

<b>Integrated Data Mgt. Sys., Inc. v Artina Group</b>
2007 NY Slip Op 30060(U)
March 2, 2007
Supreme Court, Suffolk County
Docket Number: 0025314
Judge: William B. Rebolini
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 SUFFOLK COUNTY**

PRESENT:

**WILLIAM B. REBOLINI**  
**Justice**

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Integrated Data Management Systems, Inc.

Plaintiff

-against-

The Artina Group and Nicholas Colucci,

Defendants

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Motion date: 9/18/06

Submitted: 1/24/07

Motion Sequence No.: 001 Mot Adj  
002 MD  
003 Mot D  
004 MD

Index No.: 25314-06

Attorney for Plaintiff:

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Upon the following papers numbering 1 to 18 read upon these four motions:

Order to Show Cause and supporting papers 1 - 4;

Notice of Cross Motion and supporting papers 5 - 7;

Order to Show Cause and supporting papers 8 - 10;

Notice of Cross Motion and supporting papers 11 - 12;

Affidavit in Opposition and supporting papers 13 - 14, 15 - 16;

Reply Affidavits and supporting papers 17 - 18; it is

**ORDERED** that this motion (001) by plaintiff, Integrated Data Management Systems, Inc. ("plaintiff") brought by order to show cause (Baisley, J., 9/8/06) for a preliminary injunction inter alia enjoining defendants The Artina Group, Inc. and Nicholas Colucci ("defendants") from promoting any product or service or conducting business under the names IDMS and Account Ability®; from using the names, likeness and logo belonging to plaintiff to promote defendants'

business; from advertising, marketing, or soliciting any of plaintiff's customers with claims that the tax forms defendants sell are compatible with Account Ability® software owned by plaintiff is adjourned until April 11, 2007 at 9:30 when a hearing will be held; and it is further

**ORDERED** that this cross motion (002) by defendants for an order dismissing plaintiff's complaint and for sanction is denied; and it is further

**ORDERED** that this separate motion (003) by defendants brought by order to show cause (Blydenburgh, J., 11/21/06) for an order clarifying the temporary restraining order set forth in plaintiff's order to show cause is granted to the extent that the same was addressed by Justice Blydenburgh on November 21, 2006 and memorialized in defendants' order to show cause; and it is further

**ORDERED** that that part of defendants' motion for an order vacating the temporary restraining order if plaintiff does not substitute a viable corporation authorized under New York State Law is denied; and it is further

**ORDERED** that that part of defendants's motion for an order setting this matter down for a hearing is granted; and it is further

**ORDERED** that this cross motion (004) by plaintiff, Integrated Data Management Systems, Inc. ("plaintiff") for order permitting plaintiff discovery of defendants' books and records prior to a hearing on the amount of undertaking is denied.

According to plaintiff's complaint, plaintiff is a New York Corporation in the business of designing and creating computer software. As pertinent to the instant action, plaintiff claims that in 1984 it created a software application know as Account Ability®, which is a Windows based program designed to operate on personal computers. According to plaintiff, this program allows professionals and businesses to coordinate financial information to conform to year end tax reporting requirements. Defendant on the other hand, is in the business of providing accounting and property management software publishers with private label forms programs.

In his affidavit in support of the order to show cause, Jeffrey Goldstein, President and Principal Shareholder of the plaintiff corporation claims that during the period 1995 to 2000, the parties operated under a year to year agreement wherein plaintiff licensed the Artina Group to advertise, solicit and market properly formatted tax forms, envelopes and related items to work in conjunction with the Account Ability® software. Defendant was to get pre-approval on all advertising literature and form modifications and defendant was to provide training to their employees to provide customer service. In exchange, plaintiff provided defendant with up-to-date customer lists and contact information and permitted defendant to establish a website with a shopping cart where IDMS customers would order tax forms. According to plaintiff, defendant was permitted to use the name IDMS and Account Ability® in its advertising and sales. No written agreement is provided.

Attached to defendant's cross motion is an agreement that was entered between IDMS,

Inc. (plaintiff) and OCR Data Systems, Inc., now doing business as The Artina Group (defendant) wherein defendant agreed to produce at no cost to plaintiff an IDMS forms brochure to be included by certain software packages marketed by plaintiff. Defendant was responsible for accepting, printing, shipping and billing all orders under the name of IDMS Forms and was to provide knowledgeable customer service. The initial term of the agreement was three years, with the agreement automatically renewing every year unless notice was provided ninety days prior to the end of the current year.

Whether the parties were operating under the year to year licensing agreements or the written agreement as extended, it appears that in 2004 the business relationship began to sour. In order to appease plaintiff, defendant by letter dated June 30, 2004 apologized for problems of last year and offered to increase royalties from 25 percent to 30 percent. Plaintiff claims that in the year 2005, it received numerous customer complaints regarding the service it was receiving from Artina and later learned that defendant had unilaterally modified the forms and envelopes which were consequently no longer compatible with the software. Plaintiff states that it notified defendant on or before August 1, 2006 that plaintiff was going to resume selling forms to its own customers. Thereafter, defendant continued to sell products to the public under the aforementioned website, but removed the direct link to IDMS. Plaintiff by letter to an employee of the Artina Group demanded that the link be reinstated or that Artina dismantle the website and cease to use all logos and associations relating to IDMS, Inc. In response defendant, Colucci informed Goldstein that plaintiff was circumventing the parties' agreement by selling forms and referred further correspondence to himself or defendant's lawyer. Plaintiff responded by indicating that no agreement exists between plaintiff and Artina Group, that the original agreement was with plaintiff and OCR and a new agreement was never entered with Artina Group and that the parties continued to operate without an agreement.

Plaintiff then commenced this action seeking inter alia a permanent injunction enjoining defendant from using the names IDMS or Account Ability® in the connection with defendant's business and that defendant be restrained from contacting or soliciting or selling tax forms to plaintiff's customers. Plaintiff also seeks compensatory and treble damages, and an accounting. Plaintiff simultaneously moved for a preliminary injunction and sought and received a temporary restraining order in the order to show cause that was signed by Justice Baisley on September 8, 2006. This temporary restraining order was extended as modified until further order of the court by Justice Blydenburgh, who after hearing oral argument, issued the following order:

It is ORDERED pending further order of this Court the Defendant the Artina Group and Nicholas Colucci, its principal shareholder, and all persons acting under their direction or control or in concert with them, be and hereby are enjoined and restrained from promoting or advertising the business of The Artina Group or any other business utilizing the names, likenesses, logos or other depiction or reference to the Plaintiff's names, IDMS and or Account Ability®, or any other simulation, derivation or approximation thereof, either alone or in conjunction with other words and it is further,

ORDERED that pending further order of this Court the Defendant The Artina Group and Nicholas Colucci and all persons acting under their direction or control

or in concert with them be and hereby are enjoined and restrained from soliciting any new business from the customers of IDMS and or Account Ability® software licensees under the name “IDMS TAX FORMS DIVISION” or making any sales to said customers and software licensees.

Justice Blydenburgh later clarified that “Nothing in the Order shall be deemed to prohibit The Artina Group from claiming its tax forms are compatible with IDMS and/or Account Ability® software and it may refer to such names in its website, brochures and advertising materials and it may sell such tax forms to any customers except as specifically prohibited by this Order.


In order to prevail upon a motion for a preliminary injunction, the movant must demonstrate by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant’s position” (Amana Express Int., v. Pier-Air Int., 211 AD2d 606, 606, 621 NYS2d 108). In the absence of an agreement to the contrary, “[s]olicitation of an employer’s customers by a former employee through the use of a customer list is not actionable unless the customer list is considered a trade secret or there was wrongful conduct by the employee such as physically taking or copying the employer’s files for using confidential information (see Easter Bus. Sys. v. Speciality Bus. Solutions, 292 AD2d 336, 338, 739 NYS2d 177 (Apa Sec., Inc. v. Apa, \_\_AD3d\_\_, 2007, WL466356 [2d Dept. Feb. 13, 2007])).

Here the court finds factual questions requiring a hearing on whether plaintiff has a likelihood of success as the merits, including but not limited to what agreement, if any governs the parties’ relationship, whether defendants unilaterally changed the forms, whether plaintiff properly terminated its relationship with defendant, whether defendant properly removed the link on its website to plaintiff’s services. There are also factual questions regarding the equities in this case.

Plaintiff’s motion for discovery on defendant’s books and records prior to the hearing is denied. Plaintiff seeks this information on the question of the undertaking, but the court finds it sufficient to consider only plaintiff’s financial status as this time.

Defendants move to dismiss plaintiff’s complaint and for sanctions claiming that plaintiff is a non-existent corporation. However, according to the New York State Department of State Division of Corporations website, Integrated Data Management Systems, Inc. is an active corporation with an original filing date of October 10, 1983. Accordingly defendant’s motion to dismiss is denied.

Dated: March 2, 2007

  
HON. WILLIAM B. REBOLINI, J.S.C.