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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 25**
BASES FULL, LLC,	**NASSAU COUNTY**
Plaintiff,	
-against-	**Index No: 012191-08**
	Motion Seq. No: 2
GEOBRI, INC., BASEBALL PLUS and GEORGE STATLER,	
Defendants.	**Submission Date: 5/8/09**
----------x	

The following papers having been read on this motion:

Order to Show Cause, 202.7 Affirmation, Affirmation in Support, Affidavit in Support and Exhibits.....x
Affidavit in Opposition.....x
Affirmation in Opposition and Exhibits.....x
Reply Affirmation.....x

This matter is before the Court for decision on the Order to Show Cause filed by Defendant Geobri, Inc. ("Geobri" or "Moving Defendant") on December 8, 2008, which was submitted on May 8, 2009. [1] For the reasons set forth below, the Court denies Geobri's Order to Show Cause in its entirety.

[1] This Court assumed responsibility for this motion on May 8, 2009.

BACKGROUND

A. Relief Sought

Defendant Geobri moves for an Order enforcing a stipulation that was placed on the record before the Court (Austin, J.) on September 16, 2008 ("Stipulation") by 1) enjoining and restraining Plaintiff Bases Full, LLC ("Bases Full" or "Plaintiff") from using Geobri's trade name "Baseball Plus" when advertising Plaintiff's retail showroom business and internet and catalog sales business; 2) enjoining and restraining Plaintiff from posting a web page that states that Plaintiff acquired Baseball Plus; and c) scheduling this matter for an inquest to determine the damages that Geobri allegedly sustained as a result of Plaintiff's alleged violation of the Stipulation.

Plaintiff opposes Defendant Geobri's applications.

B. The Parties' History

In October of 2006, Geobri and Bases Full entered into a written agreement ("Agreement") pursuant to which Geobri sold portions of its sporting goods/baseball supply business to Bases Full for $1 million. In accordance with the Agreement, Plaintiff paid Geobri $400,000.00 at closing and thereafter executed a $600,000.00 promissory note, payable in equal installments over a five-year period, with a final "balloon" payment of approximately $369,000.00 due upon the note's maturity. The Agreement refers to Geobri as the "Seller" and to Bases Full as the "Buyer."

Paragraph 1(C) of the Agreement provides, *inter alia*, that Plaintiff would be purchasing and acquiring "[a]ll marketing information including catalogs, brochures, logos, seller's websites, known as 'www.bplowestsprices.com and www.baseballplus.net', client information, customer lists, and operational procedures and registered and trade mark and trade name BASE BALL PLUS." Paragraph 1(C) also provides that "Purchasers [sic] use of said trademark BASE BALL PLUS shall be licensed to the Buyer solely for internet and catalogue, mail order purposes use only, which rights are the only rights transferable."

Paragraph 18a of the Agreement provides that, at the closing of the sale, the Seller will deliver to the Purchaser a written agreement reflecting Seller's agreement not to open or establish any competing mail order, catalog or internet sales business for a period of five years from the date of closing. Paragraph 18a ("Restrictive Covenant") also contains the following

qualifying language :

> Notwithstanding the above, Buyer acknowledges Seller is currently in several businesses which are agreed to be excluded from this agreement. Same may be continued and Seller may open any additional retail operation under the name of Baseball Plus. The use said name [sic] "Baseball Plus" may not be used by the Seller in any internet/catalogue business.

In June of 2008, Bases Full commenced this action in which it alleged that Geobri violated the Restrictive Covenant. Plaintiff alleged, specifically, that Geobri breached the Restrictive Covenant by: (1) secretly creating a competing, internet sales business on "e-Bay"; (2) establishing certain "dummy" entities to circumvent manufacturer-imposed bat warranty and pricing restrictions; and (3) maintaining a store website utilizing the same "header graphics" which Defendants had previously sold to Plaintiff.

On September 16, 2008, the parties entered into the Stipulation in open court, and the Court (Austin, J.) so-ordered the Stipulation on October 13, 2008. Prior to placing the terms of the Stipulation on the record, counsel for Plaintiff stated that "It is stipulated and agreed that this action is settled in its entirety on the following terms and conditions."

The parties then agreed that: (1) the then-outstanding promissory note from the Plaintiff to the Defendants, together with any obligations of the guarantors, were deemed fully satisfied and paid as of the date of the Stipulation, and the promissory note was cancelled; (2) Plaintiff would own and use the name and site www.BaseballPlus.net through August 31, 2009, after which date it would belong to the Defendants, and Plaintiffs would not be permitted to use "Baseball Plus," or any variation of that name, as part of a domain name, internet website name or any other business name; 3) Plaintiff would remove the name "Baseball Plus" from its showroom by October 31, 2008; and 4) Plaintiff would cooperate with Defendants' reasonable requests to assure transfer of the website www.BaseballPlus.net on or after September 1, 2009, including executing any necessary documents to effect that transfer.

During the Stipulation colloquy, the Court stated that "Except for the enforcement of this stipulation, the matter will be marked discontinued with prejudice." After the terms of the stipulation were placed on the record, counsel for the Defendants stated "So in effect, any type of restrictions that may have been in the agreement between Geobri and Bases Full are no longer

in effect." The Court then stated, "So to put it another way, the contract of sale that the parties previously entered into is modified as herein set forth?" Counsel for Defendants responded "Yes, your Honor, and so we're clear, there was reference not only to Geobri in that agreement but also to [Statler] who was not a party to that agreement. Again, either Geobri or [Statler] are free to do business under whatever names they wish."

Geobri alleges that Plaintiff thereafter constructed a website with the domain address "www.BaseballBargains.com" whose home page erroneously advised customers that "Baseball Bargains *acquires* BPLowest Prices and *Baseball Plus.*" (emphases added)

Geobri further alleges, and provides supporting documentation reflecting, that Plaintiff has recently mailed a catalog to its customers containing the names "BaseballBargains.com," "BPLowestprices.com" and "Baseball Plus." The catalog refers to the Plaintiff's showroom in Brentwood, New York.

C. The Parties' Positions

Geobri submits that Plaintiff's website references and catalog statements are both inaccurate, and inconsistent with the spirit and terms of the Stipulation. Geobri argues that the statement that Plaintiff "acquired Baseball Plus" is misleading in light of the fact that Geobri was still operating its own retail store and maintaining a separate website address. Moreover, Geobri asserts that, although the Stipulation permits Plaintiff to retain the "baseballplus.net" web address until August of 2009, the parties agreed to this accommodation only so that the Plaintiff could "transition" and acquaint its customers with whatever new website it would later be utilizing after August 31, 2009.

Preliminarily, counsel for Bases Full affirms that, as per an Order of Justice Austin dated December 8, 2008, Bases Full removed the phrase "Baseball Bargains acquires BP Lowest Prices and Baseball Plus" from its current website. Evan Deitch, a member of Bases Full, provides an Affidavit in Opposition dated December 10, 2008 in which he affirms that Bases Full removed the term "Baseball Plus" from its website, at the direction of Justice Austin, despite Mr. Deitch's belief that the Court's Order was erroneous.

Bases Full opposes Geobri's application on several grounds, including 1) there is no potential for confusion of Bases Full and Geobri's companies by potential customers; and 2) Geobri has unclean hands by virtue of his establishment of "baseballplusny.com," which

potentially violates the Restrictive Covenant.

RULING OF THE COURT

It is well-settled that, so long as a previously settled action has not been finally terminated by judgment or unqualified stipulation, the court retains its supervisory power over the action and may lend aid to a party moving therein for enforcement of the settlement. See *generally, Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 54-55 (1979); *DiBella v. Martz,* 58 A.D.3d 935, 936-937 (3d Dept. 2009). In determining whether to issue an injunction, the court must consider the likelihood of success on the merits, irreparable injury, and a balancing of the equities. *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840 (2005); *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). Under all the circumstances, the Court concludes that Geobri has failed to establish its entitlement to the relief it seeks.

While the Stipulation precludes the Plaintiff from utilizing the trade name "Baseball Plus.net" and/or "Baseball Plus" in any website and/or "any other business", the parties also agreed that the Plaintiff would retain right to own and use the web address until August 31, 2009. Moving Defendant concedes that Plaintiff would continue to own the foregoing web address until August 31, 2009.

Further, the Stipulation is inconclusive at best with respect to whether Plaintiff was prohibited from utilizing the web address "Baseball Plus.net" in catalogs or mail order brochures prior to August 31, 2009. Indeed, the original sales agreement expressly conveyed to the Plaintiff the right to use the trademark BASEBALL PLUS for internet, catalogue and mail order purposes.

During the Stipulation colloquy, defense counsel mentioned a second and additional date by which the Plaintiff would be restricted in the way it could utilize the name "Baseball Plus" after the settlement. Specifically, and after first mentioning the August 31, 2009 "transitional" period, defense counsel added that "[t]he plaintiff will remove the name Baseball Plus from its showroom by October 31, 2008" (later twice erroneously referred to by defense counsel as "November *2009*"). After making reference to the "show room" restriction, counsel thereafter attempted to attach an additional caveat to this portion of the stipulation by reciting that the Plaintiff would also be precluded from conducting any "additional retail business under the name

Baseball Plus as of November 1, 2009 [sic]." The Court then added for clarification, "[f]rom their [Plaintiff's] showroom not later than October 31, 2008."

It is unclear whether defense counsel – by using the term "retail business" – was referring to prohibited uses involving internet and/or mail order-catalog sales – or instead, to "retail" uses involving only the Plaintiff's "show room" – which is the way counsel initially framed this particular component of the Stipulation.

The Stipulation clearly permits Plaintiff to utilize the web address "baseballplus.net" – and thus to solicit "retail" type internet sales, by effectively using the Defendant's trade name "Baseball Plus" – until August 31, 2009. Further, when describing the meaning and import of the August 31, 2009 "transition" period, defense counsel himself stated that the Plaintiff would not be permitted to "use Baseball Plus as any part of a domain name or internet website or any other type of business name after August 31, 2009."

The Court concludes that Moving Defendant has not established that it will sustain injury absent the issuance of the requested, injunctive relief. *See generally, Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 (2d Dept. 2008); *Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC*, 42 A.D.3d 420, 421 (2d Dept. 2007). Moving Defendant's claims of injury are based on: (1) the statement contained in the Plaintiff's "BaseballBargains" website advising that "Baseball Bargains acquires Baseball Plus" – which has since been removed, and (2) the mailing of a customer catalog entitled "Baseballbargains.com", which contains the subtitled phrase, "Baseball Plus" and refers to the Plaintiff's Brentwood retail shop.

Apart from anecdotal and conjectural allegations of damage resulting from customer confusion, the record does not establish the existence of irreparable injury, or any reasonably quantifiable injury. Plaintiff has already removed the term "Baseball Plus" from its website and has agreed that it will not publish or issue any written materials or make any statements suggesting that it has "acquired" Baseball Plus.

Nor is it clear how the printed words "Baseball Plus" on the subject catalog would generate a distinctly compensable injury for the purposes of the motion. Indeed, the Stipulation: (1) permits Plaintiff to own and use the web address "BaseballPlus.net" until August 31, 2009; and (2) allows Plaintiff to link that address/trade name to – and thereby associate it directly with – Plaintiff's "Baseball Bargains" entity. Accordingly, retail internet customers who input

the web address, "BaseballPlus.net" – which contains the Defendants' trade name – are already permissibly being redirected to Plaintiff's separate "Baseball Bargains" website.

Damage claims that are wholly speculative and conclusory are insufficient to satisfy the burden of demonstrating irreparable injury. *Khan v. State University of New York Health Science Center at Brooklyn*, 271 A.D.2d 656, 657 (2d Dept. 2000). The moving party must show that the harm is imminent, not remote or speculative. *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 (2d Dept. 1995); *see also*, *Dixon v. Malouf*, 61 A.D.3d 630 (2d Dept., April 7, 2009). The Court concludes that Moving Defendant has not met its burden of demonstrating injury warranting injunctive relief. The Court has also considered the Moving Defendant's remaining contentions and concludes that they lack merit.

Accordingly, it is,

ORDERED that the Order to Show Cause filed by Defendant Geobri, Inc. is denied in all respects.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
July 9, 2009

HON. TIMOTHY S. DRISCOLL
J.S.C.

XXX

ENTERED
JUL 13 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE