Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

FELIX DEVITO, et al.,

- against -

THE ENERGY CONSERVATION GROUP, LLC.

Index Number 22751 2006

Motion Date June 20, 2006

Motion Cal. Number 25

Motion Seq. No. 3

The following papers numbered 1 to 4 read on this motion by defendant Energy to dismiss the first, second, fifth, sixth and seventh causes of action asserted in the amended complaint with respect to plaintiffs Felix DeVito and Michael DeVito pursuant to CPLR 3211(a)(1), (3) and (7), to dismiss the first, second, third and fourth causes of action asserted in the amended complaint with respect to all plaintiffs pursuant to CPLR 3211(a)(7), to dismiss the fourth cause of action asserted in the amended complaint with respect to plaintiff DeVito Bros. Enterprises, Inc. f/k/a Globe Fuel Oil Co., Inc. pursuant to CPLR 3211(a)(3), and with respect to all plaintiffs pursuant to CPLR 3211(a)(7).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits.....	6-11
Reply Affidavits.....	12-14

Upon the foregoing papers it is ordered that the motion is determined as follows:

This action was initially commenced on October 17, 2006 by plaintiffs Felix DeVito and Michael DeVito, as the sole plaintiffs, against defendant Energy seeking to assert certain claims based upon their alleged rights arising under an asset purchase agreement dated November 30, 2005, and entered into by Energy, as purchaser, DeVito Bros. Enterprises, Inc. f/k/a Globe Fuel Oil CO., Inc. (Globe), as seller, and Felix DeVito and Michael DeVito, Globe's shareholders. Defendant Energy moved to dismiss the initial complaint herein, claiming that the complaint failed to state a

cause of action, and that plaintiffs Felix DeVito and Michael DeVito lacked standing to bring the action in their individual capacities, and failed to join a necessary party plaintiff, i.e. Globe.

While the motion was sub judice, plaintiffs DeVito served an amended complaint, naming Globe as an additional plaintiff, and asserting additional causes of action.

In the amended complaint, plaintiffs Felix DeVito, Michael DeVito and Globe seek, as a first cause of action, to rescind the asset purchase agreement, based upon defendant Energy's failure to disclose to them, during the period of asset purchase negotiations, that Energy was accused in a then-pending bankruptcy court case, of having violated confidentiality agreements and solicited customers of various fuel oil companies. As a second cause of action, plaintiffs Felix DeVito, Michael DeVito and Globe seek reformation of the contract to redefine the word "Territory" to be only "the customer list which Energy received" and East Elmhurst, New York. Plaintiffs Felix DeVito, Michael DeVito and Globe allege that the noncompetition clause found in the asset purchase agreement is unreasonable and unconscionable in its duration and geographic scope. The third cause of action seeks relief for "interference with contractual/advantageous relations," based upon defendant Energy's solicitation of plaintiffs' customers. As a fourth cause of action, plaintiffs seek relief based upon defendant Energy's alleged violation of their right to privacy. The fifth, sixth and seventh causes of action are for breach of contract, based upon various specified breaches of the asset purchase agreement. These causes of action are identical to the first, second and third causes of action asserted in the original complaint, except insofar as Globe is now named as an additional plaintiff with respect to those claims. It is alleged that defendant Energy breached the asset purchase agreement by failing to make timely installment payments, timely provide information regarding accounts receivable and collections, and provide plaintiffs with access to Energy's premises to inspect Energy's records regarding receivables.

Defendant Energy now moves for dismissal in relation to the amended complaint.[1]

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[1] The court notes Energy had brought an action against DeVito Bros. Enterprises, Inc. f/k/a Globe Fuel Oil Co., Inc., DeVito Fuel Oil & Service Co., Inc., Globe Fuel Oil Co., Inc., Felix DeVito and Michael DeVito, entitled The Energy Conservation Group, LLC v DeVito Bros. Enterprises, Inc. (Supreme Court, Queens County, Index No. 23852/2006). In that action, a preliminary injunction had been

Generally, on a motion to dismiss made pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026), and the facts as alleged in the complaint are taken as true, the plaintiffs are accorded the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Sotomayor v Kaufman, Malchman, Kirby & Squire, 252 AD2d 554 [1988]; Fischbach & Moore v Howell Co., 240 AD2d 157 [1997]). In those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference (see CPLR 3211[a][1]; Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 [1999], affd 94 NY2d 659 [2000]; Kliebert v McKoan, 228 AD2d 232 [1996], lv denied 89 NY2d 802 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; see also Leon v Martinez, 84 NY2d 83, 87-88 [1994]). Where the issue involved is the interpretation of an unambiguous contract, such interpretation is a question of law for the court, and the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint (see Manchester Equip. Co. v Panasonic Indus. Co., 141 AD2d 616, 618 [1988], lv dismissed 72 NY2d 954 [1988], lv denied 73 NY2d 703 [1988]; see also Ark Bryant Park Corp. v Bryant Park Restoration Corp., 285 AD2d 143, 150 [2001]).

With respect to the first, second, fifth, sixth and seventh causes of action, defendant Energy asserts that plaintiffs Felix DeVito and Michael DeVito lack standing to assert these claims as individuals, or as shareholders of Globe.

The documentary evidence presented by defendants establishes that the DeVitos lack standing to assert the first, fifth, sixth and seventh causes of action. Although the DeVitos are denominated in the first paragraph of the asset purchase agreement as the "Shareholders" thereunder, none of the provisions of the agreement contain any contractual obligation running from defendant Energy to either, or both, of the Shareholders. Rather, a plain reading of the asset purchase agreement reveals that the DeVitos were made

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granted by order dated March 12, 2007, to the extent of enjoining the named defendants from engaging directly or indirectly in any Prohibited Business and solicitation in the Territory as defined in the asset purchase agreement. By order dated May 27, 2007, that action has been consolidated herein for all purposes.

parties to the agreement for the purpose of contractually binding them to the nonsolicitation, noncompetition and confidentiality provisions of Article 3 of the agreement, the Shareholders' representations and warranties as contained in Article 7, and the indemnification provision as set forth in Article 14. That the DeVitos executed the agreement in their individual capacities does not alter that conclusion, especially since Felix DeVito also executed the contract on behalf of Globe in his representative capacity (see generally American Media Concepts, Inc. v Atkins Pictures, Inc., 179 AD2d 446 [1992]).

Furthermore, the allegations in the first, fifth, sixth and seventh causes of action relate to wrongs allegedly suffered by plaintiff Globe, arising out of the asset purchase agreement, as opposed to the individual plaintiffs. The DeVitos make no claim that they are suing derivatively on behalf of the corporation with respect to those causes of action (see Tzolis v Wolff, 12 Misc 3d 1151(A) [2006]). Under such circumstances, the first, fifth, sixth and seventh causes of action of the amended complaint must be dismissed insofar as they have been asserted by plaintiffs Felix DeVito and Michael DeVito in their individual capacities (CPLR 3211[a][1], [3], [7]).

Defendant Energy asserts the first cause of action asserted in the amended complaint by plaintiff Globe, fails to state a cause of action for rescission. Plaintiff Globe alleges that defendant Energy failed to disclose certain information, thereby fraudulently inducing it into entering the asset purchase agreement. Plaintiff Globe has failed to show defendant Energy owed it a contractual duty to disclose the pendency of any bankruptcy case, or accusations made against Energy regarding purported noncompliance with confidentiality or nonsolicitation agreements with others. Plaintiff Globe makes no allegation that it had a fiduciary or other trust relationship with defendant Energy (see George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc., 114 AD2d 930, 931 [1985], appeal denied 68 NY2d 603 [1986]), or that defendant Energy affirmatively concealed any material fact from it (see E.B. v Liberation Publications, Inc., 7 AD3d 566 [2004]; see also P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V., 301 AD2d 373, 376 [2003]; Swersky v Dreyer & Traub, 219 AD2d 321, 326 [1996]). Under such circumstances, the first cause of action asserted by plaintiff Globe fails to state a claim for rescission (CPLR 3211[a][7]). That branch of the motion by defendant Energy to dismiss the first cause of action asserted by plaintiff Globe against it is granted.

The allegations of the second cause of action concern the enforceability of the noncompetition covenant, and relate to duties

imposed on both Globe and the DeVitos, as the Shareholders, following the sale (see generally Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc., 7 Misc 3d 1008(A) [2004], affd 16 AD3d 292 [2005]). Thus, plaintiffs Felix DeVito and Michael DeVito each has standing to assert such claim in his individual capacity. Defendant Energy, nevertheless, asserts that the second cause of action fails to state a cause of action for reformation.

Plaintiffs concede their use of the word "reformation" in the second cause of action was "injudicious," and that they, in fact, do not wish to "reform" the asset purchase agreement. Rather, plaintiffs assert they seek to obtain declaratory relief. Plaintiffs allege that under the asset purchase agreement, they cannot engage in certain business activities, which were part of Globe's business, except for the selling and delivery of diesel fuel oil and kerosene, for a five-year period, within the "Territory," which term is defined under the agreement as being the counties of New York, Queens, Bronx, Kings, Richmond, Nassau and Suffolk, and soliciting business, customers or employees from Energy. Plaintiffs further allege that at the time of the signing of the agreement, plaintiff Globe had approximately 2300 customers, 2200 of whom were located in Queens County, only a few were in Kings, New York and Nassau Counties (35 customers in each of those counties), and none were in Suffolk or Richmond Counties. Plaintiffs allege that defendant Energy should not be allowed to restrict their ability to solicit and service customers outside of East Elmhurst, New York, and with respect to customers not on the list provided at the time of the signing of the agreement. They allege that the restrictive covenant in the asset purchase agreement is unenforceable, insofar as it calls for a restraint, in terms of scope, which is more than is reasonably necessary to protect the legitimate interests of defendant Energy in the enjoyment of the asset bought, and that such covenant should be limited by the court to East Elmhurst, New York, and with respect to the named customers.

Covenants in employment contracts, which restrict the rights of employees to pursue their livelihood, are generally disfavored (see Reed, Roberts Assoc. v Strauman, 40 NY2d 303 [1976]). Covenants not to compete, which relate to the sale of a business and its accompanying good will, however, are accorded full enforcement when they are reasonable in scope and duration, do not unreasonably burden the promisor, and do not harm the general public (see Mohawk Maintenance Co. v Kessler, 52 NY2d 276, 283-284

[1981]; Sarantopoulos v E-Z Cash ATM, Inc., 35 AD3d 708 [2006]).[2] Whether a covenant is reasonable depends on the circumstances of each case (see Karpinski v Ingrasci, 28 NY2d 45 [1971]; Town Line Repairs, Inc. v Anderson, 90 AD2d 517 [1982]). This conclusion is true even where, as here, the restrictive covenant contains an acknowledgment that it is reasonable and necessary for the protection of the purchaser. If a particular restriction is considered unreasonable, it can be limited and the covenant, as amended, may be enforced (see Town Line Repairs v Anderson, 90 AD2d at 518).

In view of the allegations as to the geographical locations of their former customers, plaintiffs have stated a viable claim for declaratory relief relative to the unreasonableness of the scope of the noncompetition covenant to the extent the scope is beyond the geographical area of East Elmhurst, New York, and with respect to the customers on the list provided at the time of the signing of the agreement. That branch of the motion by defendant Energy seeking to dismiss the second cause of action in the amended complaint is granted with leave to serve a second amended complaint for such proposed declaratory relief provided that the second amended complaint is served within thirty (30) days of the date of this order.

With respect to the third cause of action in the amended complaint for tortuous interference with contractual and business relations, plaintiffs allege that pursuant to the asset purchase agreement, they were entitled to continue selling and delivering kerosene or diesel fuel oil with any persons or entities. Plaintiffs additionally allege that plaintiffs had a number of customers for whom they supplied only kerosene or diesel fuel oil, and that Energy was aware of the identity of those customers. Plaintiffs further allege that subsequent to the closing of the sale of the assets, defendant Energy wrongfully interfered with their contracts with those customers by soliciting, and convincing such customers to purchase heating fuel oil from Energy in place, and instead of, diesel fuel oil from plaintiffs.

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[2] It is said that a buyer of a business should be permitted to restrict the seller's freedom of trade so as to prevent the latter from recapturing and utilizing, by competition, the good will of the very business which the seller transferred for value (see Purchasing Assocs., Inc. v Weitz, 13 NY2d 267, 271 [1963], rearg. denied 14 NY2d 584 [1964]; see also Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc., 7 Misc 3d 1008(A) [2004], affd 16 AD3d 292 [2005]; see also Mohawk Maintenance Co., Inc. v Kessler, 52 NY2d 276, 285 [1981]).

The elements of tortious interference with a contract are "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]).

In this instance, nothing in the asset purchase agreement itself prohibits Energy from soliciting or selling to any present or former customers of Globe or the Shareholders. In addition, plaintiffs have failed to allege that any of their diesel customers had binding requirements contracts with plaintiffs, and thus, it may be presumed the contracts are terminable at will. An agreement which is terminable at will is classified as a prospective contractual relationship, and cannot support a claim for tortious interference with an existing contract (see Guard-Life v S. Parker Hardware, 50 NY2d 183, 191-192 [1980]; LoPresti v Massachusetts Mut. Life Ins. Co., 30 AD2d 474 [2006]; see also American Preferred Prescription v Health Mgt., 252 AD2d 414 [1998]).

"Tortious interference with business relations 'applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant'" (M.J. & K. Co. v Matthew Bender & Co., 220 AD2d 488, 490 [1995], quoting WFB Telecommunications v NYNEX Corp., 188 AD2d 257 [1992]). "To establish a claim of tortious interference with prospective economic advantage, a plaintiff must demonstrate that the 'defendant's interference with its prospective business relations was accomplished by "wrongful means" or that defendant acted for the sole purpose of harming the plaintiff' (Snyder v Sony Music Entertainment, 252 AD2d 294, 299-300 [1999]; see Carvel Corp. v Noonan, 3 NY3d 182, 190-191 [2004]; Jim Ball Chrysler LLC v Marong Chrysler-Plymouth, 19 AD3d 1094, 1095 [2005]; South Fourth St. Props. v Muschel, 1 AD3d 347, 348 [2003]; cf. J.S. Gourmet v Bretton Woods Home Owners Assn., 11 AD3d 583 [2004])" (Caprer v Nussbaum, 36 AD3d 176 [2006]). The allegation that defendant Energy's actions were wrongful or unlawful are conclusory and without support (see NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d 614, 621 [1996]; LoPresti v Massachusetts Mut. Life Ins. Co., 30 AD2d 474, supra; M.J. & K. Co. v Matthew Bender & Co., 220 AD2d at 490).

That branch of the motion by defendant Globe to dismiss the third cause of action asserted in the amended complaint by plaintiffs for failure to state a cause of action is granted.

For a fourth cause of action in the amended complaint, plaintiffs alleged that defendant Energy violated their right to privacy. Plaintiffs' counsel, however, now concedes that the claim is asserted on behalf of the individual plaintiffs, and is not being interposed on behalf of plaintiff Globe. Therefore, that branch of the motion by defendant Energy seeking to dismiss the fourth cause of action asserted against it by plaintiff Globe is granted without opposition.

With respect to the fourth cause of action asserted by plaintiffs Felix DeVito and Michael DeVito, they make no allegation which would implicate a constitutional right to privacy (see New York State Constitution, Article I, § 6; Griswold v Connecticut, 381 US 479 [1965] [right to privacy derived from the penumbra of the specific guarantees of the Bill of Rights to the United States Constitution]). In New York, there is no common-law right to privacy (see Howell v New York Post Co., Inc., 81 NY2d 115, 123-124 [1993]; Frederick v University Towers Assocs., 2002 WL 3191460). Nevertheless, to the extent the DeVitos claim that their right to privacy was violated by defendant Energy's distribution of advertising material containing their names without their written consent, such allegation is sufficient to state that their names are being used by defendant Energy for advertising or trade purposes without their consent (see e.g. Civil Rights Law §§ 50, 51). That branch of the motion by defendant Energy seeking to dismiss the fourth cause of action asserted against it by plaintiffs Felix DeVito and Michael DeVito is denied.

Dated: July 16, 2007

J.S.C.