

Solutions in Stainless v Heinowitz
2007 NY Slip Op 31352(U)
May 10, 2007
Supreme Court, New York County
Docket Number: 0103101/2007
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

SOLUTIONS IN STAINLESS, d/b/a UNITED
STAINLESS & ALLOY,
Plaintiff,

Index No.: 103101/07

Motion Date: 03/20/06

- v -

Motion Seq. No.: 01

STEVEN HEINOWTIZ, ANDREW MARKOWITZ and
INTEGRITY STAINLESS CORP.,

Motion Cal. No.: _____

Defendants.

The following papers, numbered 1 to 5 were read on this motion for a preliminary injunction.

Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2, 3, 4

5, 6

7

FILED

MAY 29 2007

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff moves by Show Cause Order, which was presented to the court on March 7, 2007, for a temporary restraining order and a preliminary injunction to restrain defendants Steven Heinowitz, its former employee, and Integrity Stainless Corp., its competitor, from unlawful use of proprietary lists of customers that it claims were improperly appropriated by the defendants. The plaintiff's complaint sets forth causes of action sounding in conversion, breach of fiduciary duty and loyalty, breach of contract, tortious interference with contract, and conspiracy.

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

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

Plaintiff is in the business of sales in the secondary steel market. It alleges that defendant Heinowitz, a sales employee for plaintiff before he was terminated, stole copies of all of plaintiff's databases, which contain contact information for all of its past, present and prospective customers, pricing and profit margin information, as well as budget and forecast information. Plaintiff also contends that defendant Heinowitz carried out this conversion while still its employee, in breach of its fiduciary and loyalty duties to the corporation. Finally, according to plaintiff, defendant Heinowitz conspired with defendant Integrity Stainless Steel, its competitor, to use the stolen data to the detriment of its business and to benefit their own business and economic advantage.

Defendants oppose the plaintiff's motion for temporary and preliminary injunctive relief.

On March 7, 2007, this court denied plaintiff's motion for a temporary restraining order. It determined that plaintiff was unable to show a likelihood of success on the merits based on plaintiff's failure on the application to provide more than a general assertion that the customers and contact information in its database were proprietary.

Upon further submissions and arguments on March 20, 2007, the court determined that plaintiff was not entitled to a preliminary injunction against defendants Integrity Stainless

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Corp., and Andrew Markowitz, a principal and sole shareholder of that company, both Ohio domiciles, which made special appearances to challenge plaintiff's claims. The court reasoned that assuming arguendo, personal jurisdiction over the Ohio defendants, plaintiff wholly failed to meet its burden to demonstrate a likelihood of success on the merits, irreparable injury absent injunctive relief and a balancing of equities in its favor as to such defendants. Doe v Axelrod, 73 NY2d 748 (1988). Plaintiff's only sworn allegation with respect to the Ohio defendants is with regard to several phone calls to defendant Integrity Stainless Corp. made by defendant Heinowitz sometime prior to his termination by plaintiff, inquiring about the availability and price of certain stainless steel for one of plaintiff customers. That isolated incident is insufficient to establish any claim against the Ohio defendants, much less that plaintiff would ultimately prevail on such claims. Plaintiff also fails to establish the other two prongs of the test for extraordinary remedial relief against the Ohio defendants. In particular, defendant Markowitz asserts, and plaintiff does not deny, that after terminating defendant Heinowitz, plaintiff continued to do business with the Ohio corporation, and, in fact, has an outstanding balance on its account with that corporation. Such evidence signifies that the equities fail to balance in plaintiff's favor, and even show unclean hands on its part.

As to plaintiff's application against defendant Heinowitz on which the court reserved decision, the court shall likewise deny preliminary injunctive relief. "In the absence of a breach of fiduciary duty, a covenant not to compete, or fraud, an employee at will is free to compete with his former employer."

Headquarters Buick-Nissan, Inc. v. Oldsmobile, 149 A.D.2d 302 (1st Dept. 1989).

Defendant Heinowitz was not a party to a covenant not to compete, so plaintiff's evidence is insufficient to demonstrate a probability that plaintiff will succeed on the merits of its breach of contract cause of action.

Plaintiff's factual allegations as to fraud and breach of fiduciary duty are also deficient. The court's in camera review of the plaintiff's unredacted customer records, which admittedly shows little overlap with the list Heinowitz brought with him when he was hired by plaintiff; Katzman's assertion that the list was compiled in plaintiff's business over many years, with ongoing updating and refinement; and that defendant Heinowitz made transactions with only about 100 of the 500 names he brought with him, are inconclusive as to whether the names and contact information were compiled by extraordinary means or not known to the secondary steel trade. Metal & Salvage Association, Inc. v. Siegel, 121 A.D.2d 200, 201 (1st Dept. 1986). In any event, there is no direct evidence and extremely weak circumstantial

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evidence in the record that defendant Heinowitz purloined plaintiff's data. For example, defendant Heinowitz's e-mail correspondence on his personal account does not establish that defendant possesses proprietary information belonging to plaintiff. The assertion of Daniel Katzman, plaintiff's principal, that on February 9, 2007, defendant Heinowitz e-mailed and downloaded "a host of proprietary and confidential information, including financial information and cash flow reports and cash flow projections" is belied by his failure to submit any of those documents for in camera review and by defendant's Heinowitz's submission of computer generated forms, which are blank or contain data that is not at all related to plaintiff's business. Therefore, plaintiff has not demonstrated probable success on the merits of its claim of breach of fiduciary duty by defendant Heinowitz's use of trade secrets in the form of proprietary lists.

Nor has plaintiff alleged any misrepresentations made by defendant Heinowitz on which it relied to its detriment, factors necessary to establish the likelihood of fraud.

Although plaintiff alleges that defendant Heinowitz breached his fiduciary and loyalty duties, by using plaintiff's time and facilities to divert its business while employed by plaintiff, there was no illegality in defendant Heinowitz's secret incorporation of a limited liability corporation or in his

identification and letting of office space prior to leaving plaintiff's employ, since plaintiff does not allege and the documentary evidence does not establish that such activities took place on plaintiff's time. Metal & Salvage, supra. Nor are plaintiff's hearsay statements about complaints from customers sufficient to establish a likelihood of success on those claims, since they are not admissible evidence that defendant Heinowitz diverted plaintiff's sales to any other business. Furthermore, plaintiff's allegations that the income to the company generated by defendant Heinowitz declined during January and February 2007, as a result of defendant's disloyalty is not supported by any record evidence. Plaintiff provides no annual data with respect to its historical monthly average sale volume, submitting data for those two months in 2007 only.

Defendant Heinowitz admits that on January 8, 2007, he e-mailed certain company files to his personal account "in order to preserve data while the computer was being reformatted." He states, under oath, that such data has not been deleted from his "e-mail storage" on advice of his attorney, but that he has not used the material in connection with anything other than for plaintiff's business prior to his termination. Neither plaintiff nor defendant submit copies of such material, and therefore plaintiff has not demonstrated that such material is proprietary. Nonetheless, based on defendant Heinowitz's

admission, the court hereby bars defendant from utilizing such material, requires him to return all such records to plaintiff, and to expunge such electronic data from any computer system to which he now has access.

Accordingly, it is

ORDERED that the motion is DENIED in all respects, except to the extent that forthwith defendant Heinowitz shall not use any of plaintiff's electronic files he e-mailed to his personal account on January 8, 2007 and shall return such files to plaintiff and then expunge such electronic files from his computer; and it is further

ORDERED that defendants shall move or answer pursuant to the New York Civil Practice Laws & Rules; and it is further

ORDERED that the parties are hereby directed to attend a preliminary conference on June 26, 2007, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York.

This is the decision and order of the court.

Dated: May 10, 2007

ENTER:

DEBRA A. JAMES J.S.C.
J.S.C.

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