

Postworks, LLC v Pickled Punk Pictures, Inc.

2005 NY Slip Op 30257(U)

July 14, 2005

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

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

PRESENT: ~~Richard B. Lowe III~~
Richard B. Lowe III
Justice

PART 444-564

Postworks, LLC

INDEX NO. 600273/05

MOTION DATE 2/2/05

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Richard B. Lowe III

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FILED
JUL 20 2005
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 7/14/05


RICHARD B. LOWE III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
POSTWORKS, LLC,

Plaintiff,

-against-

Index No. 600273/05

PICKLED PUNK PICTURES, INC.,
and ALEX HALPERN,

Defendants.

-----X

Richard B. Lowe III, J.:

Plaintiff PostWorks, LLC, moves for an order pursuant to CPLR 7102 (d) (1), 6301, and 6311 directing the New York City Sheriff or a City Marshall to seize certain film editing equipment and enjoining defendants pendente lite from interfering with PostWorks' right to certain accounts receivables, from tortiously interfering with its contractual relationships with its clients and employees, and from disclosing its confidential and proprietary commercial information to third parties.

In a related action arising out of the same agreements as does the action at bar, plaintiffs Pickled Punk Pictures Inc., d/b/a Post Factory, N.Y., and Alex Halpern, its president, move for an order pursuant to CPLR 6301 and 6311 maintaining the status quo between enjoining defendants PostWorks, LLC, and David Rosen, its principle, pendente lite from entering Pickled Punk's premises, except for the purpose of performing ongoing services for their mutual clients, from removing certain film editing equipment, and from

interfering with Pickled Punk's business, including interfering with the collection of its accounts receivables. See Pickled Punk Pictures, Inc. d/b/a Post Factory, N.Y. & Alex Halpern v PostWorks, LLC & David Rosen, Sup Ct, NY County, index no. 600266/05 (the Pickled Punk action).

PostWorks Action Allegations

PostWorks is in the business of post-production film editing, primarily on television projects. Its principal is David Rosen. Defendant Pickled Punk Pictures, Inc., is also in the business of post-production film editing, but primarily for feature films. Defendant Alex Halpern is president of Pickled Punk and owns 100% of its capital stock.

In this action, PostWorks alleges that, in May 2004, PostWorks and Pickled Punk entered into a license agreement effective June 1, 2004, permitting PostWorks to operate Pickled Punk as a PostWorks division for one year, in contemplation of PostWorks' proposed purchase of Pickled Punk's assets or, in the alternative, substantially all of its capital stock.

The agreement is primarily memorialized in an e-mail prepared by Rosen, dated May 12, 2004. Pursuant to the May 12 agreement, PostWorks agreed to pay the ordinary operating expenses of Pickled Punk incurred after June 1, 2004, and, in exchange, Pickled Punk granted PostWorks the right to collect all of the accounts receivables generated by work or services performed after that date. The May 12 agreement also provides that Pickled Punk would retain liability for all debt that arose prior to June 1, 2004, and owned

all receivables generated prior to that date.

Beginning on June 1, 2004, Pickled Punk's employees were either hired by PostWorks, or their positions were terminated. PostWorks hired Halpern as an employee on June 1, 2004, and later terminated his employment on January 21, 2005. The parties disagree as to whether Halpern was employed by PostWorks full time or part time

Pursuant to the May 12 agreement, PostWorks obtained the right to use Pickled Punk's trade name, "Post Factory," in exchange for payment of a license fee, or royalty, of \$75,000, in 12 equal monthly installments. The agreement permitted PostWorks to generate invoices under the trade name for work performed by Pickled Punk after June 1, 2004, and funded by PostWorks.

Beginning on June 1, 2004, Halpern, while a PostWorks employee, and PostWorks generated new accounts and new business under the Post Factory name. PostWorks alleges that, therefore, all current clients of Post Factory are clients of PostWorks d/b/a Post Factory.

On June 6, 2004, PostWorks opened a checking account at Wachovia Bank, NA, in the name of PostWorks d/b/a Post Factory (the DBA account) in order to deposit the post-June 1 accounts receivables proceeds and to pay Pickled Punk's daily operating expenses. Pursuant to a security agreement with Wachovia, PostWorks granted the bank a security interest in "all personal property of [PostWorks] . . . including . . . all accounts, equipment . . . deposit accounts."

PostWorks began depositing all proceeds of the accounts receivables into the DBA account, allegedly with the full knowledge and consent of Pickled Punk and Halpern. From June 1, 2004, through January 13, 2005, Pickled Punk and Halpern assisted and cooperated with PostWorks in the deposit of the proceeds into the DBA account.

Meanwhile, in August or September 2004, PostWorks allegedly placed approximately \$1.5 million of its film editing equipment in Pickled Punk's premises, in order to preserve and build the business. PostWorks allegedly charged Pickled Punk a rent equal to approximately 25% of the usual market rate. PostWorks recovered the rental cost of the equipment from the proceeds of the receivables. PostWorks alleges that it retained the right to terminate the rental agreement at any time and for any reason or no reason and regularly removed and replaced equipment as needed and as determined by PostWorks.

On January 13 and 14, 2005, Pickled Punk and Halpern received 13 checks payable to PostWorks d/b/a Post Factory in the aggregate amount of \$40,349.20. PostWorks alleges that the checks were tendered by third parties in satisfaction of PostWorks invoices, and that it had fully funded all expenses relating to the invoices. PostWorks alleges that Halpern, while in its employ, deposited the checks into a bank account maintained by Pickled Punk.

PostWorks alleges that Halpern advised it that Pickled Punk used the funds to pay a debt to nonparty Karen Kourtesis that Halpern had guaranteed in his personal capacity.

The debt was scheduled by Pickled Punk as payable on its April 30, 2004, balance sheet. PostWorks alleges that, therefore, the debt was solely the responsibility of Pickled Punk, in accordance with the terms of the May 12 agreement.

PostWorks alleges that, despite due demand, Pickled Punk and Halpern have paid only \$349.20 of the funds to PostWorks. PostWorks also alleges that defendants' actions have caused it to default on its obligation under the Wachovia agreement to deposit the receivables proceeds into the DBA account.

Following defendants' refusal to turn over the receivables proceeds in full, by letter dated January 21, 2005, PostWorks terminated Pickled Punk's right to use the subleased equipment and demanded immediate return of it. PostWorks also terminated Halpern's employment and its agreement to pay Pickled Punk's day-to-day operating expenses, including its rent.

Defendants have not returned the subleased equipment to PostWorks. PostWorks alleges that defendants intend to use the equipment in competition against PostWorks and in an effort to divert PostWorks' clients to itself. PostWorks also alleges that defendants have failed to provide adequate assurances that they will take all necessary steps to protect, secure, and maintain the equipment, and that they lack the financial and human resources to do so.

PostWorks also alleges that Halpern, while in its employ, had access to its highly confidential and proprietary commercial information, including PostWorks' digital

intermediary processes and systems related to the finishing end of post-production film services and its customer lists.

In the complaint, PostWorks seeks to enjoin defendants from instructing clients to pay Pickled Punk, rather than PostWorks, and from accepting and retaining clients' payments which rightfully belong to PostWorks. PostWorks also seeks to enjoin defendants from slandering PostWorks' business reputation and from attempting to induce PostWorks' employees to quit. PostWorks seeks to enjoin Halpern from disclosing to third parties confidential and proprietary information he learned while a PostWorks employee. PostWorks also seeks an order directing defendants to return the editing equipment immediately or directing the City Marshall or Sheriff to take all action necessary to replevy the equipment.

PostWorks also asserts a cause of action against Pickled Punk and Halpern for breach of the equipment rental agreement and seeks to recover \$141,149.50 in unpaid and accrued rental fees, together with interest. PostWorks also asserts a claim against them for breach of its contractual right to Pickled Punk's accounts receivables proceeds and seeks to recover \$40,000 in proceeds received in January 2005, together with interest.

Last, PostWorks asserts a claim against Halpern for breach of his duty of loyalty as a PostWorks employee by appropriating PostWorks confidential and proprietary information for his own use and benefit and seeks to recover \$2.5 million, together with interest.

Pickled Punk Action Allegations

In the related Pickled Punk action, Pickled Punk and Halpern allege that, in May 2004, Halpern and Rosen, on behalf of their respective companies, entered into a license agreement having no more than a one-year term, pursuant to which PostWorks would lease editing equipment to Pickled Punk; pay a \$75,000 license fee to use the Post Factory name; pay Pickled Punk's operating expenses, including rent and Halpern's salary; and pay Halpern a 10% commission on business he referred to PostWorks, and, in return, PostWorks would receive Pickled Punk's revenues. Pickled Punk would continue to bill clients, but would turn its revenue, including net profits, over to PostWorks and Rosen. If Pickled Punk's earnings were at least 10% of its gross revenues, then PostWorks would purchase substantially all of Pickled Punk's assets, but not assume its liabilities, for a price equal to four times earnings before interest, taxes, depreciation, and amortization, minus the \$75,000 annual license payment.

The license agreement became effective on June 1, 2004. Pickled Punk alleges that it earned net profits exceeded \$40,000 in September 2004 and in October 2004.

Pickled Punk alleges that, pursuant to an October 22, 2004, e-mail, the parties modified the terms of the May 12 agreement. Under the agreement as modified, PostWorks would purchase Pickled Punk's equipment for approximately \$380,000, of which approximately \$110,000 would be applied to Pickled Punk's outstanding Small Business Administration (SBA) loan, and would assume the \$300,000 balance of the SBA

loan and Pickled Punk's trade accounts payable. Pickled Punk also alleges that PostWorks agreed to provide Halpern with a three-year employment contract at a base salary of \$80,000, plus commissions and a 20% profit participation. The license agreement would remain in place until the closing of the asset purchase.

However, PostWorks alleges that, although Rosen and Halpern worked toward a new agreement in the fall of 2004, no such agreement was ever reached, and that the October 22, 2004, e-mail merely sets forth terms for Halpern's confirmation, which was never given. PostWorks further alleges that, throughout November and December 2004, the proposed terms were constantly changed by Halpern and that new issues were raised, such as Pickled Punk's tax status and the assumption by PostWorks of Pickled Punk's master lease and SBA loan.

Pickled Punk alleges that the trade accounts payable assumed by PostWorks under the October 22 modification included the \$40,000 debt to Ms. Kourtesis. Pickled Punk also alleges that PostWorks and Rosen knew of the debt's existence when they agreed to assume Pickled Punk's accounts payable. PostWorks and Rosen deny such agreement or knowledge.

Halpern alleges that, in December 2004, and with Rosen's knowledge, he agreed to repay Ms. Kourtesis by January 15, 2005, and, in exchange, she agreed not to pursue the far larger amount that she claimed she was owed (see Kourtesis v Pickled Punk Pictures, Inc. d/b/a Post Factory, Sup Ct, NY County, index no. 115955/04).

Pickled Punk alleges that PostWorks and Rosen breached the terms of the license agreement, as modified, by failing: to pay the monthly license fee beginning in November 2004; to pay Pickled Punk's daily operating expenses; to assume Pickled Punk's accounts payable, including the debt to Ms. Kourtesis; to pay the salaries of Halpern and one other employee; to pay Halpern earned commissions since November 2004; to pay employee benefits; to provide Halpern with an accounting of his earned commissions; and to pay the monthly license fee installments.

Pickled Punk further alleges that, given PostWorks' repudiation of the agreement, Halpern paid Ms. Kourtesis \$40,000 of the receivables proceeds that he would otherwise have forwarded to PostWorks. Halpern so advised Rosen on January 14, 2005.

In the Pickled Punk action complaint, Pickled Punk seeks to enjoin PostWorks from entering its offices, seizing the editing equipment, and interfering in its collection of its accounts receivables or in its business operations. Pickled Punk asserts causes of action for failure to negotiate in good faith, fraud, and breach of the license agreement, as modified. Pickled Punk also asserts a claim for unjust enrichment by retention of Pickled Punk's October 2004 profits. Halpern asserts claims for breach of contract in failing to pay his wages and accrued commissions and seeks statutory and common-law damages, including payment of reasonable attorneys' fees.

Temporary Restraining Order

By temporary restraining order (TRO) dated January 26, 2005, issued in the

Pickled Punk action, this court granted Pickled Punk's motion and restrained PostWorks and Rosen from entering Pickled Punk's premises, from attempting to seize or seizing the leased equipment, from attempting to collect or collecting the accounts receivables proceeds and directing that Pickled Punk hold the proceeds and disburse them only for expenses arising in the ordinary course of business, and from taking any action to interfere with Pickled Punk's business. The court also directed Pickled Punk to provide PostWorks with proof of property and liability insurance to protect the editing equipment and to file an undertaking in the amount of \$85,000.

By TRO dated January 26, 2005, issued in the PostWorks action, this court resolved PostWorks' request for a TRO in accordance with the Pickled Punk action TRO.

The Motions

In the PostWorks action, PostWorks now seeks an order pursuant to CPLR 7102 (d) (1) directing the New York City Sheriff or a City Marshall to seize the subleased equipment and pursuant to CPLR 6301 enjoining Pickled Punk and Halpern pendente lite from interfering with PostWorks' right to accounts receivables generated from June 1, 2004, through January 13, 2005, from tortiously interfering with its contractual relationships with its clients and employees, and from disclosing its confidential and proprietary commercial information to third parties.

In the Pickled Punk action, Pickled Punk seeks a preliminary injunction maintaining the status quo between the parties by enjoining PostWorks and Rosen

pendente lite from entering Pickled Punk's premises, except for the purpose of performing ongoing services for their mutual clients; from removing certain film editing equipment; and from interfering with Pickled Punk's business, including the collection of its accounts receivables.

That branch of PostWorks' motion to replevy the editing equipment is granted in part and that branch of Pickled Punk's motion to retain the equipment is denied.

To demonstrate entitlement to an injunction directing a party to perform a particular act or requiring a party to refrain from certain behavior, the plaintiff must show a probability of success on the merits, the danger of irreparable injury in the absence of the injunction, and that a balancing of the equities lies in its favor (Grant Co. v Srogi, 52 NY2d 496 [1981]; see CPLR 6301). Moreover, section 7101 of the CPLR permits a party to obtain an order of seizure to recover property wrongfully detained (General Elec. Co. v American Export Isbrandtsen Lines, Inc., 37 AD2d 959 [2d Dept 1971]).

Whether or not PostWorks properly terminated the equipment lease agreement in January 2005, it is clear that PostWorks has a superior possessory right to the equipment at this time. Pickled Punk and Halpern concede that the lease agreement naturally expired earlier this year, on May 31, 2005, and that PostWorks has a right to return of the equipment after that date (see Halpern Feb. 1, 2005, aff in Pickled Punk action, ¶ 17). The court notes that they also concede that Pickled Punk is "willing to pay" the equipment lease rates previously billed by PostWorks "for as long as it leases the Equipment" (id., ¶¶

21, 22). Therefore, the parties are directed to arrange for PostWorks to retrieve the equipment at a mutually convenient date and time, no later than 10 days after service of a copy of this order with notice of entry.

Regarding the identification of the equipment leased, PostWorks admits that it placed and removed equipment at Pickled Punk's premises during the course of the May 12 agreement and does not dispute Pickled Punk's contention PostWorks' inventory list is inaccurate and that some of the equipment listed as leased had been misidentified or had been purchased outright by Pickled Punk or that leased equipment had been omitted from the list altogether. Therefore, PostWorks is entitled to replevy only the equipment identified by Halpern as leased by Pickled Punk from PostWorks (see id., ¶¶ 19, 21, exh D).

The parties next dispute which of them has the right to the accounts receivables generated through January 21, 2005, the outside date that PostWorks itself admits that it terminated the agreement. Each seeks to enjoin the other from collecting and retaining the proceeds.

PostWorks contends that it is entitled to recover approximately \$340,000 in unpaid receivables generated through January 21, 2005, while Pickled Punk contends that the disputed amount equals \$179,212.19. As to the proceeds actually received through January 21, 2005, it appears from the parties' factual allegations that Pickled Punk forwarded to PostWorks all such proceeds, with the exception of the \$40,000 that it paid

to Ms. Kourtesis, allegedly with PostWorks' prior knowledge and agreement.

PostWorks bases its claim to the accounts receivables on the May 12 agreement. Pursuant to the agreement's last paragraph, "it is the intention of the parties that, during the term of the License Agreement, Post Factory [will] be operated as if it were a division of Post Works in that Post Works will manage and receive all accounts receivable and be responsible to pay the day-to-day current trade debt of Post Factory." Therefore, pursuant to the express terms of the May 12 agreement, PostWorks is entitled to all of the receivables proceeds generated through the end of the agreement term, or, January 21, 2005, at the latest.

However, Pickled Punk contends that PostWorks repudiated the agreement by refusing to pay its operating expenses, beginning in October 2004, when the parties began negotiating modifications to the May 12 agreement, and by refusing to pay the license fee beginning in November 2004. PostWorks denies this contention.

While parties vehemently dispute which of them breached the agreement first, it is clear from the record that, with regard to the accounts receivables, they each seek a monetary award. Injunctive relief is not appropriate where the moving party has an adequate remedy at law and can be fully compensated by a monetary award (Neos v Lacey, 291 AD2d 434 [2d Dept 2002]). Therefore, the branches of the motions to enjoin PostWorks and Pickled Punk from collecting and retaining the accounts receivables are denied.

The court notes that, although the parties allege that some clients have expressed concern that they will be held liable to both parties on the same account, such concern is not warranted. The final disposition of this action will necessarily determine which of the parties is entitled to collect the accounts as yet unpaid.

That branch of Pickled Punk's motion to enjoin PostWorks from "occupying" its premises is granted. PostWorks admittedly ceased paying Pickled Punk's rent on the premises no later than January 21, 2005, and, therefore, no longer has a right to possession of any portion of the premises.

That branch of PostWorks' motion to enjoin Halpern from disclosing its confidential and proprietary information and using its customer lists in order to compete against PostWorks is denied. A present or former employec may not compete with his or her employer by the unauthorized use of proprietary information or trade secrets or other fraudulent methods (Walter Karl, Inc. v Wood, 137 AD2d 22 [2d Dept 1988]; see, Reed, Roberts Assoc. v Strauman, 40 NY2d 303 [1976]). However, "an employee's recollection of information pertaining to specific needs and business habits of particular customers is not confidential" (Walter Karl, Inc. v Wood, 137 AD2d at 27). Here, PostWorks has failed to demonstrate that Halpern has obtained such information or that he intends to use such information without authorization.

Regarding the customer lists, injunctive relief is not warranted where, as here, the moving party fails "to show that its customer lists were of such a nature that they were

entitled to trade-secret protection" (NCN Co. v Cavanagh, 215 AD2d 737, 737 [2d Dept 1995]). Trade-secret protection will not attach to customer lists where the identities of the customers are readily ascertainable from sources outside the moving party's business (Ashland Mgt. Inc. v Janien, 82 NY2d 395 [1993]; Walter Karl, Inc. v Wood, 137 AD2d 22, *supra*).

That branch of PostWorks' motion to enjoin Pickled Punk and Halpern from slandering and disparaging it on television and within the post-production film editing industry has been previously resolved by the parties. By so-ordered stipulation dated January 25, 2005, in the PostWorks action, PostWorks, Pickled Punk, and Halpern stipulated that "[t]he parties will not disparage & slander one another to clients and others in their industry."

In a related branch of PostWorks' motion, PostWorks seeks to enjoin Halpern from inducing, or attempting to induce, any of its employees to leave its employ. This branch is denied on the ground that PostWorks has wholly failed to point to any evidence that Halpern has, in fact, attempted to do so or intends to do so.

Accordingly, it is

ORDERED that the motion of plaintiff PostWorks, LLC, is granted to the extent that the parties are directed to arrange for PostWorks to retrieve the leased equipment, as identified by defendants Pickled Punk Pictures, Inc., and Alex Halpern in their motion papers in the related action, Pickled Punk Pictures, Inc. v Post Works, LLC, Sup Ct, NY

County, index no. 600266/05, at a mutually convenient date and time, no later than 10 days after service of a copy of this order with notice of entry.

Dated: July 14, 2005

ENTER:



J.S.C.

RICHARD B. LOWE III

FILED

JUL 20 2005

NEW YORK
COUNTY CLERK'S OFFICE