

Alpha Bus. Sys., Inc. v Hernandez

2007 NY Slip Op 30322(U)

March 19, 2007

Supreme Court, New York County

Docket Number: 0111746

Judge: Edward H. Lehner

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

PRESENT: EDWARD H. LEHNER
Justice

PART 19

Alpha Business
- v -
Steven Hernandez

INDEX NO. 111746/06
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

~~is granted~~ motion is decided in accordance
with accompanying memorandum decision

FILED
MAR 26 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: MAR 19 2007

hsh
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

[* 1]

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 19

ALPHA BUSINESS SYSTEMS, INC.,

Plaintiff,

Index No.
111746/06

-against-

STEVEN HERNANDEZ and ANTHONY GRIMALDI,

Defendants.

EDWARD H. LEHNER, J.:

Before the court is a motion by Alpha Business Systems, Inc. ("Alpha" or "Plaintiff") for an order enjoining Steven Hernandez ("Hernandez") and Anthony Grimaldi ("Grimaldi") (collectively "Defendants") from soliciting any of Plaintiff's customers whose identities Defendants learned while in Plaintiff's employment or with utilizing customer lists they obtained while in such employ.

Plaintiff contends: that "Alpha's business consists of selling and leasing various photocopy and facsimile machines and equipment manufactured by the Ricoh Corporation ('Ricoh'), providing service for all Ricoh photocopy and facsimile machines and equipment and selling supplies for (these machines) to various businesses located within the New York City metropolitan area" (Rick Yoswein affidavit dated October 19, 2006, ¶ 2); that Alpha "has expended large sums of money and invested countless hours in developing its customer base ... (and that) (a)ll of Alpha's employees including Hernandez and Grimaldi are apprised of the confidential nature of Alpha's customer lists, pricing and leasing

policies by the inclusion in Alpha's Employment Manual" (Id. ¶¶ 3, 4); that Hernandez was employed as a sales representative for approximately 4 years and Grimaldi was employed as a sales manager for approximately 6 years until July 10, 2006 when they were both terminated (Id. ¶¶ 6, 8); that during their employment, Defendants "were each given full and complete access to all (of) Alpha's customer lists, lease trade-up lists, service contract information and other documents relating to Alpha's customers" (Id. ¶ 7); that Defendants solicited the Dominican Consulate in December 2005, Ridgewood Presbyterian Church and Cushman & Wakefield in June 2006 (Id. ¶¶ 9, 10, 14, 16); that after their termination Defendants have continued to contact and solicit various customers of Alpha in an effort to have such customers prematurely terminate lease agreements for photocopy and facsimile equipment obtained thru Alpha and enter into new lease agreements with the Defendants or business entities affiliated with them (Id. ¶¶ 25-36), and that "a partial customer list containing approximately 700 names of active customers ... is currently in (Defendants') possession" (Rich Yoswein affidavit dated November 2, 2006, ¶ 9).

Defendants contend: that they are former employees of Plaintiff who "started our own business in the same field ... (and) now compete with Alpha" (Hernandez affidavit ¶ 2); that all their business information was on laptops in the

office and they never had a list of Plaintiff's customers, but each only had a list of their own customers and any list of Plaintiff's customers would have been in Rick Yoswein's ("Yoswein") office and they "did not have access to it" (Id. ¶¶ 3, 4); that they "never copied any list ... (nor) memorized any list of plaintiff's customers," but came to know many firms with which they had transactions while at Alpha, and came to know many of the individuals in those companies (Id. ¶ 5); that Alpha brokers leases of photocopy and facsimile machines and when a customer wants to lease equipment, Alpha orders the equipment from the manufacturer and makes its commission from the sale to a financial institution (Id. ¶6); that almost every business in New York uses photocopy and facsimile machines and their "names ... (are) readily available from public sources" (Id. ¶ 7); that they obtained customers mainly "from either cold calls, leads from other customers, or telephone solicitation through alphabetic telephone lists of businesses 'telemarketing lists' purchased from list companies ... (and) knocking on every door in any office building" (Id. ¶ 7); that names of prospective customers could be found by looking in the Yellow Pages (Id. ¶ 8); that there was "no valid agreement with Alpha by which (they) agreed not to compete with Alpha after termination of employment" (Id. ¶ 9); that as to the Dominican Consulate, Ridgewood and the other customers" Alpha repeatedly failed to properly service

machines it had placed" (Id. ¶ 12); and that any damages are compensable monetarily and an injunction would prevent them from fairly competing in the market.

"(C)ustomer lists, (which are) the result of effort and expense on the plaintiff's part and containing information which the defendant would not have obtained absent their former employment with the plaintiff, are deserving of protection" [McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Company, Inc., 114 AD2d 165, 173 (2nd Dept. 1986)]. See also, Town & Country House & Home Service, Inc. v. Newberg, 3 NY2d 554 (1958)

In *Leo Silfen, Inc. v. Cream*, 29 NY2d 387, 392, 395 (1972), it was stated that:

"(g)enerally, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the employee from soliciting his employer's customers.

* * *

In the absence of express agreement to that effect between the parties, or a demonstration that a customer list has the several attributes of a trade secret, courts, without more, should not enjoin an ex-employee from engaging in fair and open competition with his former employer. The limiting effects upon the former employee with respect to his ability to earn a living are marked and obvious."

See also, *Columbia Ribbon & Carbon Manufacturing Co., Inc. v. A-1-A Corp.*, 42 NY2d 496 (1977); *Reed, Roberts Associates, Inc. v. Strauman*, 40 NY2d 303 (1976).

Moreover, "(k)nowledge of the intricacies of a business operation does not necessarily constitute a trade secret and absent any wrongdoing it cannot be said that a former employee 'should be prohibited from utilizing his knowledge and talents in this area.' Nor will trade secret protection attach to customer lists where such customers are readily ascertainable from sources outside the former employee's business unless the employee has engaged in an act such as stealing or memorizing his employer's customer lists. Similarly, 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 22, 27 (2nd Dept. 1988)](internal citations omitted). See also, *Howard Systems International, Inc. v. IMI Systems, Inc.*, 192 AD2d 371 (1st Dept. 1993); *Norman Weil Textiles, Inc. v. Zaretsky*, 166 AD2d 380 (1st Dept. 1990); *Apa Security, Inc. v. Apa*, ___ AD3d ___, NYLJ, February 20, 2007 (2nd Dept.), 2007 WL 466356.

Here, Plaintiff has only alleged that 11 customers out of approximately 700 have been solicited by Defendants; that there was no employment agreement between Plaintiff and Defendants restraining their post-termination activity (tr. p.

14); and it is contested whether Defendants obtained any customer list. Based on the facts presented, the court finds that Plaintiff has failed to establish herein that its list of customers possesses attributes of a trade secret as it appears that they may be readily ascertainable from non-confidential sources.

In order to prevail on a motion for a preliminary injunction, the movant has the burden of demonstrating a likelihood of ultimate success on the merits; irreparable injury absent the granting of the preliminary injunction; and that a balancing of equities favors the movant's position. [Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839 (2005)]. Considering the facts herein and the public policy of fostering competition and not depriving persons of the opportunity to earn a livelihood, the motion for injunctive relief is denied.

This decision constitutes the order of the court.

Dated: March 19, 2007



J.S.C.

FILED

MAR 26 2007

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