SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 36
NASSAU COUNTY

UNIFIED WINDOW SYSTEMS, INC.,

Plaintiff(s),

-against-

UNITED WINDOWS & SIDING, INC.,

Defendant(s)

MOTION DATE: 4/20/09
INDEX NO.: 19124/08
SEQ. NOs. 1, 3 & 4

The plaintiff's motions, pursuant to CPLR §§3215(a) and 6311, for a default judgment and preliminary injunctive relief and the defendant's cross motion, pursuant to CPLR §3012(d), to compel the acceptance of a late answer are determined as herein provided.

The plaintiff Unified Window Systems, Inc. (hereinafter "Unified") is a home improvement contractor that was incorporated on March 17, 1989 (see defendant's Exhibit B) and whose principal place of business is located at 299 Penninsula Boulevard in Hempstead. The defendant United Windows & Siding, Inc. (hereinafter "United") is a Farmingdale competitor of the plaintiff which was incorporated on January 23, 2002 (see Exhibit B to the April 29, 2009 reply affidavit of Steven DiMare). A related entity, "United Window System, Inc.", was incorporated on February 21, 1984 (see Exhibit A to the defendant's cross motion).

Unified's Chief Executive Officer, Steven DiMare asserts, in sum, that it utilizes a "unique advertisement style" (see plaintiff's Exhibit D, October 17, 2008 complaint, para.12) consisting of its "name placed on the top of the advertisement in white on a colored background. Below Unified's name are various goods sold by Unified and the services provided by Unified are located at the bottom of the advertisement in horizontal strips" (para.14) (see plaintiff's Exhibit A). However, the defendant is alleged to have recently begun to employ "exceedingly similar" advertisements in an attempt to confuse and defraud consumers (para.15) (see plaintiff's Exhibit B). On October 20, 2008 the plaintiff therefore commenced this action. Two (violation of General Business Law §349 and Unfair Competition) separate causes of action are alleged.

Service of the plaintiff's pleading was effectuated upon the defendant, pursuant to Business Corporation Law §306(b)), through the Secretary of State on October 24, 2008 (see plaintiff's Exhibit F). Following the defendant's failure to answer, move or otherwise timely appear, the plaintiff seeks a default judgment. In addition, it seeks to preliminarily enjoin the defendant from "advertising, prompting, selling and offering for sale home improvement services and products using similar or confusingly similar advertisements" (see CPLR §6311). The defendant has cross moved, pursuant to CPLR §3102(d), to compel acceptance of its late (March 9, 2009) verified answer (see defendant's Exhibit F). Its President, Peter Balsamo avers, inter alia, that it did not receive the plaintiff's pleading from the Secretary of State. Nor, since he reportedly relocated in or about October, 2008 (at or about the time the plaintiff filed its complaint) in order to care for his sick mother, did he allegedly receive the plaintiff's December 9, 2008 additional notice mandated by CPLR §3215(4)(i) (see plaintiff's Exhibit F).

Contrary to the defendant's contention, service of process upon the defendant pursuant to BCL§306(b) was complete upon delivery of the plaintiff's pleading to the Secretary of State (see Perkins v 686 Halley Food Corp., 36 AD3d 881).

"To be entitled to a preliminary injunction, the moving party has the burden of demonstrating (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" (Dixon v Malouf, ___ AD3d ___ [2nd Dept; April 7, 2009]; see Aetna Ins. Co. v Capasso, 75 NY2d 860,862). "In order to assert a prima facie cause of action under General Business Law §349, a plaintiff must be able to establish that a defendant intended to deceive its customers to the customers' detriment and was successful in doing so. `Proof that a material deceptive act or practice caused actual, although not necessarily pecuniary, harm is required to impose compensatory damages'" (Sarmiento v World Yacht, Inc., 10 NY3d 70,81 quoting Small v Lorillard Tobacco Co., 94 NY2d 43,56; see Ballas v Virgin Media, Inc., 60 AD3d 712).

Despite its self-serving characterization of its advertisement as unique, the plaintiff has not alleged that the defendant is infringing upon a trademark or appropriating proprietary information i.e., trade secrets (see Out of the Box Productions, LLC v Koschitzki, 55 AD3d 575,578; LoPresti v Massachusetts Mut. Life Ins.,

30 AD3d 474,476; Beverage Marketing USA, Inc. v Cornell Brewing Co., 20 AD3d 439, 439-440). Rather, to sustain its claim of common-law unfair competition, the plaintiff must establish that the defendant misappropriated the plaintiff's labor, skill expenditures, or good will and displayed some element of bad faith in doing so (see Abe's Rooms, Inc. v Space Hunters, 38 AD3d 690,692).

Here, although the parties' advertisements (see plaintiff's Exhibits A & B) are undeniably similar, since, inter alia, the defendant's parent corporation or related entity, United Window Systems, Inc., pre-dates the plaintiff's corporation (see defendant's Exhibits A & B), the plaintiff has failed to establish a likelihood of success on its cause of action for unfair competition. Likewise, the defendant's alleged deceptive intent and actual harm to the plaintiff have not been demonstrated. Consequently, preliminary injunctive relief as to either of the plaintiff's causes of action is unwarranted.

Moreover, in light of the lack of prejudice to the plaintiff from the delay, the existence of a potentially meritorious defense, the strong public policy to resolve actions on their merit, and the defendant's alleged lack of willfulness, the plaintiff's motion for a default judgment is denied and the defendant's application for leave to interpose a late answer (see defendant's Exhibit G) is granted (see A & C Construction Inc. of New York v Flanagan, 34 AD3d 510; Nunez v Bertram, 24 AD3d 523). Accordingly, the defendant's proposed verified answer shall be deemed timely served and the court hereby schedules an August 20, 2009 (9:30 a.m.) preliminary conference in this matter to be held in the Preliminary Conference Part (lower level).

Dated: JUN 12 2009

A.J.S.C.

ENTERED

JUN 16 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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