

Rampart Brokerage Corp. v Rosenberg

2008 NY Slip Op 31910(U)

June 27, 2008

Supreme Court, Nassau County

Docket Number: 1723-08/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

RAMPART BROKERAGE CORP.,

Plaintiff,

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 1723/08

MOTION DATE: June 24, 2008
Motion Sequence # 001

-against-

ANDREW ROSENBERG, THE PROVIDER
GROUP AGENCY LLC, NORTH SHORE
RISK MANAGEMENT INC. and NORTH
SHORE RISK MANAGEMENT LLC,

Defendants.

The following papers read on this motion:

- Order to Show Cause..... X
- Affidavit in Opposition..... X
- Memorandum of Law XX

This motion, by plaintiff, for an order pursuant to CPLR §§6301 and 6311: (i) enjoining defendant Rosenberg from violating his contracts with, and his legal obligations to, plaintiff, and ordering Rosenberg to comply, in all respects, with his Employment Agreement with plaintiff; (ii) enjoining defendants from soliciting to or accepting insurance business from, in violation of the Employment Agreement, any of plaintiff's clients; (iii) enjoining defendants' use and/or misappropriation of plaintiff's confidential and/or proprietary information; (iv) enjoining defendants from utilizing or

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misappropriating plaintiff's client relationships and good will; (v) directing defendants to account to plaintiff for their use of plaintiff's trade secrets, information, assets, documents, customer lists, client relationships; and precluding any further such use; (vi) ordering defendants to turn over to plaintiff, all of plaintiff's documents, materials, confidential and/or proprietary information, or other property of any kind; (vii) enjoining and restraining defendants from engaging in unfair competition with plaintiff and from interfering with the contractual relations and prospective economic advantage of plaintiff; and (viii) awarding plaintiff such additional and other relief, together with costs, disbursements, fees and legal fees, as this Court deems just, proper and equitable, is determined as hereinafter set forth.

FACTS

The plaintiff (hereinafter "Plaintiff" or "Rampart") was the employer of the defendant, Andrew Rosenberg (hereinafter "Rosenberg"). The plaintiff is an insurance brokerage that requires the disclosure of confidential and proprietary information from its clients. Rosenberg was employed by the plaintiff for more than twelve years between April 1995 and August 2007. For most of those twelve years, Rosenberg was the marketing director for the plaintiff's nursing home and healthcare division and was the only Rampart employee charged with these responsibilities.

On July 19, 1996, the plaintiff and Rosenberg entered into an Employment Agreement (hereinafter "Agreement"). The Agreement prohibited Rosenberg from soliciting or accepting insurance business from any Rampart client for a period of three years from the date of termination of his employment. On March 17, 2006, Rosenberg was given an Employee Handbook (hereinafter "Handbook") and signed a Receipt and Acknowledgement. The Handbook contains specific terms and conditions related to Rampart's property and confidential information.

After leaving the plaintiff's employment in August of 2007, Rosenberg joined a competing company, The Provider Group Agency LLC (hereinafter "TPGA").

PLAINTIFF'S CONTENTIONS

It was discovered and claimed by the plaintiff that in December of that same year Rosenberg was in direct violation of his Agreement and Handbook, i.e., that Rosenberg solicited and accepted insurance business from accounts and clients of Rampart. Rampart asserts that Rosenberg and the other defendants in this case have contacted the clients with whom Rosenberg worked on behalf of Rampart, and the defendants are attempting to divert the plaintiff's business. When these actions came to light, the plaintiff conducted a search of Rosenberg's e-mail account and found five e-mails from Rosenberg to his own personal e-mail address which had attachments containing confidential and trade secret information of Rampart and/or its clients.

The plaintiff argues that the defendants misappropriated Rampart's confidential information and trade secrets, are attempting to trade on Rampart's good will, and are in violation of Rosenberg's contractual agreements with Rampart. The plaintiff seeks to enjoin the defendants from violating the contractual agreements, soliciting the plaintiff's clients, and misappropriating the plaintiff's confidential information, good will, and trade secrets. The plaintiff contends that the defendants be ordered to return all of the plaintiff's proprietary information and property as well as enjoining the defendants from engaging in unfair competition with the plaintiff and from interfering with the contractual relations of the plaintiff.

DEFENDANT'S CONTENTIONS

The defendant Rosenberg argues that it was a regular practice to either print at his desk and/or e-mail monthly expiration reports to himself at home for planning purposes. It is claimed that those reports that Rosenberg did e-mail to himself do not contain any information regarding client's contact information such as addresses or phone numbers. Rosenberg asserts that TPGA was started by nursing home owners who were dissatisfied with the level of service they were receiving from their current brokers, including Rampart; and those clients, who switched their service provider from Rampart to TPGA, did so by their own free will and Rosenberg was only responding to the inquiries made by those former clients of Rampart. The defendant further argues that his execution of the agreement was, to some degree, contrived, in that he signed it because it was represented to him that a controversy with another employee would be resolved if he did sign it.

DECISION

“To be entitled to a preliminary injunction, the movant must establish (1) a likelihood of success on the merits,(2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant’s favor (see **W.T. Grant Co. v Srogi**, 52 NY2d 496, 517; **Ying Fung Moy v Hohi Umeki**, 10 AD3d 604; **Hightower v Reid**, 5 AD3d 440). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (see **Ying Fung Moy v Hohi Umeki, supra**). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (see **Doe v Axelrod**, 73 NY2d 748, 750; **Ying Fung Moy v Hohi Umeki, supra**). Furthermore, even when the facts are in dispute, a court may find a likelihood of success on the merits; conclusive proof is not required (see **Ying Fung Moy v Hohi Umeki, supra** at 605; **Terrell v Terrell**, 279 AD2d 301, 303; **Sau Thi Ma v Xuan T. Lien**, 198 AD2d 186, 187”.

(**Ruiz v. Meloney**, 26 AD3d 485, 810 NYS2d 216, 2nd Dept., 2006).

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“Further, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (see Blueberries Gourmet v Aris Realty Corp., 225 AD2d 348, 350, citing Family Affair Haircutters v Detling, 110 AD2d 745, 747”.

(JDOC Construction, LLC v. Balabanow, 306 AD2d 318, 760 NYS2d 678, 2nd Dept., 2003).

Applying these principles to the facts in the matter at bar, the Court will examine the criteria necessary for entitlement to injunctive relief.

With respect to the first criterion, that there must be a demonstration of a likelihood of success on the merits, and which is necessary to such application, the plaintiff has presented evidence that such criterion is fulfilled herein. The Agreement signed by both parties states, in pertinent part, “I (Rosenberg) will not directly or indirectly solicit or **accept** any insurance business of any nature from any accounts of Rampart Brokerage Corp. for a period of three years from the date of such termination.” (Exhibit “A” of the Plaintiff’s Order to Show Cause) (Emphasis Added). Herein, Rosenberg claims that he did not solicit any former Rampart clients, directly or indirectly, from the plaintiff. The plaintiff has not demonstrated that the e-mails sent by Rosenberg to his personal e-mail account are trade secrets as defined by case law. (See, Starlight Limousine Service, Inc. v. Cucinella, 275 AD2d 704, 713 NYS2d 195, 2000). There is no demonstrable proof, at this stage, that the e-mails contain information that is unique to the plaintiff or information that could be used to solicit clients away from the plaintiff. Even accepting such statement as true, the plaintiff has a likelihood of success based on the fact that Rosenberg accepted insurance business from clients who were clients of Rampart. Only four months after leaving Rampart, Rosenberg accepted business from Little Flower and Petite Fleur Nursing Homes for which TPGA was paid a service fee. Westhampton Care Center and Holliswood Care Center are two more examples of accepting business by Rosenberg only months after leaving Rampart. The acceptance of business came within three years of his termination, as stated in the Agreement. Those aforementioned businesses were all, at one point, Rampart clients while Rosenberg was employed with the plaintiff.

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With respect to the second criterion, that irreparable injury will occur absent the granting of injunctive relief, the plaintiff has failed to show that this element is present in this case. The plaintiff has demonstrated that the injury has already occurred, in that the plaintiff has lost 25% of their nursing home and health care insurance business. The plaintiff has not demonstrated that any further injury will occur as a result of the facts in this case.

Additionally, and equally significant is the element of damages herein. An analysis of the facts and allegations herein reveals that, indeed, a quantifiable estimate of monetary damages exists. "Since the plaintiffs have an adequate remedy [set forth in its third cause of action] in the form of damages. . ." (Singer v Riskin, 304 AD2d 554, 756 NYS2d 902, 2nd Dept., 2003), the plaintiff has not made a **prima facie** showing of irreparable injury.

For a preliminary injunction to be granted, the movant must establish all of the three criteria listed in Ruiz v. Meloney (supra). Since the plaintiff has failed to do so, this Court will not address the third and final criterion; that there must be a balance of equities in the movant's favor.

Accordingly, the plaintiff's motion is denied.

Dated JUN 27 2008

Stephen A. Sciarra

J.S.C.

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JUL 01 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE