

Brownstone Agency Inc. v Distinguished Programs Group

2008 NY Slip Op 32131(U)

July 29, 2008

Supreme Court, New York County

Docket Number: 0600751/2008

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 4am

Drownstone Agency Inc.

INDEX NO. 600781/08

- v -

MOTION DATE _____

MOTION SEQ. NO. 001

The Distinguished Program et al

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED
JUL 30 2008
COUNTY CLERKS OFFICE
NEW YORK

Dated: 7/29/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
BROWNSTONE AGENCY INC.,
Plaintiff,

-against-

THE DISTINGUISHED PROGRAMS GROUP, AIG
PROGRAMS, NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA., and LEXINGTON
INSURANCE COMPANY,
Defendants.

Index No. 600751/08

FILED
JUL 30 2008
COUNTY CLERKS OFFICE
NEW YORK

-----X
CAHN, J.:

This is a motion by plaintiff Brownstone Agency Inc. for a preliminary injunction enjoining defendants AIG Programs, National Union Fire Insurance Company of Pittsburgh, PA, Lexington Insurance Company (collectively, the AIG defendants) and The Distinguished Programs Group from using or disclosing any of Brownstone's proprietary and confidential business information and from using or disclosing any records of insured policyholders and policies placed with non-party New Hampshire Insurance Company (NHIC), by Brownstone.

On this motion for a preliminary injunction, the proof advanced by Brownstone of claimed wrongful conduct is insufficient because it consists primarily of hearsay, conjecture and/or conclusory allegations. Brownstone fails to make the requisite showing needed to demonstrate entitlement to a preliminary injunction - a likelihood of success on the merits, irreparable injury in the absence of an injunction, and a balancing of the equities.¹

BACKGROUND

¹ Although Brownstone has not adequately demonstrated a likelihood of success on the merits, and is therefore not entitled to the requested preliminary injunctive relief, this has no bearing on whether or not Brownstone will ultimately succeed in establishing any or all of the causes of action asserted in the Complaint as against any or all of the defendants.

Brownstone is an insurance agency that places business specifically tailored to brownstone buildings. According to Brownstone, it serves as a broker for clients owning approximately 19,000 properties in New York City, as well as another 2,000 in Boston. In the New York area, it sells policies directly to approximately 7,000 customers, and services approximately 12,000 policies through its relationships with independent brokers. Brownstone claims that its brownstone program is unique, based on its underwriting expertise and practices.

In the insurance industry, Brownstone is referred to as a "program administrator." Program administrators generally market and sell policies for insurers. They do so in either the retail or wholesale market. In the retail market, the program administrator markets and sells directly to the insured. In the wholesale market, the program administrator markets and sells the policy through another intermediary, i.e. an independent retail insurance broker, which is the party that works directly with the ultimate insured.²

Lexington, National Union and non-party New Hampshire Insurance Company (NHIC), are all insurance companies affiliated with AIG. AIG Programs is an unincorporated division of AIG.

On October 1, 1999, Brownstone entered into a contract with NHIC, entitled the New Hampshire Insurance Company Program Administrator's Agreement (NHIC Agreement), under which NHIC served as insurance carrier, and Brownstone served as program administrator and

² Brownstone uses both retail and wholesale methods of distribution for the insurance products it sells. With respect to its marketing of its brownstone policy, Distinguished operates only in the wholesale market.

NHIC's agent.³ Among other things, the NHIC Agreement addresses "expirations," a term in the insurance industry for renewal customers, i.e., insureds whose policies are due to expire at a date and time specified in the subject policy, absent renewal of the policy. The NHIC Agreement also provides that the records of insureds constitute the property of Brownstone, and that the forms and rates developed for the Brownstone Program "are proprietary and will only be used for business produced by [Brownstone] while this Agreement is in effect." The NHIC Agreement contains a confidentiality clause, as well as a clause providing for arbitration of disputes and limiting Brownstone's recovery, in the event of a breach of the Agreement by NHIC, to money damages only.

In June 2007, Brownstone terminated the NHIC Agreement, effective January 1, 2008. At or about the same time, it entered into an agreement, similar to the NHIC Agreement, for a similar insurance product, with non-party Everest National Insurance Company (Everest).

Like Brownstone, Distinguished is a program administrator. It is a holding company for a number of insurance entities and offers various insurance products to the real estate industry through a network of independent agents and brokers. A few months after Brownstone terminated the NHIC Agreement, Distinguished, as program administrator, introduced the New York Brick & Brownstone Insurance Program, an insurance policy specifically designed for brownstone buildings, issued by AIG affiliate insurance companies, National Union and/or Lexington. Prior to introducing this new product, Distinguished and/or National Union and Lexington submitted an application to the State Insurance Department, seeking approval of the

³ Prior to 1999, Brownstone had a comparable agreement with Reliance National Indemnity Company, with respect to its insurance coverage of brownstone properties.

new program, including proposed rates, which approval was granted.

Brownstone contends that Distinguished's Brick and Brownstone program is a carbon copy of its own program, and that Distinguished's program threatens to undermine Brownstone's years of development of its program. Brownstone contends that: (a) the records of insured policy holders and policies are its sole and exclusive property; (b) certain NHIC employees stole this information, which they were bound to protect as confidential, and brought it to Distinguished in order to "go after" Brownstone's renewals and expirations; (c) certain former Brownstone employees also stole Brownstone's confidential information and brought it with them to Distinguished; (d) Distinguished wrongfully solicited Brownstone's clients using the proprietary information stolen from Brownstone; and (e) National Union and Lexington have copied Brownstone's policies and issued policies to its former customers by virtue of confidential information stolen from Brownstone.

Brownstone further submits that its employees who went to Distinguished were disloyal and violated the terms of their employment, including the provisions in Brownstone's employee handbook requiring employees to "safeguard the confidential information and trade secrets of Brownstone Agency" and the acknowledgment therein that "[v]iolators of this policy will be subject to disciplinary action, up to and including discharge."

According to Brownstone, Distinguished's entry into this market was a deliberate interference with Brownstone's property and contracts, as well as a conversion of Brownstone's ownership rights to its renewal business. Brownstone further claims that Lexington and National Union now issue an insurance policy that is nearly identical to that sold by Brownstone, and that said insurance companies utilized Brownstone's protected underwriting information. In this

regard, Brownstone alleges that Distinguished, through the former Brownstone employees, has specifically targeted Brownstone's expirations by offering competitive rates based on confidential or proprietary Brownstone information. Brownstone further claims that its forensic analysis of the computer of a former Brownstone employee, who left to work for Distinguished, establishes that she misappropriated Brownstone information. Brownstone submits that the totality of the proof shows defendants' conversion, theft of trade secrets, and tortious interference with Brownstone's contract and prospective business advantages. Brownstone claims that, as a result of defendants' conduct, its multimillion dollar business is in jeopardy, and that, injunctive relief is necessary to protect same.⁴

Defendants deny any wrongdoing. Distinguished denies that it obtained or utilized any proprietary information from Brownstone in connection with determining which brokers to market its insurance product to. It contends that it compiled its list of the independent brokers who work in this niche market through hard work, and relying on publically available information. Such sources, which Distinguished claims it utilized in compiling its list, include: (a) its own existing lists of brokers; (b) the "Yellow Pages;" (c) lists found on the website for the Insurance Brokers Association of New York (IBANY), including the list of attendees at an IBANY cocktail reception. Distinguished contends that it used its list to then focus its marketing efforts on these brokers including by emails, phone calls, face-to-face meetings and advertising. In other words, Distinguished claims that it "hit-the-street" and got word out to its network of

⁴ It deserves mention that Brownstone is the market leader in the brownstone insurance business. It writes thousands of policies on a yearly basis, generating close to \$150 million in premiums. Distinguished, on the other hand, has only written about 300 policies, totaling approximately \$2.5 million in premiums.

independent brokers that it had a new insurance product, and that its product was good.

Distinguished submits that its marketing efforts target all retail brokers and accounts that meet the requirements of its NY Brick & Brownstone Program - - that it did not simply target expiring policies previously underwritten by Brownstone. In an affidavit, Brownstone's former employee, Constance Sung, whom Brownstone accuses of misappropriating information, categorically denies taking or sending any Brownstone expiration or renewal lists, converting Brownstone files into tiff images, or emailing any confidential and proprietary information to herself or others.

National Union and Lexington assert, that after Brownstone announced the termination of the NHIC Agreement, the AIG companies retained an interest in the "brownstone" residential property market, and took steps to prepare a program that would allow AIG companies to remain in the market. They contend that they used primarily standard forms, and underwriting and rate information - - all of which is on file with the State Insurance Department and accessible to the public - - and deny that they utilized any proprietary information of Brownstone. The AIG defendants contend that the various claims asserted by Brownstone against them depend on the contention that these defendants misappropriated or condoned misappropriation of confidential information. Brownstone alleges that expiration and renewal information, including proprietary information, were allegedly used to develop National Union's and Lexington's competing insurance program. Defendants submit that, none of the evidence submitted by Brownstone supports its assertions, including its claim that it had a "unique" methodology, or some secret formula outside of the publically-filed rating plan.

The Complaint sets forth six causes of action, seeking: (1) injunctive relief, barring defendants from "soliciting or placing insurance for any of Brownstone's Expirations;" (2)

conversion, based on defendants' alleged improper use of Brownstone "renewal information;" (3) misappropriation of trade secrets, i.e., "Brownstone's confidential and proprietary information, including its Renewal Information;" (4) tortious interference with contract, by knowingly encouraging or permitting NHIC to make Brownstone's confidential information available to National Union to assist it and Distinguished in creating a new program; (5) tortious interference with prospective business relations; and (6) imposition of a constructive trust. Brownstone demands various relief including, but not limited to, monetary and punitive damages and equitable relief.

The Court notes that NHIC is not named as a defendant. Presumably, Brownstone chose not to do so because the NHIC Agreement contains: (a) an arbitration clause, requiring any disputes between the parties to be resolved by an industry arbitration panel; and (b) a provision limiting the available relief for breach of the contract to an "award of monetary damages."

At oral argument, the Court denied Brownstone's request for a temporary restraining order.

DISCUSSION

To succeed on a motion for a preliminary injunction, a movant must show, by clear and convincing evidence: (1) a likelihood of ultimate success on the merits of the party's underlying claim; (2) danger of irreparable injury in the absence of an injunction; and (3) a balancing of the equities in its favor (Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 [1990]; Coinmach Corp. v Fordham Hill Owners Corp., 3 AD2d 312, 314 [1st Dept 2004]; Handler v 1050 Tenants Corp., 295 AD2d 238, 239 [1st Dept 2002]).

Defendants take the position that Brownstone is not entitled to the drastic remedy of a

preliminary injunction because it has failed to make the required showing with respect to the above criteria. The Court agrees. The scant record before the Court demonstrates only that Brownstone and Distinguished are direct competitors with respect to insurance policies catering to brownstone properties, and that the AIG defendants are the insurance companies that issue such policies. Nothing presented by Brownstone permits the Court to find that defendants' activities are anything other than legitimate competition, or that any of the defendants engaged in conduct that is actionable. Moreover, the broad relief sought by Brownstone would effectively enjoin defendants from issuing policies to any Brownstone customers. Speculation is not a basis for the imposition of a preliminary injunction. In the absence of concrete evidence establishing a likelihood of defendants' wrongdoing, there is no basis to impose a preliminary injunction prohibiting competitor from engaging in its business of choice.

Likelihood of success on the merits

Brownstone has not established that it is likely to succeed on the merits with respect to any of the substantive counts it asserts against defendants. It has not sufficiently established, for purposes of this motion, a conversion of its property. Its claim for misappropriation is insufficient because it has not conclusively shown that its renewal information is a trade secret or that any of the defendants misappropriated it. Its claims for tortious interference also fail because Brownstone has not established any wrongful conduct on the part of defendants or that any of defendants' actions were anything other than economically driven.

So too, Brownstone has failed to come forward with any specific evidence or information in support of its claim that its business methodology is "unique" and that its customers' renewal information constitutes protected and/or confidential information. In this regard, defendants have

proffered evidence in support of their claim that information pertaining to prospective customers is readily ascertainable from public sources, that they used public sources to assemble potential customer contacts, and that the insurance forms and rates are publically filed. Defendants have further shown that, despite Brownstone's claim that its insurance product is unique, and that the calculation of its premium rates is determined by application of proprietary methodology, these rates and methodology are readily ascertainable and on file with the State Insurance Department. Finally, case law supports the conclusion that, even if a proprietary right in an entity's customer's expirations exists, those rights would likely belong to the retail brokers, not the program administrator or insurance company (see Matter of Corning, 108 AD2d 96 [3d Dept 1985]).

Irreparable injury

Brownstone has not demonstrated the requisite irreparable harm in the absence of injunctive relief - - any injuries Brownstone may suffer due to lost revenue on account of loss of customers, are quantifiable and compensable by money damages (see Price Paper & Twine Co. v Miller, 182 AD2d 748 [2d Dept 1992]; see also U.S. Re Cos., Inc. v Scheerer, 41 AD3d 152 [1st Dept 2007]; Scott v Meij, 219 AD2d 181, 184 [1st Dept 1996]). Indeed, in the NHIC Agreement, Brownstone agreed to the provision limiting Brownstone's recovery to an "award of monetary damages," at least as against NHIC, and thus agreed that it can be adequately compensated by monetary damages.

Balancing of the equities

Nor has Brownstone shown that the equities lie in its favor. If the injunction it requests is granted, defendants will be deprived of marketing, writing or selling a competing policy practically anywhere in the New York vicinity. If the injunction is not granted, Brownstone will,

at worst, lose the commissions on a small portion of the policies that are coming up for renewal in the next few months, a result that can be remedied through monetary damages.

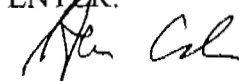
Accordingly, it is

ORDERED that the motion for a preliminary injunction is denied; and it is further

ORDERED that the Clerk shall enter judgement accordingly.

Dated: July 29, 2008

ENTER:



J.S.C.

FILED
JUL 30 2008
COUNTY CLERK'S OFFICE
NEW YORK