

<b>Empire State Elec. Supply, Inc. v Petralia</b>
2007 NY Slip Op 31714(U)
May 21, 2007
Supreme Court, Albany County
Docket Number: 0048202/0041
Judge: Joseph C. Teresi
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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EMPIRE STATE ELECTRIC SUPPLY, INC.  
And THOMAS ZEBROWSKI,

*Plaintiffs*

-against-

**DECISION and ORDER**  
**RJI NO.: 01-04-079733**  
**INDEX NO.: 4820-04**

DAVID PETRALIA, MICHAEL CRAWFORD  
AND POWERTECH CONTROLS CO, INC., a/k/a  
POWERTECH CONTROLS CO., INC.,

*Defendants.*

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Albany County Supreme County All Purpose Term, May 7, 2007  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Defendants, Powertech Controls Co., Inc., a/k/a Powertech Controls Company, Inc. (hereinafter Powertech) and Michael Crawford bring this motion for summary judgment pursuant to CPLR § 3212 and motion to dismiss the complaint pursuant to CPLR § 3211. Defendant, David Petralia, joins the motions in the entirety. Plaintiff, Empire State Electric Supply, Inc. with Thomas Zebrowski (owner), oppose the motions.

After fully reviewing the record this Court denies Defendants' motions for summary judgment and to dismiss the complaint.

The case arose from Petralia and Crawford, former employed as salesmen by Plaintiff, leaving to work for Powertech, a local competitor. Both had signed confidentiality agreements with Plaintiff. According to Plaintiff, both men quit suddenly, telling the Plaintiff's secretary that she would soon be unemployed because Plaintiff would be going out of business. The next day Plaintiff discovered that the computer network had been sabotaged, information had been deleted, information had been transferred from the network (largely stored in two key files) to Crawford via e-mail and the back up hard copies of the information (cd-rom, diskette and paper) had been stolen. Petralia, who both designed and administered the network, was the only person who could have affected the changes. Plaintiff hired a computer technician to restore network to functioning status and to restore as much of the data as feasible. Shortly thereafter, Plaintiff learned that Crawford and Petralia had been hired by Powertech with the expectation that they would "bring a customer base." Plaintiff contacted the Colonie Police and initiated criminal charges against Crawford and Petralia for the destruction and theft of proprietary information.

Both men plead guilty to a misdemeanor charge of fifth degree possession of stolen property and admitted, accordingly, to possessing stolen property with the intention of benefitting a person other than the owner and impeding the owner's recovery of that property.

The information that is the subject of this complaint relates largely to vendor price reductions, special rates and rebates available to Plaintiff, as well as customer quotations. Much of this information was purchased by Plaintiff for business use. Despite being aware that the information was the subject of a criminal investigation, Powertech not only continued to employ Crawford and Petralia, but, according to Plaintiff, has used the stolen information to negotiate with vendors.

Plaintiff's pleadings suffice to survive dismissal pursuant to CPLR § 3211. Defendants' contend that the confidentiality agreement signed by Crawford and Petralia is unenforceable because it is unlimited in terms of time and geography. Defendants fail to recognize that such restrictions apply to covenants not to compete, not confidentiality agreements (*Express Shipping, Ltd. v. Gold*, 33 AD3d 847 [2d Dept 2006]). Further, despite Defendants' contrary claims, the pleadings, if they can be sustained by evidence, contain allegations of the necessary elements for each cause of action, stating in particular that Powertech knew about the confidentiality contract based on communication between Powertech and Plaintiff; that the information was proprietary and not easily ascertainable; and that Powertech intentionally benefitted from the stolen information by using it to negotiate favorable rates with vendors.

Additionally, this case is not ripe for summary judgment. "Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue" (*Napierski v. Finn*, 229 AD2d 869, 870 [3d Dept 1996]). The court's main function in

granting summary judgment is issue identification, rather than issue determination (See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (See Wingrad v. New York University Medical Center, 64 NY2d 851 [1985]). The party opposing the motion will be given the benefit of every reasonable inference (See Boyce v. Vazquez, 249 AD2d 724; see also Dykestra v. Winridge Condominium One, 175 AD2d 482 [3d Dept 1991]). This case is, simply put, replete with triable issues.

Defendants further contend that this Court must strike Plaintiff's complaint, or impose other sanctions, because Plaintiff has failed to produce, and has, in fact, lost or destroyed hard drives that are the subject of a discovery request. Plaintiff, in attempting to salvage the business and reconstruct its computer network, did not recreate the original system, but rather upgraded to a more secure system and made use of alternative components. Defendant contends that Plaintiff's failure to preserve the hard drives from which the data was deleted, combined with the failure of Plaintiff's computer technician to document the steps he took to salvage the information, justify dismissal of the complaint, notwithstanding the fact that Plaintiff did not, at that point, anticipate litigation (*contra New York Cent. Mutual Fire Ins. Co. v. Turnerson's Elec., Inc.*, 280 A.D.2d 65 [2d Dept 2001][plaintiffs destroyed key evidence while preparing for litigation]). This Court disagrees that Plaintiff's actions were unreasonable. Notably absent from these facts are instructions from this Court or even from Defendants to preserve the hard drives. In *Cummings v. Central Tractor Farm and Country, Inc.* (281 AD2d 792 [3d dept 2001]), relied upon by Defendant, the plaintiffs were specifically instructed to preserve the evidence in question well before discovery demands took place. Here, no such request was made despite the fact that

communications between parties and a criminal investigation gave Defendant ample opportunity to make a preservation request. Moreover, the loss of information from the hard drives is only one element of Plaintiff's injuries and Defendants retain the ability to cross-examine Plaintiff and Plaintiff's computer technician regarding the condition of and loss of the hard drives (*Cutroneo v. Dryer*, 12 A.D.3d 811 [2d Dept 2004]).

Lastly, this Court declines, as a matter of discretion, to strike Plaintiff's complaint as a sanction for alleged discovery failures.

All papers, including this Decision and Order, are being returned to the attorney for Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: May 21, 2007

Albany, New York



JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Defendant's, Michael Crawford and Powertech Controls, Co., Notice of Motion, dated April 16, 2007 with Attached Huttner Affidavit, Austin Affidavit, Crawford Affidavit, Lindmar Affidavit and Attached Exhibits A-N.
2. Defendant's, David Petralia, Notice of Motion, dated April 23, 2007 with attached Exhibit A.
3. Plaintiffs' Opposition, dated May 3, 2007
4. Plaintiffs' Separate Exhibits 1-10 and 11-22
5. Defendant's, Michael Crawford and Powertech Controls, Co., Reply, dated May 4, 2007 with Attached Lindmar Affidavit and Attached Exhibits A-C.