Sunnyday Indus. Enters., Ltd. v Omanja 5 Star Ice Cream, Inc.
2008 NY Slip Op 31023(U)
April 2, 2008
Supreme Court, Nassau County
Docket Number: 0057-07/
Judge: Leonard B. Austin

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INDEX
No. 20057-07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 1-2-08
Submission Date: 1-2-08
Motion Sequence No.: 001/MOT D

x

SUNNYDAY INDUSTRIES ENTERPRISES, LTD., and SKS ENTERPRISES, INC.,

Plaintiffs,

- against -

OMANJA 5 STAR ICE CREAM, INC. and CALIP DAIRIES, INC.,

Defendants.

x

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ORDER

The following papers were read on Plaintiff's motion for a preliminary injunction:[1]

Order to Show Cause granted on December 20, 2007;
Affidavit of Sherwin Gordon sworn to on December 13, 2007;
Affidavit of James Glynn sworn to on December 14, 2007;

[1] The Court notes that the Supplemental Affidavit of Sherwin Gordon sworn to on January 9, 2008 was also received, albeit more than one week after submission of the motion. It has not been considered by the Court inasmuch as no valid excuse for its submission has been proffered. See, Thermos Spas Inc. v. Red Ball Spas & Baths, Inc., 199 A.D. 2d 605 (3rd Dept. 1993).

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Affirmation of Andrew T. Solomon, Esq. dated December 20, 2007;
Affidavit of Sherwin Gordon sworn to on December 31, 2007.

Plaintiffs Sunnyday Industries Enterprises, Ltd. ("Sunnyday") and SKS Enterprises, Inc. ("SKS") move for preliminary injunctive relief.

BACKGROUND

This action arises from what Plaintiffs characterize as a course of conduct beginning in July, 2003 by Defendant Calip Dairies, Inc. ("Calip"), the exclusive distributor of Haagen-Dazs branded ice cream and frozen desserts ("HD product") intended to destroy the business of Sunnyday and SKS or, failing that, coerce them to sell their assets to Calip for substantially less than their real value. The tactics employed by Calip allegedly included fraudulent and defamatory statements, discriminatory use of Calip's power as the exclusive distributer of HD product, unfair competition, theft of trade secrets, breach of contract, and violation of both the Donnelly Act (General Business Law ["GBL"] § 340) and Agriculture and Markets Law § 71-i(3).

Since its inception approximately 45 years ago, Sunnyday has been in the business of distributing ice cream and frozen dessert products to retail stores mostly in the New York City area. Subsequently, SKS was formed to distribute such products to other types of retail stores, principally 7-11 stores and gas stations, mostly in Nassau and Suffolk counties. For many years prior to July 2003, Sunnyday was an authorized non-exclusive distributor of HD product and purchased its product requirements directly from whichever company owned the Haagen-Dazs brand at the time.

Once Calip became the exclusive distributor of HD product in the New York Metropolitan area in 2003, however, Plaintiffs contend that the competitive landscape changed from one in which there were a number of distributors who competed with one another *vis-a-vis* price, to one in which Calip alone controlled the wholesale price paid by the retailers and sub-distributors. Moreover, according to Plaintiffs, Calip wrongfully solicited Plaintiffs' accounts, used Sunnyday's and SKS' confidential and proprietary information – – customer lists – – and, in violation of Agriculture and Market Law § 71-3, used and appropriated their assets; to wit: SKS freezers installed at many customer locations which Calip used to store ice cream which it then distributed to former SKS customers without SKS' consent.

With Sunnyday's very existence at risk, Plaintiffs contend they had no other option but to explore the possible sale of Sunnyday/SKS assets to Calip. Despite an alleged oral agreement in August 2003, whereby Calip agreed to purchase substantially all of Sunnyday's and SKS's assets – – including those already appropriated – – for $4 million, Plaintiffs allege that Calip continued to wrongfully solicit Sunnyday's customers, by using confidential information and the services of former Sunnyday employees, eventually refusing, on October 3, 2003, to honor the original oral purchase agreement. Instead, it offered to purchase only those assets which it had already appropriated with an option to purchase the remaining assets, if it so chose. Plaintiffs contend that they were left with no viable economic alternative but to accede to Calip's proposal. The sale was never consummated.

During the period from July 2003, when Sunnyday's non-exclusive distributorship agreement was terminated, until June 2004, when Calip made another proposal to purchase Plaintiffs' assets, Calip allegedly refused to sell HD product to Sunnyday at any price and used its position as exclusive distributor to prevent Sunnyday from obtaining HD product in sufficient quantities or at competitive prices. Plaintiffs managed, however, to find other sources from whom to purchase HD products.

In June 2004, Calip presented Plaintiffs with two proposed agreements. Under one, an entity known as "Calip Dairies Distribution Corp." would purchase the assets previously appropriated by Calip. Under the other, an entity known as Defendant, Omanja 5 Star Ice Cream, Inc. ("Omanja"), a sub-distributor for Calip, would nominally purchase Sunnyday's remaining assets immediately, but would not close on the purchase until some future date defined variously in the agreement as:

a) the third anniversary of the date of the agreement, or

b) on the date provided in Section 19 if the seller exercised the "put option" right, or

c) on the date provided in Section 20 if the buyer exercised the "call option" right, or

d) as might otherwise be agreed to by the buyer and seller.

Until such time as the sale closed, Omanja agreed to provide Sunnyday with its requirements for HD products.

Sunnyday alleges it was only after repeated assurances that it would not be compelled to close on the sale until it was ready to do so, the agreements were

executed on June 23, 2004. Approximately five days prior to the three year anniversary date of the Omanja agreement, on June 18, 2007, Omanja notified Plaintiff of its intention to exercise its option to purchase the assets referred to in the Omanja agreement.

Plaintiffs maintain that, since Omanja's "call option" could only be exercised if Sunnyday was in material breach of the June 23, 2004 agreement, had received notice of that breach and had failed to cure, Omanja's notice to purchase was without legal significance and that Omanja had no right to compel a closing on any date other than one to which Sunnyday might agree. Previously, in or about March 15, 2007, a company affiliated with Calip, Dunes Ice Cream Corp., had proposed to purchase certain specified Sunnyday accounts and the freezers associated therewith. The anticipated sale between Plaintiff and Omanja never closed.

On or about September 21, 2007, Calip advised Omanja, and later another subdistributor of HD product, Bartolini Ice Cream Co., Inc., that Calip would not supply HD products to them if they resold the HD product to Sunnyday. In its letter of September 21, 2007, Calip states that Sunnyday was disqualified from selling HD products because of its failure to adhere to the performance criteria that any distributor of such products is required to maintain.

Despite numerous agreements/proposals over the years regarding the purchase of Plaintiff's assets, no such sale has occurred.

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The complaint, which seeks various injunctive relief, designed to preserve Plaintiffs' business, asserts causes of action sounding in unfair competition, violation of the Donnelly Act (GBL § 340), breach of contract, tortious interference with contract and fraud.

On this motion, Plaintiffs seek to enjoin Calip from preventing, or attempting to prevent, third parties from selling HD product to Sunnyday at customary prices and on customary conditions and to cease and desist from retaliating and attempting to retaliate against such third parties.

DISCUSSION

Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be granted cautiously. Gagnon Bus Co. Inc. v. Vallo Transp., Ltd., 13 A.D. 3d 334, 335 (2nd Dept. 2004). In order to obtain preliminary injunctive relief, the moving party must demonstrate that irreparable harm will occur if an injunction is not granted, that such party has a likelihood of success on the merits, and that a balance of the equities tips in its favor. Glorious Temple Church of God in Christ v. Dean Holding Corp. 35 A.D. 3d 806, 807 (2nd Dept. 2006). See, Aetna Ins. Co v. Capasso, 75 N.Y. 2d 860 (1990); Doe v. Axelrod, 73 N.Y. 2d 748 (1988); and Ohabi v. Mayfield, 8 A.D. 3d 459 (2nd Dept. 2003). The purpose of such an injunction is to preserve the status quo pending a decision on the merits of the litigation. Icy Splash Food & Beverage, Inc. v. Henckel, 14 A.D. 3d 595, 596 (2nd Dept. 2005).

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Irreparable harm in the context of a motion for a preliminary injunction means any injury for which money damages are insufficient. OraSure Technologies, Inc. v. Prestige Brand Holdings, Inc., 42 A.D. 3d 348 (1st Dept. 2007); and Icy Splash Food & Beverage, Inc. v. Henckel, *supra*. In determining whether Plaintiff has met this standard, the Court is mindful that a preliminary injunction is a drastic remedy which is not routinely granted. Marietta Corp. v. Fairhurst, 301 A.D. 2d 734, 736 (3rd Dept. 2003). The decision whether or not to issue a preliminary injunction is a matter left to the sound discretion of the court (Doe v. Axelrod, *supra*; and Ying Fung Moy v. Hohi Umeki, 10 A.D. 3d 604 [2nd Dept. 2004]) and only after a *prima facie* entitlement to such relief has been established. Gagnon Bus Co. Inc. v. Vallo Transp., Ltd., *supra*; and William M. Blake Agency, Inc. v. Leon, 283 A.D. 2d 423 (2nd Dept. 2001).

It does not appear from the record that Plaintiffs, whose non-exclusive distribution rights of HD products were terminated in 2003 by Nestle Holdings Inc., the exclusive manufacturer/marketer of HD products, would suffer an irreparable injury, should it be proven that Defendants interfered with Plaintiffs' business or otherwise prevented Plaintiff from obtaining HD product. Any damages suffered by Plaintiffs are calculable and may be determined at trial.

Moreover, Plaintiffs have failed to demonstrate a likelihood that they will succeed on the merits. While it is possible, even where facts are in dispute, to find that a Plaintiff has a likelihood of success on the merits (Ruiz v. Meloney, 26 A.D. 3d 485, 486 [2nd Dept. 2006]), it is also true that a movant must demonstrate a clear right to relief which

is plain from the undisputed facts. Related Properties, Inc. v. Town Bd. of Town/Village of Harrison, 22 A.D. 3d 587, 590 (2nd Dept. 2005); and JDOC Construction, LLC v. Balabanow, 306 A.D. 2d 318 (2nd Dept. 2003). Here, the material facts at issue are far from undisputed. The parties dispute whether Plaintiffs suffered an injury within the ambit of the Donnelly Act; whether Sunnyday refused to abide by the performance objectives Calip required; whether Omanja failed to abide by the terms of the Asset Purchase Agreement of June 23, 2004.

There is no uncontroverted proof in the record substantiating Plaintiffs' allegations that either Calip or Omanja refused to sell, and/or caused others to refuse to sell, HD product to Sunnyday for the purpose of eliminating Sunnyday as a competitor; that Calip or Omanja breached their respective agreements with Plaintiff with regard to Calip's purchase of Sunnyday/SKS assets or Omanja's alleged obligation to supply HD products to Plaintiff; or that Calip caused three Sunnyday employees to breach any purported agreements with Sunnyday and induced numerous unnamed Sunnyday customers to permit Calip to store ice cream and frozen dessert products in Sunnyday freezers.

A claim of unfair competition is generally predicated on the alleged bad faith misappropriation of commercial advantage belonging to another by exploitation of proprietary information or trade secrets. Beverage Marketing USA, Inc. v. South Beach Beverage Co., Inc., 20 A.D. 3d 439, 440 (2nd Dept. 2005). As the Court of Appeals has observed, "a trade secret must first of all be secret." Ashland Management, Inc. v.

Janien, 82 N.Y. 2d 395, 407 (1993). Significantly, the resolution of an unfair competition claim requires a complex factual analysis of a variety of factors including the character and circumstances of the business. Capitaland Heating & Cooling , Inc. v. Capitol Refrigeration Co., Inc., 134 A.D. 2d 721, 722 (3rd Dept. 1987). Where, as here, there are sharply contested material 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. Pearlgreen Corp. v. Yau Chi Chu, 8 A.D. 3d 460, 461 (2nd Dept. 2004).

Accordingly, it is,

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

ORDERED, that counsel shall appear for a preliminary conference on May 8, 2008 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
April 2, 2008

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