

**Central Radiology Servs., P.C. v Sharp Imaging
Radiology, P.C.**

2007 NY Slip Op 33764(U)

November 7, 2007

Supreme Court, Nassau County

Docket Number: 3594-07/

Judge: Leonard B. Austin

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INDEX
No. 13594/07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 8-15-07
Submission Date: 8-15-07
Motion Sequence No.: 001/MOT D

_____ x
CENTRAL RADIOLOGY SERVICES,
P.C. and ALLEN ROTHPEARL, M.D.,
P.C.,

COUNSEL FOR PLAINTIFFS
Eisenberg & Carton, Esqs.
2631 Merrick Road, Suite 201
Bellmore, New York 11710

Plaintiffs,

- against -

COUNSEL FOR DEFENDANT

NO APPEARANCE

SHARP IMAGING RADIOLOGY, P.C.
a/k/a SHARP RADIOLOGY, P.C.,

Defendant.

_____ x

ORDER

The following papers were read on Plaintiff's motion for a preliminary injunction:

- Order to Show Cause dated August 8, 2007;
- Affidavit of Allen Rothpearl sworn to on August 2, 2007;
- Plaintiff's Memorandum of Law.

Plaintiffs, Central Radiology Services, Inc. ("Central") and Allen Rothpearl, M.D., P.C. ("ARMDPC"), move for a preliminary injunction seeking to enjoin Defendant from

CENTRAL RADIOLOGY SERVICES, P.C. v. SHARP IMAGING RADIOLOGY, P.C.
Index No. 13594-07

using and/or listing Plaintiffs' addresses on its letterhead.

BACKGROUND

Allen Rothpearl is a physician duly licensed to practice medicine in New York. Dr. Rothpearl specializes in diagnostic radiology. Dr. Rothpearl is the president and sole shareholder in Central and ARMDPC.

Central is in the business of operating a diagnostic radiology facility located at 79-01 Metropolitan Avenue Middle Village, New York ("Middle Village facility").

ARMDPC is in the business of operating a diagnostic radiology facility at 1510 Jericho Turnpike, New Hyde Park, New York ("New Hyde Park facility").

Defendant, Sharp Imaging Radiology, P.C. a/k/a Sharp Radiology, P.C. ("Sharp"), is in the business of providing diagnostic radiological services. Sharp provides these services at offices it does not own or operate. Sharp rents space at radiological facilities on an hourly or other temporary basis. Sharp uses rented these facilities to conduct its business.

For a period of time, Sharp rented time at Central's Middle Village facility. During that time, Sharp listed Central's Middle Village facility on its letterhead and other business documents as one of its locations. Sharp's arrangement to use the Central's Middle Village facility expired on July 24, 2007.

Sharp never had an arrangement to use ARMDPC's New Hyde Park facility.

Plaintiffs allege that Sharp lists Central's Middle Village facility and ARMDPC's New Hyde Park facility on its letterhead and other business documentation.

CENTRAL RADIOLOGY SERVICES, P.C. v. SHARP IMAGING RADIOLOGY, P.C.
Index No. 13594-07

Central and ARMDPC seek to permanently enjoin Sharp from listing their addresses on its letterhead and other business documents. On this motion, Central and ARMDPC seek a preliminary injunction enjoining Sharp from listing their addresses on their letterhead and other business documents during the pendency of this action.

DISCUSSION

The party seeking a preliminary injunction must establish (1) a likelihood of success on the merits, (2) the Plaintiff will suffer irreparable harm in the absence of an injunction and (3) a balancing of the equities favors the granting of an injunction. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990); Doe v. Axelrod, 73 N.Y.2d 748 (1988); and Olabi v. Mayfield, 8 A.D.3d 459 (2nd Dept. 2004).

Plaintiffs allege two causes of action (1) violation of the Lanham Act (15 U.S.C. §1115, *et. seq*) and (2) common law unfair competition.

The Lanham Act [15 U.S.C. 1125 (a)(1)(A)] prohibits a misrepresentation of fact in connection with any services which is likely to cause confusion, mistake or deceive as to affiliation or association.

Plaintiffs also assert that Defendant is engaging in unfair competition. To succeed on this theory, Plaintiffs must establish the Defendant misappropriated their labors, skills, expenditures or good will and acted in bad faith in so doing. Abe's Room, Inc. v. Space Hunters, Inc., 38 A.D.3d 690 (2nd Dept. 2007).

Sharp never had a right to use the address of ARMDPC's New Hyde Park facility on its letterhead or any other documents. Thus, it should be enjoined from doing so.

CENTRAL RADIOLOGY SERVICES, P.C. v. SHARP IMAGING RADIOLOGY, P.C.
Index No. 13594-07

While Sharp may have had the right to use the address of Central's Middle Village facility on its letterhead and documents while it rented time at the facility, that right expired on July 24, 2007 when Sharp's right to use those facilities expired. Any indication that Sharp is affiliated with ARMDPC or Central is misleading and confusing. Additionally, Sharp is trading on Central and ARMDPC's good will. Thus, Plaintiffs have established a likelihood of success on the merits.

. Irreparable harm means injury for which money damages would be insufficient. See, Klein, Wagner & Morris v. Lawrence A. Klein, P.C., 186 A.D.2d 631 (2nd Dept. 1992). In this case, Plaintiff may never be able to establish it sustained money damages. However, Plaintiffs should be able to prevent Sharp from holding itself out as having use of or an affiliation with Plaintiffs' facilities inasmuch as damage to their reputation would likely be incalculable. See, e.g., Johnson v. DCC Compact Classics, Inc., 1989 WL 74824 (SDNY).

A balancing of the equities also favors the issuance of a preliminary injunction. Sharp has no right to use Plaintiffs' facilities or to represent to the public that it has any affiliation therewith. Plaintiffs have demonstrated a greater harm in their absence of a preliminary injunction than Sharp would suffer with its being granted..

CPLR 6312(b) requires the Court to fix an undertaking in an amount sufficient to compensate Defendants for damages sustained should it be determined that the preliminary injunction was improvidently granted. See, Magolies v. Encounter, Inc., 42 N.Y.2d 475 (1977); and Schwartz v. Gruber, 216 A.D.2d 526 (2nd Dept. 1999).

CENTRAL RADIOLOGY SERVICES, P.C. v. SHARP IMAGING RADIOLOGY, P.C.
Index No. 13594-07

Sharp did not oppose the motion. From a reading of the papers submitted in support of this motion, Sharp has no demonstrable right to use Plaintiffs' facilities or to hold itself out as having any affiliation with either Plaintiff on their locations. The Court cannot comprehend what monetary damage Sharp will incur if it is required to remove Plaintiffs' facilities addresses from its letterhead and business documentation other than the cost of printing the new letterhead and documents. Therefore, Plaintiffs should post a nominal undertaking of \$500. See, Clover Street Assocs. v. Nilsson, 244 A.D.2d 312 (2nd Dept. 1997).

Accordingly, it is,

ORDERED, that Plaintiffs motion for a preliminary injunction is **granted**; and it is further,

ORDERED, that within seven (7) days from the date of service of a copy of this order with Notice of Entry, and during the pendency of this action, Defendant is directed to remove from its letterhead and other business documentation including but not limited to business cards, invoices, promotional material and website(s), the addresses of Plaintiffs' Middle Village and New Hyde Park facilities provided that Plaintiffs shall post an undertaking in the sum of \$500 within ten (10) days of the date of this order. Such undertaking may be by filing such sum with the Nassau County Clerk, by New York authorized surety or by depositing such sum in escrow with Plaintiffs' attorney; and it is further,

CENTRAL RADIOLOGY SERVICES, P.C. v. SHARP IMAGING RADIOLOGY, P.C.
Index No. 13594-07

ORDERED, that counsel for the parties are directed to appear for a Preliminary Conference on December 13, 2007 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
November 7, 2007



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
NOV 20 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE