

Babylon Paper Stock v Fusco
2007 NY Slip Op 32670(U)
August 21, 2007
Supreme Court, Suffolk County
Docket Number: 0012472/2007
Judge: Emily Pines
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Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES

Justice Supreme Court

Original Motion Date: 05-02-2007

Motion Submit Date: 06-28-2007

Motion Sequence No.: 001 MD

BABYLON PAPER STOCK, X

Plaintiff,

-against-

JOSEPH T. FUSCO,

Defendant .

X

CAPUTI, WEINTRAUB & NEARY
50 Elm Street
Huntington, New York 11743

COSTANTINO & COSTANTINO
632 Merrick Road
Copiague, New York 11726

ORDERED, that this motion (motion sequence number 001) by Plaintiff for a preliminary injunction brought on by Order to Show Cause (REBOLINI, J.) granted April 24, 2007 is denied; and it is further

ORDERED, that the temporary restraining order granted April 24, 2007 is hereby vacated and of no further force and effect; and it is further

ORDERED, that a Preliminary Conference is scheduled for October 4, 2007 at 9:30 a.m. in D.C.M., Suffolk County Supreme Court, One Court Street, Room 203A, Court Street Annex, Riverhead, New York.

Plaintiff commenced this action by filing a Summons and Verified Complaint and Order to Cause on or about April 24, 2007. The Complaint sets forth four (4) causes of action: unfair competition; tortious interference with contract; misappropriation of proprietary information; and defamation. On the first and third causes of action plaintiff seeks injunctive relief and on the second and fourth causes of action seeks monetary damages.

THE ALLEGATIONS

The submissions reflect that plaintiff is a recycling company which hired Defendant in or about September 2006 as a sales consultant. Plaintiff, via an affidavit by its president, Frank Tuozzo ("Tuozzo"), alleges that Defendant was hired as an "at will" employee to solicit new business for Plaintiff but that such employment lasted only four months. Tuozzo alleges that he terminated Defendant's employment because he did not generate any new business for Plaintiff. Plaintiff alleges that as a sales person, Defendant came into possession of Plaintiff's "customer list, written contracts, computer disk and other proprietary contact information." Tuozzo alleges that Defendant did not return these items upon his termination, despite a demand that he do so. Defendant subsequently obtained employment with DeMatteo Salvage, a competitor of Plaintiff's.

Plaintiff alleges that Defendant is actively soliciting its customers, specifically targeting nine (9) customers that had written contracts with Plaintiff. Plaintiff alleges that at least one of these clients, Compare Foods, terminated Plaintiff's services after being solicited by Defendant. Plaintiff alleges that Defendant had "actual knowledge that BABYLON PAPER had valid written contracts with the Compare Foods stores" and that Defendant intentionally induced the customer to breach their contract with Plaintiff. Plaintiff alleges that as an employee, Defendant learned confidential proprietary information, including the names and addresses of its customers, pricing, length of contract and customer contact information. Plaintiff further alleges that Defendant has been disseminating false and injurious statements about Plaintiff and Tuozzo by stating that Plaintiff is a disreputable company and has engaged in criminal conduct.

Based upon these allegations, Plaintiff seeks an Order, *inter alia*, granting a preliminary injunction enjoining Defendant from soliciting any of Plaintiff's customers already under contract with

Plaintiff; awarding Plaintiff a preliminary injunction enjoining Defendant from disclosing to any person Plaintiff's confidential business information, including but not limited to information that is not generally known or available to the public including costs, pricing, customer's names and addresses, etc; and directing Defendant to immediately return to Plaintiff all confidential and proprietary information relating to Plaintiff's business including customer lists, contracts, computer disks and contact lists. By Order (REBOLINI, J.) granted April 24, 2007, Defendant was restrained and enjoined, pending the hearing of the within motion, from soliciting any of Plaintiff's customers already under written contract with Plaintiff and from disclosing to any person Plaintiff's confidential business information, including but not limited to, information that is not generally known or available to the public, including information with respect to Plaintiff's costs, pricing, the identity of Plaintiff's customers under written contract including names and addresses and the names of representatives of such customers responsible for entering into contracts with the Plaintiff.

In opposition to the motion, defendant denies every allegation propounded by Plaintiff, with the exception of his employment with Plaintiff. Defendant denies that he was ever given or received any customer list, contracts, computer disks or other proprietary or trade information as alleged by Tuozzo. Specifically, Defendant alleges that he was hired to solicit "high grade" recycling clients, which differed from the existing customers and contracts of Plaintiff, which Defendant states were not "high grade". Defendant explains that "high grade" commercial customers were essentially commercial printing businesses. Defendant states that the only documents he ever received from plaintiff were blank contracts to be used when soliciting these "high grade" customers. Defendant claims that he never received any pre-existing customer lists, executed contracts, computer disks or contact lists.

With regard to his termination by Plaintiff, Defendant states that he was hospitalized in February 2007 and advised by Plaintiff

that his services were no longer required. Defendant states that after he was terminated by Plaintiff, he obtained employment with DeMatteo Salvage, which required him to solicit all types of recyclers, not just "high grade" customers. He states that he began canvassing for DeMatteo and ultimately negotiated certain agreements with Compare Foods, a supermarket chain that he represents is not a "high end" recycler. Defendant alleges that he had no information regarding Compare Food's relationship with Plaintiff and that his negotiation of the contract was without the use of any information or trade secret of Plaintiff.

In reply, Tuozzo disputes Defendant's claim that he was hired to solicit "high end" recyclers only and claims that he was hired to solicit any new business, regardless of whether it was high grade or low grade paper. He states that Defendant had access to a computer which contained Plaintiff's customer list and other proprietary information.

Defendant has also submitted a supplementary affidavit in opposition by Carmine DeMatteo, president of DeMatteo Salvage. DeMatteo has annexed a copy of the blank contract used by his company which includes, at paragraph 11, a representation by the customer that it has no other contractual obligation with another company for the same service.

PRELIMINARY INJUNCTION

CPLR Rule 6312(a) states in relevant part that "On a motion for a preliminary injunction the Plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the Defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the Plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual".

It is well settled that "a party seeking the drastic remedy of

a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts upon the moving papers. The burden of proof is on the movant to demonstrate a likelihood of success on the merits, the prospect of irreparable injury if the relief is withheld, and a balancing of the equities in the movant's favor." **Gagnon Bus Company, Inc. v. Vallo Transportation, Ltd.**, 13 A.D.3d 334, 786 N.Y.S.2d 107 (2d Dept. 2004). **See also, South Amherst, Ltd. v. H.B. Singer, LLC.**, 13 A.D.3d 515, 786 N.Y.S.2d 573 (2d Dept. 2004). Where the facts are in sharp dispute, a preliminary injunction should not be granted. **Related Properties v. Town Board of Town/Village of Harrison**, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dept. 2005). However, the "presentation by defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion." **CPLR Rule 6312(c)**.

The law is well settled that in the absence of a restrictive covenant not to compete, "'an employee is free to compete with his or her former employer unless trade secrets are involved or fraudulent methods are employed.'" **NCN Co. v. Cavanagh**, 215 A.D.2d 737, 627 N.Y.S.2d 446 (2d Dept. 1995), **quoting, Walter Karl, Inc., v. Wood**, 137 A.D.2d 22, 528 N.Y.S.2d 94. **See also, Pearlgreen Corp., v. Yau Chi Chu**, 8 A.D.3d 460, 778 N.Y.S.2d 516 (2d Dept. 2004). The use of a customer list to solicit a former employer's customers is not actionable "unless the customer list is considered a trade secret or there was wrongful conduct by the employee such as physically taking or copying the employer's files or using confidential information." **APA Security, Inc., v. APA**, 37 A.D.3d 502, 831 N.Y.S.2d 201 (2d Dept. 2007). **See also, Eastern Business Systems, Inc., v. Specialty Business Solutions, LLC.**, 292 A.D.2d 336, 739 N.Y.S.2d 177 (2d Dept. 2002). However a prerequisite to protection against misappropriation of a trade secret is the element of secrecy; hence, where the names and addresses of potential customers or their representatives are readily ascertainable, trade secret protection will not attach. **Atmospherics, Ltd., v. Hansen** 269 A.D.2d 343, 702 N.Y.S.2d 385 (2d Dept. 2000).

Additionally, to prevail on a claim for tortious interference

with contractual relations, a Plaintiff must prove: (1) the existence of a contract between Plaintiff and a third party; (2) the 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. ***Bayside Carting v. Chic Cleaners***, 240 A.D.2d 687, 660 N.Y.S.2d 3 (2d Dept. 1997); ***M.J. & K, Inc., v. Matthew Bender and Co., Inc.***, 220 A.D.2d 488, 631 N.Y.S.2d 938 (2d Dept. 1995).

Here, Plaintiff cannot meet the three-prong test for a preliminary injunction on its claim for tortious interference with contract. While Plaintiff can demonstrate a likelihood of success on the merits of this claim, it cannot demonstrate either irreparable injury or a balancing of the equities in its favor. The Court agrees that although Defendant was an at-will employee of Plaintiff and not bound by a restrictive covenant not to compete upon the termination of his employment, it belies credulity that he was unaware of the entities with whom Plaintiff had existing contracts. Defendant, of course, will be free at the trial of this matter to contest his knowledge of the contracts especially in light of the representation in the DeMatteo contracts that the customer acknowledges that it is has no other contractual obligation with any other company. Moreover, plaintiff's contracts with Compare Foods, annexed to the motion papers, demonstrate that those contracts for recycling were in effect during the period of Defendant's employment and were not due to expire until the year 2011 and, defendant admits in his affidavit in opposition that he actively solicited business from Compare Foods. Thus, Plaintiff may ultimately prevail on its claim of tortious interference. However, plaintiff cannot demonstrate irreparable injury if the preliminary injunction is not granted. Plaintiff's loss of the contractual amounts due from its customers can be compensated by money damages and thus cannot be considered as irreparable injury. ***Betesh v. Jemal***, 209 A.D.2d 568, 619 N.Y.S.2d 94 (2d Dept. 1994). ***See also, Appio v. Mel Lyn Office Supplying***, 222 A.D.2d 541, 635 N.Y.S.2d 651 (2d Dept. 1995); ***Price Paper and Twine v. Miller***, 182 A.D.2d 748, 582 N.Y.S.2d 746 (2d Dept. 1992). Therefore, Plaintiff's motion for a preliminary injunction is denied.

Plaintiff has similarly failed to meet its burden for a preliminary injunction on its claim of misappropriation of trade secrets. The Courts have clearly demonstrated disfavor toward any action that sanctions the loss of a person's livelihood and will not impede an employee's ability to compete with a former employer unless the "evidence is clear and convincing that it is necessary to protect the trade secrets of the employer or that fraudulent methods were used by the employee to disparage the employer's business." **Price Paper, supra.** As to this claim, the Court cannot find, at this time, that Plaintiff has demonstrated a likelihood of success on the merits. Plaintiff sets forth only an unsubstantiated allegation that its customer lists, contracts and pricing information was confidential. That, without more, cannot rise to the level of a finding of confidentiality. **Walter Karl, Inc., v. Wood**, 137 A.D.2d 22, 528 N.Y.S.2d 94 (2d Dept. 1988). Additionally, where, as here, there is a sharp factual dispute as to whether defendant obtained customer lists and if so, whether he obtained them by wrongful methods, Plaintiff is not entitled, at this juncture, to a preliminary injunction directing defendant to return such information. **APA, supra.**

For the reasons set forth herein, the motion for a preliminary injunction is denied in its entirety and the temporary restraining order contained within the April 24, 2007 Order to Show Cause is vacated and of no further force and effect.

Counsel are directed to appear for a preliminary conference on October 4, 2007 at 9:30 a.m.

The foregoing constitutes the **DECISION** and **ORDER** of the Court.

Dated: August 21, 2007
Riverhead, New York



EMILY PINES
J. S. C.