitors who do not know or use it (see ***Ashland Mgt. Inc. v Janien***, 82 NY2d 395, 407, 604 NYS2d 912 [1993]; *see also* Restatement of Torts § 757, comment [b]). An essential requisite to legal protection against misappropriation of such a formula, process, device or compilation of

information is the element of secrecy. Secrecy has been defined in accordance with the § 757 Restatement of Torts as: (1) substantial exclusivity of knowledge of the formula, process, device or compilation of information; and (2) the employment of precautionary measures to preserve such exclusive knowledge by limiting legitimate access by others *(see* ***Delta Filter Corp. v Morin***, 108 AD2d 991, 485 NYS2d 143 [3d Dept 1985]).

Trade secret protection will thus not attach to customer lists and/or files where the plaintiff failed to take any measures to require the defendant to guard the secrecy of customer lists or to prevent the defendant from using the information once he or she has left the employ of the plaintiff (*see* ***Starlight Limousine Serv., Inc. v Cucinella***, 275 AD2d 704, 713 NYS2d 195 [2d Dept 2000]). Nor will trade secret protection attach where customer lists and other information maintained by the plaintiff can be acquired from non-confidential sources (*see* ***Leo Silfen, Inc. v Cream***, 29 NY2d 387, 328 NYS2d 423 [1972]).

Knowledge of the intricacies of a business operation does not necessarily constitute a trade secret and absent any wrongdoing, it cannot be said that a former employee "should be prohibited from utilizing his knowledge and talents in this area" (***Reed, Roberts Assoc. v Strauman***, 40 NY2d 303, 309, *supra*; *see also* ***Buhler v Michael P. Maloney Consulting, Inc.***, 299 AD2d 190, 749 NYS2d 867 [1st Dept 2002]). Information that is garnered by the defendant's casual memory and knowledge does not constitute actionable wrongdoing (*see* ***Leo Silfen, Inc. v Cream***, 29 NY2d 387, *supra*; ***Levine v Bochner***, 132 AD3d 532, 517 NYS2d 270 [2d Dept 1987]). Where the information at issue is public knowledge, or could be acquired easily and duplicated, it is not a trade secret (*see* ***Starlight Limousine Serv., Inc. v Cucinella***, 275 AD2d 704, *supra*). Where, however, the defendant is shown to have physically taken or copied the plaintiff's confidential information, lists and/or files, an actionable wrongdoing is implicated (*see* ***Falco v Parry***, 6 AD3d 1138, *supra*).

While it is axiomatic that an employee owes a duty of good faith and loyalty to an employer, the employee may incorporate a business prior to leaving the employer without breaching any fiduciary duty (*see* ***Island Sports Physical Therapy v Kane***, 84 AD3d 879, 923 NYS.2d 158 [2d Dept 2011]; ***Island Sports Physical Therapy v Burns***, 84 AD3d 878, *supra*; ***Schneider Leasing Plus v Stallone***, 172 AD2d 739, 569 NYS2d 126 [2d Dept 1991]). Nevertheless, an employee may not solicit his or her employer's customers or otherwise compete during the course of his or her employment with the employer by the use of the employer's time, facilities or proprietary information (*see* ***30 FPS Prods., Inc. v Livolsi***, 68 AD3d at 1102, 891 NYS2d 162 [2d Dept 2009]; ***Schneider Leasing Plus v Stallone***, 172 AD2d 739, 569 NYS2d 126 [2d Dept1991]; *cf.*, ***A&Z Scientific Corp. v Latmoire***, 265 AD2d 355, 696 NYS2d 495 [2d Dept 1999]). Where, however, the employee has left the employ of his employer, the employee is free to compete and to solicit his former employer's customers unless the customer list constitutes a trade secret or there was other wrongful conduct such as a physical taking or copying of the employer's customer lists or files (*see* ***Island Sports Physical Therapy v Kane***, 84 AD3d 878, *supra*; ***Beverage Mktg., USA, Inc. v South Beach Beverage Co., Inc.***, 58 AD3d 657, 873 NYS2d 84 [2d Dept 2009]).

Upon application of the foregoing legal maxims to the facts presented on the instant motion, the court finds that the plaintiff failed to satisfy the three prong test imposed upon the granting of preliminary injunctive relief. There was an insufficient showing of a likelihood of success on the merits of the plaintiff's pleaded claims sounding in unfair competition and injunctive relief, which are the only

claims not readily compensable by an award of money damages. The record is devoid of proof from which the court might discern that defendants engaged in breaches of duties owing to the plaintiff during defendant Feehan's employment with the plaintiff or that the defendants engaged in the misappropriation and or misuse of trade secrets, if any, belonging to the plaintiff. In this regard the court notes that any customer lists, contact lists, contract lists have not been shown to be trade secrets as there is ample proof that they are readily ascertainable from non-confidential sources, and/or from defendant Feehan's casual memory. Moreover, the record contains undisputed evidence that the plaintiff took few, if any, precautionary measures to preserve any exclusive knowledge of pricing, contact or customer lists by limiting legitimate access thereto by defendant Feehan or by securing his agreement to a restrictive covenant or other non-compete agreement.

The record is also insufficient with respect to any proof of Feehan's engagement in wrongful conduct that allowed him to unfairly compete with the plaintiff during or after his employment with the plaintiff. There is no evidence that defendant Feehan took, stole or converted any documents belonging to the plaintiff, except for the unsubstantiated allegations of such conduct by the plaintiff's president. Those allegations have been directly refuted by defendant Feehan and his denial of engagement in any such conduct has not been rebutted (*see* ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, *supra*). The record is equally devoid of any evidence of the existence of the type of extraordinary circumstances which would warrant the granting of the plaintiff's demands for mandatory injunctive relief.

Since the plaintiff has failed to meet the likelihood of success element of its claims for preliminary injunctive, discussion of the remaining two elements imposed upon the plaintiff as the party seeking preliminary injunctive relief is academic relief, namely irreparable harm or injury and that the balance of the equities favors the movant. The court nevertheless notes that to establish irreparable harm or injury, the plaintiff was required to adduce some proof of actual loss of customer accounts (*see* ***IVI Envt., Inc. v McGovern***, 269 AD2d 497, 707 NYS2d 107) or a loss of good will (*see* ***BDO Seidman v Hirshberg***, 93 NY2d 382, 690 NYS2d 854 [1999]), or a loss of trade secrets (*see* ***Invesco Inst. (N.A.), Inc. v Deutsche Inv. Mgt. Am., Inc***, 74 AD3d 696, 904 NYS2d 46 [1st Dept 2010]). The record is devoid of proof that the plaintiff sustained any one of these losses and devoid of any proof that a balance of the equities tips towards the plaintiff.

In view of the foregoing, the instant motion (#002) by the plaintiff for preliminary injunctive relief is denied. Counsel are reminded that their appearances at the preliminary conference scheduled above are required.

DATED: 2/7/13

THOMAS F. WHELAN, J.S.C.