Mahoney v DiCarlo Distrib., Inc.
2009 NY Slip Op 30763(U)
March 26, 2009
Supreme Court, Suffolk County
Docket Number: 0228-2007
Judge: Emily Pines
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NUMBER: 0228-2007

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:
HON. EMILY PINES
J. S. C.

Original Motion Date: 02-11-2009
Motion Submit Date: 02-25-2009
Motion Sequence No's.: 003 MOTD

_______________________________________X

BRIAN MAHONEY,

Plaintiff,

-against-

DICARLO DISTRIBUTORS, INC., DICARLO FOOD SERVICE and J.V.M. DICARLO, LLC,

Defendants.

_______________________________________X

DICARLO DISTRIBUTORS, INC.,

Plaintiff,

-against-

BRIAN MAHONEY and PERFORMANCE FOOD GROUP,

Defendants.

_______________________________________X

Attorney for Plaintiff
Richard W. Vandenburgh, Esq.
Foster & Vandenburgh, LLP
220 Roanoke Avenue 2nd Floor
Riverhead, New York 11901

Attorney for Defendant Dicarlo Dist.
Friedman Harfenist Kraut & Perlstein LLP
3000 Marcus Avenue - Suite 2E1
Lake Success, New York 11042-1005

Attorney for Defendant Performance Foods
McGuireWoods LLP
Jacob P. Hildner, Esq.
77 West Wacker Drive, Suite 4100
Chicago, Illinois 60601

ORDERED, that the motion (motion sequence number 003) by Brian Mahony and Performance Food Group, for summary judgment dismissing the claims against them is granted; and it is further

ORDERED, that the trial on the remaining issues in this consolidated action is scheduled for April 14, 2009 at 9:30 a.m. before the undersigned.

This is a consolidated action arising out of the former employer-employee relationship between the parties wherein Brian Mahony ("Mahony") was an employee of DiCarlo Distributors, Inc. ("DiCarlo") from on or about January of 1997 to November 1, 2006. In conjunction with his employment, Mahony signed a document entitled "Non-Solicitation and Confidential Information Agreement" (the "Agreement"). The Agreement stated in relevant part that:

> Employee agrees that during the period of his/her employment by DiCarlo and for a period of one (1) year following the termination of Employee's employment either by DiCarlo for Cause, or by Employee, Employee shall not without prior written consent of DiCarlo, on his/her own account, or as an agent, employee, partner, stock holder, consultant, or otherwise solicit business *from any customer Employee was involved with prior to or at the time of termination* within the County of Suffolk, within the State of New York.

(Emphasis added.) Subsequent to leaving DiCarlo, in January of 2007, Mahony commenced an action seeking to recover commissions he alleged it wrongfully withheld from him upon his termination of employment. Shortly thereafter, DiCarlo commenced an action against Mahony alleging breach of the Agreement, tortious interference with business relations and divulging trade secrets.[1] Specifically, DiCarlo alleges that when Mahony left its employ, he went to work for defendant Performance Food Group ("Performance") and that during the course of said employment with Performance, Mahony contacted several customers that he was involved with during his employment by DiCarlo in violation of the aforementioned Agreement. DiCarlo alleges in its Complaint that Mahony contacted Carnival Restaurant, Amici Restaurant, Seaport Diner and the Acropolis Restaurant and that such violated the Agreement. DiCarlo also brought the action against Performance, alleging unfair competition, tortious interference with prospective contracts and business relationships, and divulging trade secrets and confidential information.

Mahony now moves for summary judgment seeking dismissal of DiCarlo's complaint against him and Performance joins in the motion. Mahony submits an affidavit wherein he states that subsequent to the termination of his employment with DiCarlo, he never solicited, approached or initiated or completed any sales transactions with any of his former customers, nor did he disclose any confidential information. Mahony attaches a copy of the customer list, provided by DiCarlo during discovery, which lists the customers he worked with prior to leaving DiCarlo. He states that he did not

[1] The Court has consolidated these actions for trial.

solicit, approach, initiate or complete any sales transactions with any of these customers. Mahony does state however, that one of his DiCarlo customers was the Southold Fire Department, Protection Engine #1 Company and that subsequent to leaving DiCarlo, he developed a separate business relationship with Southold Fire Department, Protection Eagle Hook and Ladder #3 Company. Mahony states that each of these companies of the Southold Fire Department is responsible for its own purchasing on separate accounts and each has its own members, officers, treasurers, etc. Each company makes purchases with donations to the particular unit and not with taxpayer dollars. Mahony states that he has not had any contact with Engine #1 Company subsequent to the termination of his employment with DiCarlo.

Mahony also annexes a copy of a portion of his examination before trial wherein DiCarlo's attorney waived the right to ask any questions about his alleged violations of the Agreement. Mahony argues there is no credible proof of any violation of the Agreement and the allegations asserted in the Complaint are only speculative and based upon innuendo. Mahony also submits an affidavit by Karen Kling ("Kling"), the Customer Service Manager for AFI Foodservice, a subsidiary of Performance. Kling states that she reviewed DiCarlo's customer list and the records of Performance and concluded that Mahony did not sell to or provide services to any of the customers on the customer list, with the exception of the Southold Fire Department, discussed above. Based upon all of the foregoing evidence, Mahony urges the Court to grant summary judgment dismissing the Complaint by DiCarlo.

DiCarlo opposes the motion and submits an affirmation by counsel, an affidavit by Michael DiCarlo, director of sales of the corporation, copies of the pleadings and excerpts from depositions of Michael Clancey ("Clancey") and Robert Eisenberg ("Eisenberg"), two DiCarlo salesman. Clancey testified that he had stopped at Carnival Restaurant and Amici with Mahony when he was employed by DiCarlo, but that he did not know whether Mahony solicited those accounts subsequent to leaving DiCarlo. Clancey further testified that he observed Mahony at Painter's Restaurant after he left DiCarlo and that Painter's was a customer of his (Clancey's). Clancey also admitted that it was the only account he was aware of Mahony soliciting subsequent to his employment at DiCarlo's. Eisenberg also testified at an examination before trial and stated that he observed Mahony at the Venetian Yacht Club, which was a customer of Eisenberg's. Eisenberg stated that he knew Mahony was attempting to solicit business from the Venetian Yacht Club because he observed him there in the middle of the day, alone and that such establishment is only a catering facility and not open to the public for lunch or dinner.

Based on the foregoing, DiCarlo argues that there are questions of fact warranting a trial and

requests that the Court deny the motion for summary judgment.

Mahony submits a reply to the opposition wherein he reiterates that the customer list of Mahony, provided by DiCarlo together with the affidavits of Mahony and Kling, demonstrate *prima facie* that he did not violate the Agreement. Specifically, the evidence adduced by DiCarlo, to wit, the testimony of Clancey and Eisenberg regarding his alleged solicitation of Painter's Restaurant and the Venetian Yacht Club is irrelevant, because neither were his clients prior to his termination from employment with DiCarlo. He asserts that under the plain language of the Agreement, he was only obligated to refrain from contacting customers he was personally involved with and not DiCarlo's customers on the whole. Moreover, Mahony asserts that DiCarlo has not come forward with any evidence to refute his testimony that he did not solicit business from any of his former customers. Additionally, Mahony notes that DiCarlo has not produced any evidence that he disclosed confidential information, completed any sales transaction with any former DiCarlo customer or violated any fiduciary duty to DiCarlo. DiCarlo has not provided any evidence that it lost any business opportunities, nor that Mahony disclosed any trade secrets, engaged in tortious interference with business relations or unfair competition. Mahony asserts that DiCarlo's entire case is premised on the non-solicitation agreement but has demonstrated no breach of said agreement. Thus, Mahony urges the Court to dismiss DiCarlo's Complaint in its entirety.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Goldberger v. Brick & Ballerstein, Inc.***, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. ***Zayas v. Half Hollow Hills Cent. School Dist.***, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996).

In the case at bar, Mahony and Performance have met their prima facie showing of entitlement to summary judgment by the submission of the affidavits of Mahony and Kling and the customer list provided by DiCarlo establishing that Mahony did not solicit any of the customers he was involved with while employed by DiCarlo. Although he admits he did do business with the Southold Fire Department, he states that it was a separate engine company that controlled its own accounts and finances and operated independently from the engine company he dealt with while a DiCarlo employee. The Court

notes that the customer list provided by DiCarlo specifically lists the account as "Protection #1 Southold Fire Department". Thus, Mahony and Performance have demonstrated the prima facie absence of any material fact and the burden shifts to DiCarlo to demonstrate a genuine issue of fact. Since Mahony has demonstrated that he did not solicit any customer that was his while he was employed by DiCarlo, DiCarlo cannot establish any such misuses of the customer lists by Performance. Likewise, DiCarlo has not established any of the elements of the claims of tortious interference or unfair competition against Performance.

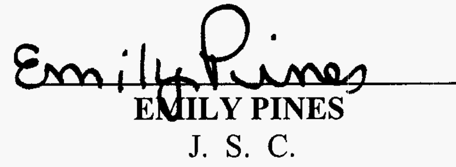
DiCarlo has unquestionably failed to meet its burden. Although DiCarlo's Complaint paints a broad brush regard ing the alleged violation of the non-solicitation Agreement by Mahony and Performance, breach of fiduciary duty, unfair competition and disclosure of trade secrets, it is unable to substantiate any of its claims. Rather, it propounds only speculative theories and the testimony by two employees regarding Mahony's alleged solicitation of accounts that were not Mahony's customers and hence, not governed by the Agreement. DiCarlo had the opportunity to question Mahony regarding his alleged violations and elected not to do so. The conclusory assertions unsupported by competent evidence set forth in opposition are insufficient to defeat the motion for summary judgment. ***Rosenberg v. Rockville Centre Soccer Club, Inc.***, 166 A.D.2d 570, 560 N.Y.S.2d 856 (2d Dept. 1990). ***See also, Bowman v. Chasky***, 30 A.D.3d 552, 817 N.Y.S.2d 153 (2d Dept. 2006); ***J.A. Grammas Assoc., v. Ehrlich***, 229 A.D.2d 517, 645 N.Y.S.2d 543 (2d Dept. 1996); ***Dvoskin v. Prinz***, 205 A.D.2d 661, 613 N.Y.S.2d 654 (2d Dept. 1994); ***Kruger Pulp and Paper Sales, Inc., v. Intact Containers, Inc.***, 100 A.D.2d 894, 474 N.Y.S.2d 554 (2d Dept. 1984).

Based on the foregoing, the motion to dismiss DiCarlo's Complaint is granted in its entirety. This matter will proceed to trial solely on Mahony's Complaint against DiCarlo for unpaid commissions. The trial in this matter is scheduled for April 14, 2009 at 9:30 a.m. before the undersigned. There shall be no adjournments.

Dicarlo v Mahony
Motion Sequence Number 003 Decision
Index Number 0228-2007

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: March 26, 2009
Riverhead, New York



EMILY PINES
J. S. C.