Delfino Insulation Co., Inc. v Jaworowski
2007 NY Slip Op 34437(U)
April 26, 2007
Supreme Court, Suffolk County
Docket Number: 03-4916
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 03-4916
CAL. No. 06-01686-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-19-06
ADJ. DATE 1-8-07
Mot. Seq. # 004 - MD
005 - XMG

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DELFINO INSULATION CO., INC.,

Plaintiff,

- against -

JOHN J. JAWOROWSKI and JACK HUNTER, individually and d/b/a HUNTER INSULATION,

Defendants.

---X

DAVID J. GOLD, P.C.
Attorney for Plaintiff
116 John Street, Suite 3110
New York, New York 10038-3411

SCOTT D. MIDDLETON, ESQ.
Attorney for Defendant Jaworowski
3330 Veterans Memorial Highway
Bohemia, New York 11716

THOMAS G. NOLAN, ESQ.
Attorney for Defendant Hunter
Union Square, P.O. Box 826
Aquebogue, New York 11931

Upon the following papers numbered 1 to 28 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers 17 - 20 ; Answering Affidavits and supporting papers 21 - 24; 25 - 28 ; Replying Affidavits and supporting papers ________; Other ________; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for an order granting plaintiff a money judgment in the sum of $1,500,000 for actual and punitive damages related to breach of its restrictive covenant and solicitation of its customers is denied; and it is further

ORDERED that this cross motion by defendant Jack Hunter d/b/a Hunter Insulation for an order granting him summary judgment dismissing plaintiff's complaint is granted.

Plaintiff Delfino Insulation Co. Inc., ("Delfino") commenced this action against its former employee, John Jaworowski ("Jaworowski"), and Jack Hunter d/b/a Hunter Insulation ("Hunter") for breach of an employment contract and the misappropriation of trade secrets. Plaintiff is seeking a sum of

$500,000 plus interest in actual damages for the "misappropriation and misuse" of its trade secrets and $1,000,000 in punitive damages for defendants' alleged "willful, deliberate and intentional" breach of a noncompete clause in the employment contract with Jaworowski.

By his affidavit, Frederick Furnell, plaintiff's assistant secretary, alleges that Jaworowski breached his restrictive covenant with Delfino Insulation when he accepted employment from Hunter in contravention of the terms of a noncompete clause he signed on or about August 12, 1999 wherein Jaworowski agreed not to "divulge plaintiff's trade secrets and client lists and not to engage in similar employment within a seventy-five mile radius from plaintiff's locations for a period of three years after leaving plaintiff's employ." Mr. Furnell explained that shortly after plaintiffs discovered that Jaworowski had accepted employment from Hunter in March of 2003, Hunter announced during a builders' meeting that it would be opening a new location in Orange County that would be managed by Jaworowski. Mr. Furnell cites the loss of Applied Building Development Inc.'s account as one example of business loss Delfino suffered shortly after the builders' meeting.

Plaintiff now moves for summary judgment in its favor on the grounds that defendants have failed to submit a meritorious defense and there are no triable issues of fact warranting denial of its motion. In support of its motion plaintiff submits, inter alia, copies of the pleadings; an affidavit from its assistant secretary, Frederick Furnell; and deposition testimony from defendants John Jaworowski and Jack Hunter. Plaintiff also submits a photocopy of a flyer distributed by Hunter Insulation announcing the opening of an office in Newburgh, Orange County and the hiring of John Jaworowski.

In opposition defendants argue that plaintiff's motion should be denied, because there are issues of fact as to whether plaintiff's employment agreement was temporally and geographically reasonable, and whether defendant Jaworowski signed the contract under duress. Defendants also contend that plaintiff neither established the existence of the alleged trade secrets or customer lists, nor demonstrated that this information was of any value since there has been widespread changes in prices and bidding practices since Jaworowski left Delfino Insulation more than two years ago.

Defendant Hunter also cross moves for summary judgment dismissing plaintiff's claims against it. Hunter argues that plaintiff's breach of contract claim is without merit, since it was not a party to, or aware of plaintiff's contract with Jaworowski. Plaintiff argues that Hunter's cross motion should be denied because Hunter's offer of employment to Jaworowski was the proximate cause of Jaworowski's breach of their employment contract, and Hunter profited from this breach.

The relevant clauses of the employment agreement between plaintiff and Jaworowski provide as follows:

> 1. In consideration of employer employing employee in the capacity of Sales Rep., employee covenants and agrees not to disclose or use for the benefit of themself or any third party all confidential information, trade secrets, customer lists, suppliers, and other information of employer either during the term of employment or for a period of three years thereafter without the written consent of employer

> 2. Upon termination of the employment relationship between the parties, employee agrees not to engage in a similar business to that of the employer, directly or indirectly, as employer, employee...or otherwise within a seventy-five (75) mile radius of the business location of any branch, sub corporation, or business head quarters of the employer in the Long Island, New York region.

The agreement also contained provisions explaining that the employer would be entitled to injunctive relief or actual or punitive damages in the event the employee wilfully and deliberately breached the terms of the contract.

At his examination before trial Jaworowski testified that although he held other positions with plaintiff, he was only required to sign an employment contract with a non-compete provision some time after he became a sales representative. Jaworowski testified that he reluctantly signed the contract when his job was threatened by management and his commission checks were withheld. Jaworowski testified that he was not represented by an attorney and that he did not have a chance to review the agreement before he signed it. Jaworowski testified that as a sales representative he worked with the installers and drivers to ensure they met the needs of builders that they were visiting for that day, and then he went out and solicited new customers. Jaworowski testified that although he initially worked in plaintiff's Bohemia office, he and another salesman were reassigned to its new office in Orange County, New York, to expand business upstate. He explained that some of the accounts given to him were longtime Delfino Insulation accounts, and that he also developed new accounts by phone calls, news papers, knocking on doors and looking around while he drove. Jaworowski testified that he was not given a list of accounts. Rather, he obtained customer names from files maintained in a generally accessible filing cabinet in plaintiff's Bohemia office. Although Jaworowski could not recall how many files he was working on, he knew that the number of accounts he worked on grew. Jaworowski also testified that he did not keep records of the customers and that, while he memorized some customer information and kept statements for the purpose of tracking his commissions, he disposed of such customer information once he was paid. Jaworowski testified that he secured the Applied Building Development account while he was working for Delfino in its Upstate office. Jaworowski testified that he had one or two meetings with Hunter before he was hired as a sales representative in March of 2003. He testified that all discussions during those meetings related solely to the job's description and his compensation as a salaried, rather than commission paid employee.

At his examination before trial John Hunter, president of Hunter Insulation, testified that Jaworowski worked with his company for 1½ years as a sales representative after he was referred to him by another employee within his company. Hunter testified that as far he knew Jaworowski worked for a lumber yard, and that his offer of employment to Jaworowski was not contingent on Jaworowski bringing in specified accounts. Hunter testified that although Jaworowski solicited some new customers, he did not meet his regular monthly sales quota. Hunter further explained that although he discovered that Jaworowski used to work for Delfino sometime after he hired him, Jaworowski only informed him of the non-compete agreement after the initiation of Delfino's action. Hunter also testified that he had no knowledge that a flyer announcing Jaworowski's employment with Hunter was composed in his office and that he only learnt of the flyer after it was distributed at the builder's meeting. Hunter also testified that he was not sure how many of the flyers had been distributed.

The proponent of a summary judgment motion must make out a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the insufficiency of the opposing papers (***Sheppard- Mobley v King***, 10 AD3d 70, 778 NYS2d 98 [2004]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v New York***, 49 NYS2d 557, 427 NYS2d 595 [1980]).

It is well settled that restrictive covenants contained in employment contracts that tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored in the law (*see*, ***Reed, Roberts Assocs. v Strauman***, 40 NY2d 303, 386 NYS2d 677 [1971]; ***Skaggs-Walsh, Inc. v Chmiel***, 224 AD2d 680, 638 NYS2d 698 [1996]). Such covenants will be enforced only if reasonably limited temporally and geographically and then only to the extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of trade secrets or confidential customer information, or if the employee's services are unique or extraordinary (***Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.***, 42 NY2d 496, 398 NYS2d 1004 [1977]; *see also*, ***Savannah Bank N.A. v Savings Bank of Fingerlakes***, 261 AD2d 917, 691 NYS2d 227 [1999]; ***H&R Recruiters v Kirkpatrick***, 243 AD2d 680, 663 NYS2d 865 [1997]; ***Family Affair Haircutters v Detling***, 110 AD2d 745, 488 NYS2d 204 [2d Dept 1985]). With regard to the alleged use of confidential customer lists by a former employee, a restrictive covenant will not be enforced unless a plaintiff can demonstrate that the information contained in the list was not readily available through other sources (***Leo Silfen, Inc. v Cream***, 29 NY2d 387, 328 NYS2d 423 [1972]). Moreover, the solicitation of a plaintiff's clients by a former employee is not actionable unless the customer list could be 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 (***Amana Express Int'l. v Pier-Air Int'l Ltd.***, 211 AD2d 606, 621 NYS2d 108[1995]; *see also*, ***JAD Corp of America v Lewis***, 305 AD2d 545, 759 NYS2d 388 [2003]). Additionally, former employees are entitled to utilize their recollection of information concerning the particular business needs and habits of customers, and such recollected information is not construed as confidential for purposes of enforcing restrictive employment covenants (*see*, ***Buhler v Michael P. Maloney Consulting Inc.***, 299 AD2d 190, 749 NYS2d 867 [2002]; ***Investor Access Corp. v Doremus & Co.***, 186 AD2d 401, 588 NYS2d 842 [1992]).

Notwithstanding indisputable evidence that defendant Jaworowski breached the terms of plaintiff's non-compete agreement, plaintiff has failed to demonstrate that its non-compete agreement was temporally and geographically reasonable to the extent necessary to protect its legitimate interests (***Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.***, *supra*; ***Reed, Roberts Assoc. v Strauman***, *supra*; ***D & W Diesel v McIntosh***, 307 AD2d 750, 762 NYS2d 851 [2003]; ***Technology for Measurement v Briggs***, 291 AD2d 902, 737 NYS2d 197 [2002]; ***Walter Karl, Inc. v Wood***, 137 AD2d 22, 528 NYS2d 94 [1988]), or that its customer list was a trade secret and was obtained through wrongful means (***Leo Silfen, Inc. v Cream***, *supra*; ***Buhler v Michael P. Maloney Consulting***, *supra*; ***Investor Access Corp. v Doremus & Co.***, *supra*). Plaintiff submitted no evidence that it kept a single customer list or that the

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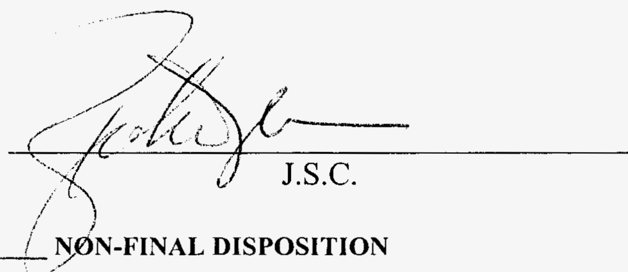
names of its past or prospective customers were not readily ascertainable from sources outside its business. Rather, defendant testified that the client information kept by the plaintiff were kept in an unlocked filing cabinet in its office (***Leo Silfen, Inc. v Cream***, *supra*; ***Frederic M. Reed & Co. v Irvine Realty Group***, 281 AD2d 352, 723 NYS2d 19 [2001]). While defendant testified that he memorized some customer information in order to keep track of his commissions, plaintiff has offered no evidence that he obtained its customer list by wrongful means or that they lost any other business due to the alleged misuse of their customer information (*see*, ***Buhler v Michael P. Maloney Consulting***, *supra*; ***Investor Access Corp. v Doremus & Co.***, *supra*). Additionally, plaintiff failed to prove that the defendant's services were unique or extraordinary or that he was irreplacable (*see*, ***Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.***, *supra*; ***Reed, Roberts Assocs. v Strauman***, *supra*). Plaintiff's request for damages is also speculatory, since plaintiff neither submitted evidence of how much business it lost due to the loss of Applied Building Development's account nor specified any other customer whom it allegedly lost due to Jaworowski's alleged misuse of its customer information. Accordingly, plaintiff's motion for summary judgment seeking a money judgment of $1,500,000 for actual and punitive damages is denied.

With regard to plaintiff's claims against defendant Hunter, as Hunter was not a party to the employment contract and there is no evidence he hired Jaworowski for the sole purpose of harming plaintiff, plaintiff may not maintain causes of action against him for either breach of contract or tortious interference with business relationships (***Snyder v Sony Music Entertainment Inc.***, 252 AD2d 294, 684 NYS2d 235 [1999]; ***ENV Servs. v Alesia***, 10 Misc3d 1054A, 809 NYS2d 481 [2005]). Hunter testified that although he learned that Jaworowski previously worked with Delfino Insulation sometime after he employed him, he had no knowledge of Jaworowski's employment contract or that Jaworowski had composed a flyer for circulation at the builders' meeting. Indeed, Mr. Hunter testified that Jaworowski was referred to him by an employee within his own company while Jaworowski was still working for Rowley Building Products and that as far as he knew Jaworowski had not worked with Delfino Insulation for almost three years before he hired him. Plaintiff also failed to raise any triable issue of fact warranting denial of Hunter's cross motion for summary judgment (*see*, ***Zuckerman v New York***, *supra*). Accordingly, Hunter's cross motion for summary judgment dismissing plaintiff's complaint is granted.

Dated: APR 26 2007



J.S.C.

X FINAL DISPOSITION ___ NON-FINAL DISPOSITION