

**Clean Earth Holdings, Inc. v Kopenhaver**

2009 NY Slip Op 31461(U)

June 25, 2009

Supreme Court, New York County

Docket Number: 604077/07

Judge: Charles E. Ramos

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

PRESENT: CEP

PART 53

Index Number : 604077/2007

CLEAN EARTH HOLDINGS, INC.

VS.

KOPENHAVER, BRENT,

SEQUENCE NUMBER : 003

COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

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

**FILED**  
JUL 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

*Case is decided in accordance with  
accompanying Memorandum Decision.*

Dated: [Signature] 6/29/09

[Signature]  
**HON. CHARLES E. RAMOS** 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: COMMERCIAL DIVISION

-----X  
CLEAN EARTH HOLDINGS, INC., CEI HOLDINGS  
CORPORATION, CLEAN EARTH, INC. AND  
ALLIED ENVIRONMENTAL GROUP, INC.,

Plaintiffs,

-against-

BRENT KOPENHAVER, THEODORE BUDZYNSKI, PURE  
EARTH INC., PEI DISPOSAL GROUP, INC.,  
JEFFREY BERGER, JAMES CASE, RICHARD RIVKIN,  
AARON ENVIRONMENTAL GROUP, INC., AND  
STEPHAN SHAPIRO,

Defendants.  
-----X

Index No. 604077/07

**FILED**  
JUL 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**Charles Edward Ramos, J.S.C.:**

Motion sequence 003, 004, and 005 are hereby consolidated  
for disposition.

In motion sequence 003, the plaintiffs Clean Earth Holdings,  
Inc., CEI Holdings Corporation, Clean Earth, Inc., and Allied  
Environmental Group, Inc. (collectively, "Clean Earth") move to  
compel Jeffrey Berger, James Case, Richard Rivkin, (the "Sales  
Defendants"), Aaron Environmental Group, Inc. ("AEG"), Brent  
Kopenhaver, Pure Earth, Inc. ("Pure Earth") and PEI Disposal  
Group, Inc. (collectively, the "Defendants") to respond to  
outstanding discovery requests.

In motion sequence 004, Clean Earth moves for leave to amend  
the complaint.

In motion sequence 005, the Defendants move for summary  
judgment dismissing the original complaint.

**Background**

This case involves the alleged violations of non-compete and

non-solicit agreements, which led to claims of misappropriation of Clean Earth's proprietary information.

As alleged in the original complaint, on October 17, 2005, Kopenhaver, Clean Earth's Chief Financial Officer, and Budzynski, Clean Earth's Executive Vice President, sold their interests in Clean Earth. In connection with the sale, both were prohibited from soliciting any of Clean Earth's customers, employees, or business relations for a period of four years and prohibited from competing with Clean Earth for a period of two years pursuant to the stock purchase agreement (the "SPA").

However, Clean Earth alleges upon information and belief that Kopenhaver, along with others, formed Pure Earth in January 2006 in violation of the SPA provisions that prohibit Kopenhaver from directly competing against Clean Earth. Clean Earth also alleges upon information and belief that Budzynski is providing consulting services to Pure Earth in violation of the SPA.

On November 20, 2007, the Sales Defendants abruptly resigned *en masse* from Clean Earth for direct competitor Pure Earth. Besides covertly conspiring to leave *en masse*, Clean Earth further alleges that the Sales Defendants misappropriated its confidential and proprietary business information and is using it in direct competition. Furthermore, the Sales Defendants are alleged to have exploited and diverted certain business opportunities from Clean Earth to Pure Earth.

Clean Earth then commenced this action alleging causes of action for breach of contract, breach of the covenant of good

faith and fair dealing, breach of fiduciary duty, tortious interference with contract, aiding and abetting breach of fiduciary duty, unfair competition, misappropriation, and civil conspiracy. On December 20, 2007, Clean Earth moved for and was subsequently denied a preliminary injunction. Additionally, Budzynski was dismissed from the action (Transcript, December 20, 2007, 26:24). The parties then proceeded to conduct discovery. During document discovery, Clean Earth discovered evidence that prompted it to seek leave to amend the complaint. Clean Earth was unable to obtain the consent of the Defendants, resulting in the instant motion. No depositions have been taken yet.

#### Discussion

##### *Motion Sequence 004*

Clean Earth moves for leave to amend the complaint to: (1) add Christopher Uzzi and Stuart Berry as defendants to the action, (2) allege additional causes of action against Jeffrey Berger, and (3) remove the defendant Theodore Budzynski from the action.

Clean Earth argues that the amendment is based on previously unavailable evidence obtained during discovery after the motion for preliminary injunction. The Defendants contend that Clean Earth should be denied leave because of the nine-months that have passed since the commencement of litigation.

"Leave to amend pleadings, including a bill of particulars, is to be freely given, absent prejudice or surprise...In the absence of prejudice, mere delay is insufficient to defeat the

amendment" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]).

The Defendants fail to establish "some indication that [they have] been hindered in the preparation of [this action] or have been prevented from taking some measure in support of [their] position" to warrant a denial of the motion (*id.*). Therefore, Clean Earth's motion for leave to amend is granted.

*Motion Sequence 005*

The Defendants move for summary judgment on the original complaint. However, in light of this Court's grant of leave for Clean Earth to amend its complaint, which has resulted in the addition of two defendants and the fact that no depositions have been taken yet, this Court finds the motion for summary judgment to be premature.

Therefore, the summary judgment motion is denied with leave to renew upon the completion of depositions, at which time all the defendants will have appeared in the action.

Accordingly, it is

ORDERED that the plaintiffs' motion to compel discovery is granted, and it is further

ORDERED that the plaintiffs' motion to amend the complaint is granted, and it is further

ORDERED that the defendants' motion for summary judgment is denied without prejudice, and it is further

ORDERED that the plaintiffs are directed to serve Stuart Berry and Chris Uzzi within twenty (20) days of notice of entry

of this order, and it is further,

ORDERED that the parties are directed to contact Part 53 to schedule a discovery conference within forty-five (45) days of notice of entry of this order.

This constitutes the decision and order of the Court.

Dated: June 25, 2009

ENTER:



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J.S.C.

**HON. CHARLES E. RAMOS**

**FILED**  
JUL 06 2009  
COUNTY CLERKS OFFICE  
NEW YORK