

Capri Nail Corp. v Iris Nail Corp.

2005 NY Slip Op 30206(U)

May 31, 2005

Supreme Court, New York County

Docket Number: 0116705/2003

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

Index Number : 116705/2003

INDEX NO. _____

CAPRI NAIL CORP.

MOTION DATE _____

vs

IRIS NAIL CORP.

MOTION SEQ. NO. _____

Sequence Number : 5

MOTION CAL. NO. _____

DISMISS ACTION

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION

FILED

JUN - 2 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/31/05

WALTER B. TOLUB s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 15

-----X
 CAPRI NAIL CORP. and KYONG MI PARK,

Index No. 116705/2003

Plaintiffs,

-against-

IRIS NAIL CORP., JONG KIL HAN and
 WHITEFRIAR EAST CORP.,

Defendants.
 -----X

By this motion, defendants Iris Nail Corp. ("Iris Nail") and Jong Kil Han ("Ms. Han") move for: (1) summary judgment pursuant to CPLR §3212 dismissing Plaintiffs' complaint in its entirety, (2) granting a permanent injunction that prohibits Plaintiffs from opening or operating a business within the designated non-compete zone contained in the 2000 Stock Purchase Agreement ("2000 Agreement") and (3) a declaration that the Plaintiffs breached the 2000 Agreement by naming their new nail salon "Iris Nail" thereby diverting the goodwill of Defendants.

Facts

Plaintiff Kyong Mi Park (Ms. Park) and Ms. Han are the respective owners of two competing nail salons on the Upper East Side of New York City. Plaintiff Capri Nail Corp. ("Capri Nail") operates Iris Nail Salon located at 1217 Madison Avenue at 88th Street. Defendant Iris Nail operates Carnegie Nails (formerly known as Iris Nail Salon), located at 1306 ½ Madison Avenue at 93rd Street.

Prior to September 7, 1999, Ms. Park was the sole owner of Iris Nail. Ms. Han worked for Ms. Park as a manager at the nail salon. On September 7, 1999, Ms. Park and Ms. Han

entered into a Shareholder's Agreement ("1999 Agreement") through which Ms. Park sold 50% of her interest in Iris Nail Corporation to Ms. Han.

On September 20, 2000 Ms. Park and Ms. Han entered into a second agreement ("2000 Agreement"). In that agreement Park relinquished her 50% ownership in Iris Nail (currently Carnegie Nails) to Han, who thereafter became the sole owner and operator of the salon. The parties also agreed upon a non-compete clause. That non-compete provision stated:

The parties agree he/she and his/her spouse and/or family member will not directly or indirectly own, manage, operate, control, be employed by participate in, or be connected in any manner with the ownership, management operation or control any business which will compete with each other within five (5) blocks North and South and one (1) block East and West of the existing location at 1306 ½ Madison Avenue, New York, NY and 1217 Madison Avenue New York, NY as long as the parties maintain ownership, interest at the two business location [sic].

This litigation arose out of Plaintiffs' attempt to open two nail salons. Prior to the 2000 Agreement and in contravention of the 1999 Agreement, Ms. Park opened a new Nail salon at 1217 Madison Avenue at 88th Street and named it "Iris Nail." Defendants argue that Plaintiffs' use of the name "Iris Nail" at the new salon is diverting the goodwill they purchased from Plaintiffs. The second salon at issue is located at 1097 Madison Avenue at 83rd Street and was in the middle of construction when this action was commenced. By Order of dated January 12, 2004, this court granted the Defendants a preliminary injunction preventing Ms. Park from opening a nail salon at this location based on the 2000 Agreement's non-compete clause.

Discussion

Summary Judgment

Defendants' motion for summary judgment to dismiss the complaint must be denied

because there are material issues of fact in dispute. On a motion for summary judgment the court determines whether the uncontraverted facts entitle a movant to judgment as a matter of law. (McKinney's CPLR §3212(b); Barr, Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial* [2004] §37:01). A party is entitled to summary judgment if the sum total of the undisputed facts, through papers and proofs submitted, establish the elements of a claim as a matter of law (McKinney's CPLR §3212(b); Barr, Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial* [2004] §37:80). For a claim or defense to be established as a matter of law, the summary judgment movant must come forward with facts to establish each element of a claim. (Siciliano v. Forchelli & Forchelli, 793 N.Y.S.2d 102, 2005 Slip Op. 02645 [2005]).

Under the 2000 Agreement, the Plaintiffs agreed to sell and the Defendants agreed to purchase 100 shares of stock for \$30,000 (Defendants Exhibit E, 2000 Agreement, Par 16). It provided that “fixtures, equipment, merchandise, inventory, chattels, etc., contained on the premises, belong to the Corporation, limited only by the security agreement hereinbefore set forth.” (Defendants' Exhibit E, 2000 Agreement, Par 14). The plaintiffs' goodwill was not specifically listed as an asset to be sold nor was it expressly excepted from the sale.

Here it is alleged that the Plaintiff interfered with the goodwill purchased by the Defendant by naming the nail salon 5 blocks away “Iris Nail”. There are questions as to whether the name “Iris Nail” was transferred in the sale for exclusive use by Ms. Han and whether use of the name by Ms. Park violated the non-compete clause of the 2000 Agreement. It is possible that Ms. Park sold the goodwill and trade name for the particular store, but has not agreed to refrain from doing business in her own name. (*See Julius Bien Co. v. Franklin*, 87 Misc. 434, 151 N.Y.S. 23 [Sup. Ct. NY 1914]). Whether Ms. Park interfered with any goodwill purchased by Defendants, whether exclusive use of the name “Iris Nail” was transferred in the sale and if

use of the name violated the non-compete clause of the 2000 Agreement are material facts in dispute. The counterclaim has not been established as a matter of law sufficient to survive a motion for summary judgment and the Defendants' motion is denied.

Permanent Injunction

A permanent injunction is a drastic remedy which may be granted only when the party seeking it demonstrates that it will suffer irreparable harm absent the injunction. (ICY Splash Food and Beverage, Inc. v. Henckel, 14 A.D.3d 595 [2nd Dept. 2005]). In this case there was an express covenant not to compete in the 2000 Agreement. Defendant argues that Plaintiff should be permanently enjoined from opening a nail salon at 1097 Madison Avenue and 83rd Street because it would violate the non-compete clause.

Evidence was presented that the parties are restricted from opening, operating or participating in any nail salon type business within the designated non-compete zone. The 2000 Agreement's non-compete zone encompasses the area from 83rd Street to 98th Street between Fifth and Park Avenues (see Plaintiff's Order to Show Cause Exhibit 2).

Pictures were submitted by the Defendants of the corner of 83rd Street and Madison Avenue. The pictures clearly indicate, and it has been established as a matter of fact, that 1097 Madison Avenue is on the corner of 83rd Street and is not located between 82nd and 83rd as the Plaintiffs allege. (Affirmation of J. Cullen Howe, Exhibit A).

Defendants Han and Iris Nail Corp. have met their burden of proof and established by a preponderance of the evidence that 1097 Madison Avenue is on 83rd Street and therefore in violation of the non-compete clause in the 2000 Agreement. Accordingly, Defendants' motion for a permanent injunction barring Plaintiff from opening and operating a nail salon at 83rd Street and Madison Avenue is granted.

Declaratory Relief of Breach of the 2000 Agreement

Defendants' remaining counterclaim for declaratory relief is denied as the counterclaim fails to plead a cause of action as required by CPLR 3017(b). Accordingly it is

ORDERED that Defendants' summary judgment motion is denied; and it is further

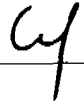
ORDERED that Defendants' motion for a permanent injunction is granted; and it is further

ORDERED that Defendants' request for declaratory relief is denied.

Counsel for the parties are directed to appear for a pre-trial conference on Friday June 17, 2005 at 11:00am in IAS Part 15, Room 335, New York County Courthouse, 60 Centre Street New York, New York.

Dated: 5/31/05

FILED
JUN - 2 2005
NEW YORK
COUNTY CLERK'S OFFICE



HON. WALTER B. TOLUB J.S.C.