

Jacobi Tool & Die Mfg., Inc. v Mondi

2007 NY Slip Op 33576(U)

October 24, 2007

Supreme Court, Suffolk County

Docket Number: 0024655/2007

Judge: Edward D. Burke

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**SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY**

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : 08/28/07
Adj. Date : 10/17/07
Mot Seq # : 001 MD
*PRELIMINARY CONFERENCE
SCHEDULED FOR JANUARY 9, 2008*

JACOBI TOOL & DIE MANUFACTURING, INC.
and ROGER JACOBI, Personally ,

Plaintiff(s),

- against -

LUIGI "LOUIE" MONDI, VINCENT CHILLEMI,
ANTHONY CHILLEMI and C.J.N. MACHINERY
CORP.,

Defendant(s).

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Upon the following papers numbered 1 to 8 read on this motion by the plaintiffs for preliminary injunctive relief; Notice of Motion/Order to Show Cause and supporting papers 1 to 3 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 4 to 6 ; Replying Affidavits and supporting papers 7 to 8 ; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that plaintiffs' application for an order scheduling oral argument on this motion for preliminary injunctive relief is considered under 22 NYCRR 202.8 and is denied; and it is further

ORDERED that the plaintiffs' motion (#001) for an order awarding them preliminary injunctive relief is decided as follows:

Plaintiffs commenced this action for a judgment awarding them damages for the purportedly tortious and other actionable conduct committed by the defendants and for preliminary injunctive relief restraining the defendants from canvassing and soliciting the customers of the corporate plaintiff and disclosing and utilizing trade secrets and proprietary information belonging to the corporate plaintiff. Plaintiffs allege that defendant Mondy, a former employee of the corporate plaintiff, violated a 1997 non-disclosure agreement wherein defendant Mondy agreed not to disclose confidential information belong to the corporate plaintiff and further agreed not to canvas or solicit orders from the corporate plaintiff's customers for a period of thirty-six (36) months following the termination of defendant Mondy's employment with said corporate plaintiff. Plaintiffs further allege

that defendant Mondy terminated his employment with the corporate plaintiff in July of 2007 and began working as an independent contractor engaged in the manufacture and sale of high-speed, vertical centrifuges for the pharmaceutical industry, the same business in which the corporate plaintiff is engaged. Plaintiffs further assert that such conduct on the part of defendant Mondy, his solicitation of customers of the corporate plaintiff and his use of confidential information and trade secrets violated the non-disclosure agreement defendant Mondy executed in 1997. Plaintiffs allege that the other defendants, who purportedly afforded defendant Mondy office space and equipment after he left the employ of the corporate plaintiff, misappropriated trade secrets and that said defendants owe monies to the plaintiffs for goods sold and delivered. Plaintiffs demand money damages from all defendants and permanent injunctive relief restraining them from engaging in the conduct complained of herein.

Now before the court is the instant motion (#001) by the plaintiffs for preliminary injunctive relief enjoining and restraining all defendants from utilizing and disclosing trade secrets belonging to the corporate plaintiff; from canvassing and/or soliciting orders from the corporate plaintiff's customers; and from inducing said customers to cease patronizing the corporate plaintiff and other related relief. The defendants oppose said motion asserting that the plaintiffs have no viable claims against the corporate defendant, C.J.N. Machinery Corp., nor against the Chillemi defendants, who are merely the owners of defendant, C.J.N. Machinery, Corp., and that the plaintiffs are not entitled to any of the preliminary injunctive relief demanded by them because defendant Mondy engaged in no wrongful conduct.

It is well established that an motion for preliminary injunction opens the record and gives the court authority to pass upon the sufficiency of the underlying pleading (*Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182). However, the court's inquiry is limited to determining whether the plaintiff has a cause of action as the court's power does not extend to an evaluation of conflicting evidence (*68 Burns Holding, Inc. v Burns Street Owners Corp.*, 18 AD3d 857, 796 NYS2d 677).

Review of the record adduced on the instant motion for preliminary injunctive relief reveals that plaintiff, Roger Jacobi, has no cognizable claims against any of the defendants and that the corporate defendant has no cognizable claims against defendants, Vincent Chillemi and Anthony Chillemi. According, all claims interposed hereby by plaintiff, Roger Jacobi, against all defendants are dismissed and all claims interposed by the corporate plaintiff against defendants Vincent Chillemi and Anthony Chillemi are dismissed for legal insufficiency. Pursuant to CPLR 1003, the individual plaintiff, Roger Jacobi, is dropped as a party plaintiff as are the Chillemi defendants and the caption of this action is hereby amended to reflect same. The court further finds that the corporate plaintiff has no cognizable claims for damages or injunctive relief against corporate defendant, C.J.N. Machinery Corp., except for its claims for recovery of monies under theories of unjust enrichment and/or an account stated by reason of the corporate plaintiff's delivery of goods to said corporate defendant. Accordingly, the corporate plaintiff's "Seventh", "Ninth" and "Tenth" causes of action against the corporate defendant are dismissed while said plaintiff's claims for recovery of monies due by reason of goods sold and delivered set forth in causes of actions numbered "Twelfth" and "Thirteenth" are continued against the corporate defendant.

A party seeking the drastic remedy that a preliminary injunction confers must establish a clear legal right to that relief under the law and upon undisputed facts set forth in the record (*Gagnon Bus Company, Inc. v Vallo Transportation, Ltd.*, 13 AD3d 334, 786 NYS2d 107). To prevail on a motion for preliminary injunctive relief, the movant must clearly demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*Pearlgreen Corp. v Yau Chi Chu*, 8 AD3d 460, 778 NYS2d 516).

To establish a likelihood of success on the merits of its claims against defendant Mondy, the corporate plaintiff was required to make some showing, albeit minimally, that the restrictive covenant contained in the 1997 non-disclosure agreement is potentially enforceable and that defendant Mondy actually solicited customers or divulged confidential information in violation of said covenant (*Scott Stackcrow & Company, CPAs, PC v Skavina*, 9 AD3d 805, 780 NYS2d 675; *TMP Worldwide, Inc. v Franzino*, 269 AD2d 332, 703 NYS2d 183). Absent the requisite showing that the relied upon restrictive covenant is enforceable and was violated by defendant Mondy, it was incumbent upon the corporate plaintiff to establish that defendant Mondy misappropriated trade secrets and/or engaged in wrongful conduct by which he acquired customer lists or confidential and/or proprietary information belonging to the corporate plaintiff (*Pearlgreen Corp. v Yau Chi Chu*, 8 AD3d 460, 778 NYS2d 516, *supra*). To establish irreparable harm or injury, the corporate plaintiff was required to adduce some proof of actual loss of customer accounts (*see, IVI Environmental, Inc. v McGovern*, 269 AD2d 497, 707 NYS2d 107) or a loss of good will (*BDO Seidman v Hirshberg*, 93 NY2d 382, 690 NYS2d 854) or a loss of trade secrets, in which latter case, irreparable harm is presumed (*L-3 Communications Corporation v Kelly*, 10 Misc3d 1055[A]; *see, also, North Atlantic Instruments v Haber*, 188 F3d 38). Finally, the corporate plaintiff was required to demonstrate that under all of the circumstances, the balance of the equities tipped in favor of the corporate plaintiff's position.

Review of the record adduced on the instant motion reveals that the restrictive covenant contained in the 1997 non-disclosure agreement is not likely enforceable due to its over-broad nature. Said covenant contains a non-solicitation clause unlimited in geographic area and purports to prohibit defendant Mondy from canvassing and soliciting sales from any person, company or firm who was a customer of the corporate plaintiff for a period of three (3) years prior to the termination of defendant Mondy's employment with the corporate plaintiff and from inducing any such person, company or firm to terminate their patronage of the corporate plaintiff. Since the covenant is facially over-broad (*Scott Stackcrow & Company, CPAs, PC v Skavina*, 9 AD3d 805, 780 NYS2d 675, *supra*; *Jays Custom Stirnging, Inc. v Yu*, 2001 WL 76107 SDNY 7/6/2001) and the plaintiff failed to demonstrate that the same should nevertheless be enforced so as to protect the corporate plaintiff's legitimate interest in preventing defendant Mondy, a former employee, from exploiting the goodwill of a customer of the corporate plaintiff which was created and maintained at said corporate plaintiff's expense (*BDO Seidman v Hirshberg*, 93 NY2d 382, 690 NYS2d 854, *supra*), the restrictive covenant has not been shown to be enforceable. Nor did the plaintiff establish that the subject restrictive covenant is enforceable notwithstanding its overly broad nature so as to protect the corporate plaintiff's trade secrets, confidential customer information, its client base or is necessary to prevent irreparable harm because defendant Mondy's services were unique and extraordinary

(*BDO Seidman v Hirshberg*, *ibid.*; see also, *Silipos v Bickel*, 2006 WL 2265055[SDNY] 8/6/2006). The plaintiffs' submissions also failed to contain any proof that the facially over-broad restrictive covenant, which appears to have been imposed upon defendant Mondi as a condition of his employment with the plaintiff in 1997, originated in the absence of overreaching, coercive use of dominant bargaining power or other anti-competitive misconduct on the part of the corporate plaintiff and is thus partially enforceable (*Scott Stackcrow & Company, CPAs, PC v Skavina*, *supra*; *Silipos v Bickel*, *supra*; *Kanan, Corbin, Schipak & Arnow, Inc. v FD International, Ltd.*, 8 Misc3d 412, 797 NYS2d 883).

In the absence of an enforceable restrictive covenant, an employer may be entitled to a preliminary injunction restraining a former employee from soliciting said employer's customers through the use of customer lists only in those cases where the employer demonstrates that the customer list was a trade secret or that the former employee engaged in wrongful conduct in procurement of customer lists and confidential information (*Ingenuitt, Ltd. v Harriff*, 33 AD3d 589, 822 NYS2d 301; *Pearlgreen Corp. v Yau Chi Chu*, 8 AD3d 460, 778 NYS2d 516, *supra*). The plaintiffs' moving papers failed, however, to include due proof of the existence of each of the foregoing factors necessary to establish a likelihood of success on the merits of the corporate plaintiff's causes of action sounding in unfair competition, tortious interference with business relations, breach of fiduciary duties and the like; none of which are dependent upon the existence of a restrictive covenant (*APA Security, Inc. v APA*, 37 AD3d 502, 831 NYS2d 201; Cf., *Ingenuitt, Ltd. v Harriff*, 33 AD3d 589, 822 NYS2d 301, *supra*).

The court also finds that the corporate plaintiff failed to demonstrate irreparable harm or injury in the absence of the granting of preliminary injunctive relief. The affidavits of the principals of two (2) of the corporate plaintiff's customers who aver that defendant Mondi solicited them after he left the corporate plaintiff's employ, were not considered by the court inasmuch as they were first submitted only as exhibits to the plaintiffs' reply papers (*Parkin v Ederer*, 27 AD3d 633, 810 NYS2d 901; *Furth v Elrac, Inc.*, 11 AD3d 509, 784 NYS2d 112). In any event, the corporate plaintiff failed to establish actual or impending loss of customer accounts, good will or loss of trade secrets or other harm that could not be remedied by money damages should the corporate plaintiff succeed on one or more of its pleaded claims against defendant Mondi. Finally, the corporate plaintiff failed to demonstrate that the balance of the equities favors its position. The instant motion (#001) for preliminary injunctive relief is thus denied; and it is further

ORDERED that a preliminary conference shall be held on January 9, 2008 at 9:30 a.m. in the courtroom of the undersigned located in the Supreme Court Building, 1 Court Street, Room 362, Riverhead, New York. Counsel for the respective parties are thus directed to appear at 9:30 a.m. on January 9, 2008 ready for said conference.

Dated: October 24, 2007.



EDWARD D. BURKE, A.J.S.C.