

Vitagliano v Donnelly
2007 NY Slip Op 33053(U)
September 26, 2007
Supreme Court, Suffolk County
Docket Number: 0012865/2007
Judge: Sandra L. Sgroi
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SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Present:

Hon. SANDRA L. SGROI

Mot Seq: 001 MG

Adj'd Date: 8-16-07

Return Date: 5-15-07

ANTHONY VITAGLIANO, MICHAEL VITALIANO, RLM PROPERTIES, INC., and RITE FENCE CO., INC.,
Plaintiffs,

JOSEPH L. GROSSO, P.C.
Attorney for the Plaintiff
45 Sarah Drive
Farmingdale, New York 11735

-against-

KEVIN DONNELLY, HOLBROOK FENCE AND RAIL and ALL ISLAND FENCE,
Defendants.

JERRY GARGUILO, P.C.
Attorney for Defendant
542 North Country Road
Saint James, New York 11780

Upon the following papers numbered 1 to 22 read on this Motion: Notice of Motion and supporting papers 1-9; 10; Affirmation in opposition and supporting papers 11-12; Affirmation in reply and supporting papers 13-22; it is,

ORDERED that the motion of the Plaintiffs, Anthony Vitagliano, Michael Vitaliano, RLM Properties, Inc. and Rite Fence Co., Inc., for injunctive relief is granted to the extent that

1. the Court directs that the Defendant Kevin Donnelly not destroy or damage any documents or property belonging to any of the Plaintiffs and the Defendants shall immediately turn over said documents and property which would include but not be limited to corporate property of the Plaintiffs, Plaintiffs' corporate books, records, checks, checkbooks, accounting records, computers, bank statements, contracts, corporate vehicles (including the 1999 Ford Explorer), and cash within ten days of service of a copy of this order;
2. these records and property shall be delivered to the attorney for the Defendant who shall forthwith turn them over to the attorney for the Plaintiffs;
3. the Defendants are directed not to use the name of RLM Properties, Inc., Holbrook Fence or Rite Fence Co., Inc. and the Defendants are restrained from interrupting the business activities of the

Plaintiffs including but not limited to intercepting their telephonic communication, entering the business premises of the Plaintiffs without prior written permission, receiving mail intended for the Plaintiffs, depositing any checks intended for the Plaintiffs or directing Postal Authorities to deliver mail intended for the Plaintiffs to the Defendants or their agents;

and it is further

ORDERED that the Plaintiffs shall file an undertaking in the amount of \$800.00 within twenty days of service of a copy of this order.

Anthony Vitagliano and Michael Vitaliano¹, officers of Holbrook Fence, a company engaged in the commercial and residential service and installation of fencing and fencing materials, have commenced this action for money damages and permanent injunctive relief against the Defendants. The Plaintiffs have moved by order to show cause for preliminary injunctive relief against the Defendant Kevin Donnelly. The order to show cause is supported by an affirmation of the attorney for the Plaintiffs. An affirmation of an attorney is without probative value where he lacks personal knowledge of the transactions giving rise to the litigation (see, *Schwartz v. Licht*, 173 A.D.2d 458, 570 N.Y.S.2d 83).

The order to show cause is supported by a complaint, which states that it is verified, but the verification has not been attached to the complaint. Attached as exhibits to the Plaintiff's papers are three separate affidavits from the Plaintiff Michael Vitaliano. According to this Plaintiff, the Plaintiff RLM Properties, Inc. was created approximately 15 years ago when the assets of Holbrook Fence were acquired. RLM Properties, Inc. has continued to do business as Holbrook Fence.

When RLM Properties, Inc. was created, Michael Vitaliano, Anthony Vitagliano and the Defendant Kevin Donnelly were equal shareholders of that entity. At that time, Rite Fence Co., Inc., also a named Plaintiff herein, was the primary business run by Michael Vitaliano and Anthony Vitagliano. According to Michael Vitaliano's affidavit, Donnelly was placed in charge of the activities of Rite Fence Co., Inc. and the Plaintiffs trusted the Defendant to properly carry out his duties as a corporate employee.

The businesses functioned in this manner until 2005, when the Plaintiffs became aware that:

the account balances as reported by Kevin Donnelly did not appear to be consistent with the number of jobs that were being done.

In 2005, my brother and I contacted the office of the Suffolk County District Attorney and cooperated with them since that time in an investigation into the activities of Kevin Donnelly insofar as it pertained to Holbrook Fence, Rite Fence Co., Inc. and RLM Properties, Inc.

On April 23, 2007, I gave an Affidavit to the office of the Suffolk County District Attorney which was a result of being shown two invoices which involved jobs that I personally worked on, that were billed through Holbrook Fence, but payment for which was never reflected in the

¹Pursuant to the papers submitted herein, the last names of these two Plaintiffs, while similar, are spelled differently. These two Plaintiffs are brothers.

It has been discovered that there are two business certificates on file with the Suffolk County Clerk, the first involving "Holbrook Fence and Rail", located at 433 Ocean Avenue, Oakdale, New York, with the owner listed as Kevin Donnelly, with a filing date of March 1, 2005 (Exhibit "B"). A second business certificate for "All Island Fence", with an address of 433 Ocean Avenue, Oakdale, New York with the owner's name being Kevin Donnelly is also on file (Exhibit "C"). Kevin Donnelly resides at 433 Ocean Avenue, Oakdale, New York, which address is used as the business address for Holbrook Fence.

Based upon the documents shown to me by the office of the District Attorney, as well as the Affidavit of a forensic accountant on the staff of the District Attorney's office, it now appears that Kevin Donnelly has diverted sums from Holbrook Fence by depositing them into an account entitled "Holbrook Fence and Rail". While the invoices referred to in my April 23, 2007 Affidavit total approximately \$4,000.00, other information in my possession and a preliminary analysis of the cash flow of Holbrook Fence, the same diverted by Kevin Donnelly may approximate many hundreds of thousands of dollars***.

There is absolutely no connection whatsoever between Holbrook Fence, RLM Properties, Inc., Rite Fence Co., Inc. and the entity created by Kevin Donnelly, Holbrook Fence and Rail. Similarly, there is no connection between the plaintiffs and All Island Fence. (Affidavit of Michael Vitaliano, Plaintiff's Exhibit "B").

Once the Plaintiffs ascertained the extent of the problem, they held a corporate meeting for RLM Properties, Inc. wherein Kevin Donnelly was terminated as an officer and director of RLM Properties, Inc and his employment was terminated with Rite Fence Co., Inc.

In opposition, the Defendants have only interposed an affirmation of their attorney, who clearly does not have personal knowledge of the facts as alleged by the Plaintiffs in the supporting affidavits to the order to show cause. It is not alleged and there is no showing that the meetings held by the Plaintiffs to terminate the employment and corporate offices of the Defendant Donnelly was improper.

The Plaintiffs have also submitted a reply affirmation in an affidavit wherein the specific proof of wrongdoing has been laid out through a review of the checking accounts of RLM Properties, Inc. for the years 2003, 2004, 2005, 2006, and 2007.

To establish entitlement to a preliminary injunction, the Plaintiffs must show a probability of success on the merits, a danger of irreparable injury if an injunction is not given, and a balance of the equities in their favor (see, *Aetna Ins. Co. v Capasso*, 75 N.Y.2d 860, 862, 552 N.E.2d 166, 552 N.Y.S.2d 918; *Regatta Condominium Assn. v Village of Mamaroneck*, 303 A.D.2d 741, 742, 758 N.Y.S.2d 813; *Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 588 N.Y.S.2d 424). Further, a preliminary injunction is an extraordinary and drastic remedy which Courts should rarely grant and, if the relief is granted, then only under unusual circumstances where such relief is required to maintain the status quo pending the trial of the action (see, *Rosa Hair Stylists v Jaber Food Corp.*, 218 A.D.2d 793, 794, 631 N.Y.S.2d 167; *Times Square Stores Corp., v Bernice Realty Co.*, 107 A.D.2d 677, 682, 484 N.Y.S.2d 591).

The relief requested herein is necessary because the payment of monetary damages if the Plaintiffs are successful will not preserve the status quo or fully protect the Plaintiffs. While injunctive relief is not necessary

“where ... a litigant can fully be recompensed by a monetary award,” the Plaintiffs need to take control of the corporate property presently alleged to be in the possession of Kevin Donnelly is immediate and requires injunctive relief (*Price Paper & Twine Co. v Miller*, 182 AD2d 748, 750, 582 N.Y.S.2d 746).

When there are sharply contested issues of fact that can only be determined at trial the heavy burden of proving a clear right to preliminary injunctive relief is not established(see, *MacIntyre v. Metropolitan Life Ins. Co.*, 221 A.D.2d 602, 634 N.Y.S.2d 180; *Merrill Lynch Realty Assocs. v. Burr*, 140 A.D.2d 589, 593, 528 N.Y.S.2d 857; *Zurich Depository Corp. v. Gilenson*, 121 A.D.2d 443, 503 N.Y.S.2d 415). Here, however, the Defendant has not submitted an affidavit by someone with actual knowledge contesting either the allegations of the Plaintiffs or the documentary evidence that has been submitted to the Court. Therefore, the Plaintiffs have shown a probability of success in this action and a balancing of the equities in their favor (see, *Eastern Business Systems, Inc. v. Specialty Business Solutions, LLC*, 292 A.D.2d 336, 739 N.Y.S.2d 177).

Donnelly was bound to exercise good faith and loyalty in the performance of his duties as an employee for the Plaintiffs (see, *Western Elec. Co. v. Brenner*, 41 N.Y.2d 291, 295, 392 N.Y.S.2d 409, 360 N.E.2d 1091; *Lamdin v. Broadway Surface Corp.*, 272 N.Y. 133, 138, 5 N.E.2d 66; see also, *Royal Carbo Corp. v. Flameguard, Inc.*, 229 A.D.2d 430, 645 N.Y.S.2d 18). An officer or director of a corporation also is under a fiduciary duty to refrain from engaging in a competing business (see, *Laro Maintenance Corp. v. Culkin*, 267 A.D.2d 431, 700 N.Y.S.2d 490 citing *Foley v. D'Agostino*, 21 A.D.2d 60, 66-67, 248 N.Y.S.2d 121). It is axiomatic that the improper taking of materials from an employer is actionable (see, *Advanced Magnification Instruments of Oneonta, N.Y., Ltd. v. Minuteman Optical Corp.*, 135 A.D.2d 889, 522 N.Y.S.2d 287, 289).

The injunction granted by this Court is limited and serves only to protect the Plaintiff Corporations and prevent further waste of assets (see, *North Fork Preserve, Inc. v. Kaplan*, 31 A.D.3d 403, 819 N.Y.S.2d 53). If the Plaintiffs are unable to regain control of the corporate property quickly they face irreparable harm.

It is alleged that Kevin Donnelly has in his possession various corporate documents of RLM Properties, Inc. and Rite Fence Co., Inc. that the Plaintiffs are requesting be returned to them forthwith. The Court herein directs that the Defendant Kevin Donnelly not destroy or damage any such documents and to immediately turn over said documents which would include but not be limited to corporate property of the Plaintiffs, Plaintiffs' corporate books, records, checks, checkbooks, accounting records, computers, bank statements, contracts and cash within ten days of service of a copy of this order. These records and property shall be delivered to the attorney for the Defendant who shall forthwith turn them over to the attorney for the Plaintiffs. Further, the Defendants are directed not to use the name of RLM Properties, Inc., Holbrook Fence or Rite Fence Co., Inc. and the Defendants are restrained from interrupting the business activities of the Plaintiffs including but not limited to intercepting their telephonic communication, entering the business premises of the Plaintiffs without prior written permission, receiving mail intended for the Plaintiffs, or directing Postal Authorities to deliver mail intended for the Plaintiffs to the Defendants or their agents.

The Plaintiffs have also requested that this Court direct that Kevin Donnelly cease conducting business under the name of Holbrook Fence and Rail and Island Fence, provide the Plaintiffs with various records of Holbrook Fence and Rail and All Island Fence and direct that various payments be made to the Plaintiffs by the Defendants.

As the Appellate Division stated in *Price Paper & Twine Co. v. Miller* (supra):

Courts 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(cites omitted).

In the absence of a restrictive covenant limiting competition, a former employee may freely compete with a former employer "unless trade secrets are involved or fraudulent methods are employed" (*Walter Karl, Inc. v. Wood*, 137 A.D.2d 22, 27, 528 N.Y.S.2d 94; see, *Starlight Limousine Serv. v. Cucinella*, 275 A.D.2d 704, 705, 713 N.Y.S.2d 195). Clearly, the allegation that the Defendant Donnelly stole money alleges wrongful conduct that is actionable (see, *Eastern Business Systems, Inc. v. Specialty Business Solutions, LLC*, 292 A.D.2d 336, 739 N.Y.S.2d 177). However, there is no proof that the Defendant Donnelly has continued to use trade secrets, proprietary information or fraudulent methods after he left the employ of the Plaintiffs and therefore the Court declines at this time to issue an injunction that will prevent said Defendant from working and earning a living (see, *Pearlgreen Corp. v. Yau Chi Chu*, 8 A.D.3d 460, 778 N.Y.S.2d 516; *NCN Co. v. Cavanagh*, 215 A.D.2d 737, 627 N.Y.S.2d 446).

The Plaintiffs will be entitled to review the records of the Defendants as part of the discovery process and there is no showing that an injunction is necessary to accomplish that review. While the Plaintiffs may eventually be entitled to a money judgment against the Defendants, absent extraordinary circumstances, the Court will not grant a preliminary injunction that orders the ultimate relief demanded in a final judgment (see, *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 348-349, 765 NYS2d 573).

Dated: 9/26/07


SANDRA L. SGROI, J. S. C.