

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MASTER MECHANICAL CORP,

Plaintiff,

-against-

JAMES MACALUSO and LEGEND MECHANICAL
CORP.,

Defendants.

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DECISION AND ORDER AFTER HEARING

The plaintiff filed an Order to Show Cause on June 15, 2006 seeking a Temporary Restraining Order and Preliminary Injunction. The plaintiff seeks to enjoin the defendants from performing work for and/or soliciting work from certain customers of the plaintiff and to enforce the terms of a confidentiality and restrictive covenant agreement signed by defendant Macaluso on July 20, 2003.

By an order of this Court dated October 2, 2006 this motion was referred to a hearing which was held on November 29, 2006 and December 14, 2006.

Facts

The plaintiff, Master Mechanical Corp. (“Master”) is seeking to enforce the terms of a confidentiality and restrictive covenant agreement. The agreement was signed by defendant Macaluso on July 20, 2003 and provides, in pertinent part:

During the term of your employment and thereafter, you: (a) shall treat and maintain, as the Company’s confidential property; (b) shall not use (except in the course of the Work and then only on a confidential basis satisfactory to the Company), in any form or manner; and (c) shall not disclose, in whole or in part, to any other party any information or experience regarding any of the Company’s plans,

programs, systems, specifications, operations, customers, customer contacts, sources of supply, marketing, distribution, products, processes, methods, technology, devices, materials, equipment, costs, prices, finances, or personnel (collectively the "Information")...

The agreement also provides:

You further agree...that you will not, for a period of two (2) years after your termination of employment from the Company for any reason, directly or indirectly, either as an employee, agent, nominee, consultant, independent contractor, partner, shareholder, member or owner of any firm or organization, engage in any HVAC and/or plumbing business with any employee of the Company, or solicit, lure or perform any services or work, previously provided by the Company, ... for any customer or client of the Company for which the Company performed work or services for during the twelve months prior to your termination of employment, or which customer or client existed as a customer or client of the Company as of the date of your termination.

The agreement further provides:

If your employment is terminated, whether by resignation or firing, and you continue to engage in the same trade and field of employment, either individually or in some arrangement other than as part of this Company, it is recognized you have the possibility of taking with you, or servicing certain customers or clients of the Company in violation of the above paragraph. If you do so during the two years following your termination, whether on your own behalf or in connection with your employment or affiliation with another company, firm or entity, in addition to all other remedies available to the Company for such violation, you agree to compensate the Company for the lost business value of those customers or clients, which amount of compensation shall be deemed to be agreed and liquidated damages. For purposes of determining the business value of a customer or client of the Company, we both agree that the valuation of such customer or client shall be an amount equal to the total of the last twelve (12) months billing to said customer or client prior to your termination date...

The plaintiff claims that the defendants violated and continue to violate the terms of this agreement. The plaintiff argues that during the last month of defendant Macaluso's employment, (October 2005) and subsequent to his leaving the company, defendant Macaluso solicited work from certain customers of the plaintiff. The specific customers in question include Kulka Contracting, KAM Construction, Racanelli Construction Co., KDA Holdings, Larsen & Sons, and Sweet Construction. The plaintiff estimates that there were approximately \$10 million dollars worth of bids submitted to these contractors prior to defendant Macaluso leaving Master. The plaintiff claims that the invitations to bid from many of these customers have ceased.

The plaintiff alleges that defendant Macaluso incorporated his business, Legend Mechanical Corp. ("Legend"), while still employed by the plaintiff, in violation of the agreement. The plaintiff further alleges that the defendants bid on certain jobs for which Macaluso had previously submitted bids on Master's behalf and, as a result, Master lost several contracts to Legend. Plaintiff contends that the loss of these contracts to Legend was based on defendants' knowledge of Master's costs and pricing, which allowed the defendants to undercut the proposals and bids submitted on Master's behalf.

At a hearing on November 29, 2006 the plaintiff testified that defendant Macaluso, was hired by the plaintiff in June 2003 as a Commercial Sales Person because of his experience as a closer on commercial jobs and, more specifically, to become the "Face of Master Mechanical." The plaintiff further testified that, in order to perform the duties of this position, defendant Macaluso was given access to Master's pricing and cost information, which was not readily available outside the company. After approximately two and a half years, defendant Macaluso left Master. Subsequent to defendant Macaluso's departure from Master, the plaintiff was informed that the defendants were soliciting jobs from Master's customers and breaching the terms of the confidentiality and restrictive covenant agreement.

The plaintiff contends that without an order for a preliminary injunction by this Court, the plaintiff will continue to suffer irreparable injury from the alleged unfair competition.

The defendants claim that they have not breached any of the terms of the agreement. Defendant Macaluso claims that, during his more than 20 years in the industry, he has established contacts with many general contractors for which he has done previous work and that many of the clients serviced by him while he worked for the plaintiff were a direct result of these contacts and not from his employment with Master.

Defendant Macaluso testified on his own behalf and on behalf of Legend at a hearing on November 29 and December 14, 2006. He stated that he has been in the HVAC business for many years, beginning with employment at his father's company upon graduation from high school. He worked for his father for approximately 15 years. Following his employment with his father and prior to his employment with the plaintiff, the defendant Macaluso worked for Appollo Air Conditioning and Sound Refrigeration. He testified that the way the industry works, the term "customer" refers to certain contractors that will allow you to bid on their jobs. They are not exclusive to one company and in no way can be deemed "your customer". He further testified regarding the plaintiff's confidential and/or proprietary information, that no such information exists. Macaluso testified that the plaintiff's pricing structure and method of bidding on jobs, were standard in the industry and not of a confidential nature.

Defendant Macaluso further testified that the plaintiff presented him with the agreement after he had already left his previous position with Appollo and he felt forced to sign it under duress and without consideration. He, therefore, contends that it is unenforceable. However, the only issue that is currently pending before this Court is whether to grant equitable relief and not the enforceability of the agreement.

Discussion of Law

It is well settled that a preliminary injunction will not be granted unless the moving party first establishes (1) that it has a likelihood of ultimate success on the merits, (2) that irreparable injury will occur absent a preliminary injunction, and (3) that a balancing of the equities favors the movant (*see, IVI Environmental, Inc. v McGovern*, 269 AD2d 497; *see also, Aetna Ins. Co. v Capasso*, 75 NY2d 860; *J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 406; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517; *Borenstein v Rochel Properties, Inc.*, 176 AD2d 171). Furthermore, as a general rule, irreparable injury cannot be established if the applicant for a preliminary injunction has an adequate remedy at law. (*see, Cliff v R.R.S. Inc.* 207 AD2d 17; *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 70 A.D.2d 1021). (*see also, Mr. Dees Stores, Inc v A.J. Parker, Inc.*, 159 AD2d 389 injunctive relief was denied where plaintiff failed to show that it could not be adequately compensated by money damages).

As noted by the Court, the November hearing addressed the limited issue of the plaintiff's request for injunctive relief. The hearing did not address the broader issues raised by the complaint including, without limitation, the plaintiff's request for damages based on the defendants' conduct. These broader questions will be addressed by the court in subsequent proceedings. However, with respect to the request for injunctive relief, the court finds that the plaintiff has failed to meet its burden with respect to the question of irreparable injury. In fact, the record includes a detailed description of the action taken and the work performed by the defendants that plaintiff alleges has violated the agreement at issue in this proceeding. Therefore, if it is determined that the defendants have violated their obligations to the plaintiff in connection with the agreement an adequate remedy can be provided through the calculation of damages.

Therefore, upon the evidence presented at the hearing for a preliminary injunction and the motion papers submitted, it is

ORDERED that this motion by the plaintiff for a preliminary injunction is denied. The parties are directed to conclude remaining discovery as expeditiously as possible so that the court may address the remaining issues in this case.

DATED: April 26, 2007

J. S.C.