

Starworks, LLC v McCormick
2009 NY Slip Op 31179(U)
May 28, 2009
Supreme Court, New York County
Docket Number: 103928/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

STAWORS

INDEX NO. 103928/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. CPLR 86301

KRISON MCCORMICK

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The TRO is continued pending decision of motion submitted - J

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
MAY 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

MAY 28 2009

Dated: _____

HON. JUDITH J. GISCHE 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 10**

-----X
Starworks, LLC,

Plaintiff (s),

-against-

Kristi McCormick,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 103928/09
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the paper considered in the review of this (these) motion(s):

Papers

Starworks' OSC (§6301) w/PRN affirm, AV affid (separates) exhs	2
Opp w/JEN affirm, KM affid	3
Starworks' reply w/AV affid, exhs	4
Order extending TRO	

FILED
MAY 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff Starworks, LLC, a limited liability company ("LLC"), contends that one of its former members, defendant Kristi McCormick ("McCormick") breached her duties to the LLC by, among other things, misappropriating client lists. Plaintiff commenced this action by filing and serving the summons and complaint together with this order to show cause which seeks a preliminary injunction against McCormick competing with the LLC.

Pending its decision on this motion, the court enjoined McCormick from using or divulging any confidential or proprietary information or trade secrets of the plaintiff.

Order, Gische J., 3/20/09. The court's decision is as follows:

Arguments

The LLC is a talent agency. McCormick joined the agency and became a member of the LLC in January 2008. When she joined, McCormick was a member of another LLC ("SW2"). SW2 and a third company merged with the plaintiff/LLC.

Terms related to the merger and how the LLC would conduct its business are contained in the "Operating Agreement of Starworks, LLC" made January 1, 2008 ("operating agreement"). The operating agreement contains a two-part "Non-competition; Confidentiality" clause. Section 6.2.1 of the operating agreement ("OA § _____") provides that for as long as a person is a member of the LLC, that person "shall not, directly or indirectly or through third parties, be engaged in a business that is competitive with the business of the LLC." The confidentiality prong of this clause (i.e. OA § 6.2.1) provides that "each member shall not disclose to others . . . any information [which is] . . . confidential or proprietary."

The non-competition agreement is conditional. It requires that the following occur to make it effective:

"in its sole discretion and upon written notice given to a Member within ten (10) business days after any Member ceases to be a Member of the LLC, [the LLC may] require that the Member comply with the restriction of this Section 6.2.1 for a month to month period of up to one (1) year. The obligation of the Member to comply with the restrictions of this Section 6.2.1 shall be conditioned upon the continued payment by the LLC of the Member's then current Monthly Draw on a month to month basis for each month up to the maximum twelve (12) months ("the Non-Compete Payment") during which the LLC shall elect to maintain the aforesaid restrictions in effect. . ."

By email dated February 17, 2009, McCormick notified Alana Varel, the LLC's managing member that she was resigning. McCormick's resignation letter states that

she is resigning her position as "Partner" of the LLC effective February 28, 2009 and that the LLC has "until March 10, 2009 to exercise the non-compete clause outlined in [section] 6.2.1 . . ." The letter continues with a recitation of what she (McCormick) believes this amount is. Thereafter, McCormick and members of the LLC talked about some settlement possibilities, but their negotiations failed. The LLC then sent McCormick a check on March 16, 2009, presumably for her draw. McCormick, however, did not cash the check but rejected it. She sent an email to Varel dated March 19, 2009 stating: "I will not be cashing this check as my non-compete deadline has passed. I will no longer be collecting guaranteed payments. I will however expect my cash equity remaining and the payment for my shares. . ."

In support of its motion for a preliminary injunction against McCormick competing with the LLC, Varel contends that McCormick was competing with the LLC well before she resigned. As evidence of this, Varel has produced an email dated February 4, 2009. The email shows it included an attachment called "main stylist list.xls." That email was sent to a non-party. McCormick also reportedly sent a letter "pitching" her services to a prospective client for her own new business.

According to Varel, McCormick is hurting LLC's business because she is giving away proprietary information belonging to the LLC and trying to steal the LLC's clients. The main stylist list that McCormick allegedly gave out contains the name of over 200 important fashion stylists in the industry. Varel claims the list provides the LLC with a significant competitive advantage over its competitors, and is but one example of confidential trade secrets that McCormick has disseminated. The LLC argues that the issuance of a preliminary injunction is necessary to prevent immediate and irreparable

harm to its business which is, among other things, finding and booking models and celebrities for name-brand advertisers and magazines.

In opposition, McCormick states that she had her own business when she joined the LLC and brought in many clients. She states she has numerous contacts in the industry and had them well before the merger. McCormick argues the information on the list which the LLC claims is proprietary consists of information widely available through the internet.

McCormick contends that the LLC did not timely exercise its option under the non-compete clause, and therefore, the LLC waived its right to enforce it. Thus, McCormick argues that the LLC does not stand the likelihood of success on the merits, and the preliminary injunction must be denied.

Discussion

On a motion for a preliminary injunction, the movants (here the plaintiffs) must prove the likelihood of ultimate success on the merits, that they will suffer irreparable harm unless the relief is granted, and a balance of the equities in their favor. Paine v. Chriscott v. Blair House Associates, 70 AD2d 571 (1st dept. 1979); Aetna Insur. Co. v. Capasso, 75 NY2d 860 (1990). The purpose of a preliminary injunction is to maintain the *status quo* so as to insure that a victory is not worthless. See: Moy v. Umeki, 10 AD3d 604 (2nd dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Thus even where there are facts in dispute, the court may, in its discretion, order such relief pendente lite to maintain the status quo. Moy v. Umeki, supra at 605.

Plaintiff has not established a likelihood of success on the merits. Whether

McCormick delivered a hard copy of her resignation letter to the LLC or sent it by email, it appears that she resigned on February 17, 2009 and the effective date of her resignation was February 28th. Applying either date, the check that the LLC sent her on March 16th was untimely because it was after the option period for the non-competition period had ended.

Plaintiff also not made a showing of irreparable harm. To establish irreparable harm or injury, plaintiff has to offer some proof, for example, that it has lost customer accounts or suffered other losses that cannot be compensated through damages. IVI Environmental, Inc. v. McGovern, 269 A.D.2d 497 (2nd Dept 2000). Even accepting plaintiff's facts, that McCormick engaged in acts that violated the terms of LLC's operating agreement, plaintiff has not shown that money damages will not sufficiently compensate it for the harm McCormick has allegedly done.

Nor does it appear that the balance of equities tip in plaintiff's favor for the following reasons. One of the client lists that McCormick allegedly disseminated consists of names, phone numbers, etc., of stylists and other professionals that the LLC compiled and provided to Starworks' paying customers. The LLC seeks to enjoin McCormick from further disseminating lists like this one and "stealing" Starworks customers.

It is well established law that a restrictive covenant against a former employee will be enforced only if reasonably limited temporally and geographically and then only to the extent necessary to protect the employer from unfair competition which stems from the former employee's use or disclosure of information. IVI Environmental, Inc. v. McGovern, 269 A.D.2d at 498 (*internal citations omitted*). Generally, whether a

plaintiff's customer list or other proprietary information constitutes a trade secret is ordinarily a triable issue of fact. Ashland Management Inc. v. Altair Investments NA, LLC, 59 A.D.3d 97 (1st Dept 2008). Here, not only has plaintiff failed to offer any proof that it timely exercised its non-competition option under the operating agreement, McCormick has come forward with strong arguments that the information she is accused of misappropriating is not proprietary, but widely available, or can be culled from, many sources. VI Environmental, Inc. v. McGovern, 269 A.D.2d 497 (2nd Dept 2000).

Since plaintiff has not made a threshold showing of likelihood of success on the merits, irreparable harm, or that the equities balance in its favor, Starworks' motion for a preliminary injunction is hereby denied. The temporary restraining order granted by the court is hereby vacated forthwith.

Conclusion

Plaintiff's motion for a preliminary injunction is denied for the reasons stated in this decision and order. The temporary restraining order pending the court's decision on this motion is vacated forthwith.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 28, 2009

So Order

Hon. Judith J. Gische, J.S.C.

FILED

MAY 29 2009

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NEW YORK