

**Atlas El. Corp. v United El. Group, Inc.**

2007 NY Slip Op 30105(U)

February 26, 2007

Supreme Court, Queens County

Docket Number: 0029185

Judge: Orin R. Kitzes

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. ORIN R. KITZES**  
**Justice**

**PART 17**

-----X  
**ATLAS ELEVATOR CORP.,**

**Plaintiff,**

**-against-**

**Index No. 29185/06**  
**Motion Date: 2/21/07**

**Motion Cal. No. 4**

**UNITED ELEVATOR GROUP, INC. and RON LISKA**  
**Defendants.**

-----X  
The following papers numbered 1 to 14 read on this application by plaintiff, pursuant to CPLR 6301 enjoining defendants from using certain business related information; and cross-motion by defendants pursuant to CPLR 3211 for an order dismissing the complaint against defendants.

	<u>NUMBERED</u>	PAPERS
Order to Show Cause-Affidavit-Exhibits.....		1-3
Affirmation.....		4
Affidavits of Service.....		5-6
Affirmation in Opposition.....		7
Cross-Motion-Affirmation.....		8-9
Affirmation in Reply-Affidavit.....		10-12
Cross-Motion Reply.....		13-14

Upon the foregoing papers it is ordered that this application by plaintiff, pursuant to CPLR 6301 enjoining defendants from using certain business related information; and cross-motion by defendants pursuant to CPLR 3211 for an order dismissing the complaint against defendants are denied, for the following reasons:

The underlying action involves allegations of misappropriation and use of plaintiff's confidential information whereby defendants obtained this information, that included plaintiff's clients list, and used it to secure service contracts with plaintiff's clients. Plaintiff claims that it is in the business of installing, maintaining and repairing elevators and escalators. During 2006, defendants and plaintiff entered into negotiations for the sale of the business to defendants. To prepare for the closing, plaintiff released its clients list to defendants and defendants entered into contracts with some of those clients.

However, the closing for the sale of the business did not take place and defendants have not returned the confidential information to plaintiff. Plaintiff also claims that defendants have entered into service contracts with about ten of its former clients-based solely on plaintiff's references that were made to facilitate the sale of the business. According to plaintiff, these and other bad acts not only constitute a misappropriation and use of corporate information, they are in violation of an express covenant of good faith.

Plaintiff commenced the instant action and now moves for a temporary restraining order and preliminary injunction. Specifically, it seeks, *inter alia*, an order enjoining and restraining the defendants from further use of plaintiff's confidential information, including the client list, for its own interests. Plaintiff claims the temporary restraining order is needed to protect its business from being further eroded by defendants bad acts. Plaintiff claims it has set forth sufficient facts to satisfy the needed elements for the requested relief. It has submitted, *inter alia*, the affidavit of John Blunnie, president of Atlas Elevator Corp. (hereinafter, "Atlas") Defendants oppose this application.

On an application for a preliminary injunction movant must establish the likelihood of success on the merits, irreparable injury and the balancing of equities in its favor. (Aetna Ins. Co. v. Capasso, 75 NY2d 860, 862; W.T. Grant Co. v. Srogi, 52 NY2d 496.) Plaintiff has not established the necessary elements to obtain injunctive relief, particularly irreparable injury inasmuch as money damages may eventually provide an adequate remedy. (See, Appio v. Mel Lyn Office Supplying, 222 AD2d 541; Equestrian Assocs. v. Freidus, 192 AD2d 572; Haulage Enters. Corp. v. Hempstead Resources Recovery Corp., 74 AD2d 863.) It is significant that plaintiff is still an operating business with several remaining clients and to the extent defendant has improperly taken clients, it is possible to determine the amount of work he received therefrom and thereby establish a sufficient money damage amount.

Moreover, plaintiff has failed to show the likelihood of success on the merits since it has failed to submit any evidence that supports its claims that defendants have taken clients from plaintiff. The affidavit from Mr. Blunnie does not set forth with any specificity the clients allegedly taken by defendants and plaintiff has failed to submit any evidence from a former client that it has signed an agreement with defendants. Furthermore, the balancing of equities do not favor plaintiff since there is no sufficient support for its claims of its business being damaged. Accordingly, plaintiff's application is denied.

The cross-motion seeking dismissal of the action pursuant to CPLR 3211 is denied. Defendants claims that the complaint fails to set forth a cause of action since there is no reference to an agreement for defendant to not compete. Rather, the agreement referred to merely prohibited defendants from disclosing information obtained regarding the maintenance accounts. Defendants also claim that defendant Liska is not a proper party to this action since he was merely working for the defendant corporation.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84

NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., *supra*; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, *supra*, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

A review of the complaint indicates that it sufficiently sets forth allegations that defendants breached an agreement to hold certain information confidential and to act with good faith regarding that information. Even though the agreement did not set forth non- competition language, a cause of action is sufficiently set forth since defendants are alleged to have used the confidential information in a manner that was not in good faith and detrimental to plaintiff. Moreover, there is no indication that defendant Liska was acting as a corporate agent when he facilitated co-defendant's receiving the confidential information and subsequent use of the client's list. Accordingly, plaintiff's complaint sets forth a cause of action for breach of contract and misappropriation of confidential information and its improper use. Consequently, the cross-motion is denied.

**Dated: February 26, 2007**

.....  
**ORIN R. KITZES, J.S.C.**