

Schieffelin & Co., LLC v Hadjiminias

2008 NY Slip Op 31503(U)

May 29, 2008

Supreme Court, New York County

Docket Number: 0104451/2008

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

SCHIEFFELIN & COMPANY, LLC
(d/b/a Vespa Soho),
Plaintiff,

INDEX NO. 104451/2008

- v -

MOTION DATE 5/15/08

MOTION SEQ. NO. 001

ANDREW HADJIMINAS and HADJIMINAS & COMPANY, LLC,
Defendants.

MOTION CAL. NO. 14

The following papers, numbered 1 to 11 were read on this motion for preliminary injunction and admission pro hac vice

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FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

J.S.C. Upon the foregoing papers, It is ordered that this motion, by order to show cause, for a preliminary injunction is decided in accordance with the annexed memorandum decision and order.

The parties have agreed to the remaining branch of the motion, for admission pro hac vice Darren Barrelro, Esq., by so-ordered stipulation dated March 31, 2008.

Dated: 5/29/08
New York, New York

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MICHAEL D. STALLMAN
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
SCHIEFFELIN & COMPANY, LLC
(d/b/a Vespa Soho),

Plaintiff,

Index No. 104451/08

- against -

ANDREW HADJIMINAS and HADJIMINAS & COMPANY,
LLC,

Defendants.

Decision and Order

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X

HON. MICHAEL D. STALLMAN, J.:

Plaintiff, a Vespa dealership in Manhattan moves, by order to show cause for an order preliminarily enjoining defendants from operating a Vespa dealership in Brooklyn, alleging that defendants violated confidentiality and non-compete provisions of agreements the parties executed during discussions to buy the Vespa dealership in Manhattan.

BACKGROUND

Plaintiff is an authorized Vespa dealer doing business as Vespa Soho in Manhattan. In August 2007, defendant Andrew Hadjiminias allegedly approached plaintiff about purchasing Vespa Soho. In connection with the discussions to purchase Vespa Soho, Hadjiminias executed a Confidentiality and Non-Disclosure agreement dated August 1, 2007 (Confidentiality Agreement). On August 30, 2007, Hadjiminias also entered into a Non-Compete and Non-Circumvention Agreement with plaintiff (Non-Compete Agreement). The closing date of sale of Vespa Soho was allegedly extended several times. Plaintiff's managing member allegedly told Hadjiminias that if the transaction did not close, plaintiff would open a dealership in Brooklyn. The sale of Vespa Soho did not go through.

Plaintiff allegedly signed a ten year lease for space in Brooklyn in anticipation of opening a Vespa dealership there. However, according to plaintiff, Hadjiminias became an authorized Vespa dealer in Brooklyn, and Piaggio USA, Inc. (Piaggio), the exclusive importer of Vespa scooters for the United States, has refused to permit plaintiff to open a Vespa dealership in Brooklyn.

Plaintiff commenced this action on March 27, 2008, asserting six causes of action: breach of contract, breach of the covenant of good faith and fair dealing, unfair competition, breach of fiduciary duty, tortious interference with prospective economic gain, and fraud. Plaintiff alleges that defendants used confidential information in violation of the Confidentiality Agreement, and that they have breached the Non-Compete Agreement. Plaintiff claims that defendants only feigned their intention to purchase plaintiff's business to obtain plaintiff's confidential information.

DISCUSSION

“[T]o be entitled to a preliminary injunction, plaintiff[] ha[s] to show a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in [its] favor.” Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 (1990); see e.g. OraSure Technologies v Prestige Brands Holdings, 42 AD3d 348, 348 (1st Dept 2007).

The Confidentiality Agreement between Clear Rock Business Brokers Brokers, LLC (CRB) and Hadjiminias states, in pertinent part:

“Accordingly, RECIPIENT agrees:

(a) that all Confidential Information provided by CRB to RECIPIENT on behalf of CLIENT [B0183-Vespa Dealership] is and shall remain the property of CLIENT, at all times whatsoever, and that such Confidential Information will not be used by RECIPIENT in any way detrimental to CLIENT or CRB, and will be kept confidential by RECIPIENT . . . and shall not, except as hereinafter provided, without the prior written consent of CLIENT, be disclosed by RECIPIENT . . . , in any manner whatsoever, in whole or in part. . . .

* * *

3. TERM. RECIPIENT agrees that this agreement shall remain in effect for a period of one (1) year from the date of receipt of any proprietary or confidential information.”

Schieffelin Aff., Ex D. The Non-Compete Agreement provides, in pertinent part:

“2. Non-Circumvention. For a period of two (2) years following the Effective Date of this Agreement [8/30/07], Recipient shall not, without the prior written consent of Seller, which consent Seller may withhold in its sole discretion,

a. Utilize any Confidential Information to circumvent or compete with Seller on the specific Business Opportunity, which includes amongst other things any attempt to open a Piaggio or Vespa dealership other than the Business Opportunity currently contemplated between parties or

b. Utilize information lawfully furnished or disclosed to Recipient by a non-party to this Agreement without any obligation of confidentiality and through no wrongful act of the recipient Party, or information independently developed by Recipient relative to the Business Opportunity, to circumvent or compete with Seller on the specific Business Opportunity.”

Ex E. The Non-Compete Agreement identifies the “Business Opportunity” as the potential sale of all or substantially all of the assets of Schieffelin & Company, LLC, as well as the assignment and assumption of all the agreements of Schieffelin & Company, LLC.

Defendants’ argument that the Non-Compete Agreement is an unenforceable agreement to agree is unconvincing. Whereas the agreement to purchase plaintiff’s assets may have been in negotiations, the provisions quoted above contain specific, definite promises.

However, plaintiff submits no direct evidence that defendants have violated the Confidentiality Agreement. Plaintiff concludes that defendants must have used confidential information to which Hadjiminias had access to become an authorized Vespa dealer. However, it cannot be reasonably inferred from the circumstances that defendants used any of plaintiff’s

not justified. See Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp., 42 NY2d 496, 500 (1977)(denying plaintiff's request "to sever the impermissible portion" of a restrictive covenant that broadly prohibited competition in the United States for a period of two years, so as to be enforceable). Imposing a city-wide restriction is not appropriate. Piaggio apparently sees no problem in having 2 Vespa dealerships in New York City. Plaintiff's dealership is located in Manhattan, and Piaggio has allegedly permitted defendants to operate a Vespa dealership in Brooklyn. Neither has plaintiff shown that it has a legitimate business interest in restricting defendants from operating a Vespa dealership in Brooklyn. As discussed above, plaintiff has not met its burden of showing on this motion that defendants used any confidential information obtained from plaintiff.

Even if the Court accepted plaintiff's unsupported contention that a "large percentage of its sales" are to clientele residing in Brooklyn, plaintiff is not asking the Court for a preliminary injunction against defendants from soliciting plaintiff's existing customers. Rather, plaintiff is seeking to enforce a restraint on competition against defendants for the privilege of having negotiated with plaintiff. In the absence of overreaching, coercive use of dominant bargaining power or other anti-competitive misconduct, and the lack of legitimate business interest, partial enforcement is unjustified. Cf. BDO Seidman v Hirshberg, 93 NY2d 382, 394 (2000). Thus, plaintiff has not demonstrated a likelihood that paragraph 2(b) of the Non-Compete Agreement would be enforceable.

Finally, plaintiff has not demonstrated a likelihood of success on its cause of action for breach of fiduciary duty against defendants. An arm's length business relationship does not give rise to a fiduciary obligation. Foster v Kovner, 44 AD3d 23, 30 (1st Dept 2007); SNS Bank, N.V. v

[*6]
Citibank, N.A., 7 AD3d 352, 355 (1st Dept 2004)(collecting cases). “Nor is the mere communication of confidential information sufficient in and of itself to create a fiduciary relationship. . .” Wiener v Lazard Freres & Co., 241 AD2d 114, 122 (1st Dept 1998).

CONCLUSION

Plaintiff has not met its burden of demonstrating a likelihood of success on its causes of action against defendants. The Court therefore declines to address plaintiff’s arguments as to irreparable injury and a balancing of the equities in its favor. The Court also declines to address defendants’ argument that merger clauses in agreements concerning the purchase of plaintiff’s assets superseded and replaced the promises regarding plaintiff’s use of confidential and independently acquired information. See Radow Opp. Affirm., Exs C, D. However, the Court points out that the Confidentiality Agreement is between CRB and Hadjiminias, with plaintiff as a beneficiary of the promise of confidentiality. Accordingly, it is hereby

ORDERED that plaintiff’s motion for a preliminary injunction is denied; and it is further

ORDERED that the parties are directed to appear at a preliminary conference on August 14, 2008 at 9:30 A.M. in IAS Part 7, 111 Centre Street Room 949, New York, New York.

Copies to counsel.

Dated: 5/29/08
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK