

**Emerging Vision, Inc. v Sarseta Enters., Inc.**

2009 NY Slip Op 32727(U)

November 10, 2009

Supreme Court, Nassau County

Docket Number: 20598/08

Judge: Stephen A. Bucaria

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

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
EMERGING VISION, INC., f/k/a STERLING  
VISION, INC.,

Plaintiff,

-against-

SARSETA ENTERPRISES, INC. and  
DR. ARTHUR ATKINSON,

Defendants.

TRIAL/IAS, PART 3  
NASSAU COUNTY

INDEX No. 20598/08

MOTION DATE: Sept. 8, 2009  
Motion Sequence # 001

The following papers read on this motion:

- Order to Show Cause..... X
- Affirmation/Affidavit in Opposition..... XX
- Emergency Affirmation in Support..... X
- Reply Affidavit..... X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

Plaintiff, Emerging Vision Inc., f/k/a Sterling Vision, Inc., moves by order to show cause, pursuant to Article 63 of the CPLR, for a temporary restraining order and a preliminary injunction (a) enjoining, restraining and or prohibiting the Defendants from operating a retail optical store at 8962 Porter Road, Niagara Falls, New York 14304, or at any other location in violation of the covenants not to compete set forth in Sections 5 (B) and

**EMERGING VISION, INC.****Index no. 20598/08**

15 (D) of the Franchise Agreement, executed by and between the parties herein; (b) enjoining, restraining and/or prohibiting the Defendants from using the telephone numbers and listings used at Store No. 168; (c) enjoining, restraining and/or prohibiting the Defendants from using the Sterling Optical Operating Manual, marketing materials, or any other confidential material used at Store No. 168 and compelling Defendants to return such material to the plaintiff; (d) enjoining, restraining and/or prohibiting Defendant from using the customer records relating to Store No. 168 and; (e) compelling Defendant to deliver to the plaintiff the customer records relating to Store No. 168. (Sequence # 001).

*Factual Background:*

In or about April 1988 Emerging Vision Inc., f/k/a Sterling Vision, Inc. [hereinafter EVI] and Sarseta Enterprises, Inc. entered into a Franchise Agreement pursuant to which EVI granted to Sarseta the right to operate a Sterling Optical Center, designated as Store No. 168 which was located at Wayside Nursery Plaza, 8962 Porter Road, Niagara Falls, New York 14304. By a separate document entitled "Guaranty and Assumption Agreement", defendant Dr. Arthur Atkinson personally and unconditionally guaranteed Sarseta's performance of "each and every undertaking, agreement, covenant, duty and obligation set forth in or required by the Franchise Agreement". The term of the Franchise Agreement [hereinafter the Agreement] was for a period of ten years commencing on April 8, 1988 and terminating on April 8, 1998. Notwithstanding that the Agreement formally expired in 1998, the parties herein continued a business relationship, the parameters of which are sharply disputed by the parties.

On or about November 14, 2008, EVI commenced the underlying action seeking an accounting and to compel the defendants to produce for physical inspection, the financial records maintained by the defendants in connection with the operation of Store No. 168. Thereafter, in or about January 2009, the Defendants removed the Sterling Optical sign and allegedly ceased operating Store No. 168 as a Sterling Optical location and began doing business at said location under the name "Dr. Art Atkinson Optical". This was followed by a letter by defendants' counsel dated February 13, 2009, a portion of which stated "While it appears that Sterling and/or EVI and Sarseta may, after April 8, 1998, have continued in some form of a business relationship, this letter constitutes formal notice that Sarseta now has terminated any form of business relationship with Sterling and/or EVI." On the same day, EVI served an Amended Verified Complaint which added claims to enforce the covenants not to compete as are contained in the Agreement and for a permanent injunction

enjoining the defendants from acting in contravention of such covenants.

*The Covenants Not to Compete*

Of particular relevance to the matters herein raised, the subject Agreement included a covenant not to compete at Section 5(B)(1) which provides that during the term of the Agreement, the franchisee shall not “have any direct or indirect interest, as an owner, investor, partner, lender, director, officer, employee, consultant, representative or agent, or in any other capacity, in any entity which owns, develops, operates or franchises or licenses others to operate retail optical stores, centers or businesses which are engaged in the sale of contact lenses, prescriptions or non-prescription eyewear or related eye care products or services with a fifty (50) mile radius” of Store No. 168 (affidavit in support at Exh. A at p. 12).

In addition to the foregoing, the Agreement contains a post termination covenant which provides that for a period of two years following the termination of the Agreement, the franchisee “shall not have any direct interest as an owner, investor, partner, lender, director, officer, employee, consultant, representative or agent, or in any other capacity, in any entity which owns, develops, operates or franchises or licenses others to operate retail optical stores, centers or businesses which are engaged in the sale of contact lenses, prescriptions and non-prescription eyewear or related eye care products within a ten (10) mile radius” of store No. 168 (*id.* at Exh. A at p.42).

*Plaintiff's Supporting Arguments*

EVI contends that, notwithstanding the 1998 termination date, the Agreement was renewed by implication for an additional ten year term in 1998 and again in 2008, by virtue of the defendants continuing to operate Store No. 168 under the terms of the now expired Agreement, including continuing to report gross sales, as well as by paying royalties and advertising contributions as required thereby. EVI asserts that, given the continuing viability of the Agreement, the restrictive covenant as embodied in Section 5(B) remains operative, and the defendants, by doing business under the name “Dr. Art Atkinson Optical” at the location of Store No. 168, are acting in direct violation thereof thus warranting the injunctive relief prayer for herein. Alternatively, EVI posits that in the event this Court were to determine that the Agreement was terminated by way of defense counsel’s letter dated February 13, 2009, the post-termination covenant not to compete as contained in section

15(D) precludes the defendants from operating a retail optical store within a ten mile radius of the Porter Road location for a two year period following the termination of the Agreement.

As to the substantive terms of the restrictive covenants, EVI argues that same are valid, reasonable and enforceable by this Court; that in the event the injunctive relief is not granted, it will suffer irreparable harm in the form of unfair competition, lost customer relationships and the loss of customer good will which was built up over the 20 years during which the defendants operated a Sterling Optical store at the subject location. To this point, EVI provides the affidavit of Dr. Dennis Osiak who operates four Sterling Optical franchises, two of which are within approximately 10 and 15 miles from the Porter Road location. Dr. Osiak states that the location where Dr. Atkinson is currently operating his non-Sterling store is “close enough” to his Sterling Optical stores so as to unfairly compete therewith.

### Defendants' Opposition

Initially, the defendants argue that EVI cannot establish a likelihood of success on the merits as the subject Agreement terminated in 1998 and the restrictive covenants therein contained are no longer operative. Counsel for the defendants contends that, for the period between 1998 and 2008, while Dr. Atkinson admittedly remitted royalty payments and advertising fees to EVI and continued to utilize the Sterling Optical sign on the exterior of the Porter Road location, those facts do not establish that the defendants intended to renew the subject Agreement in its entirety, particularly with respect to the post termination restrictive covenant. Dr. Atkinson avers that, in 1998, he verbally informed “Sterling Vision Inc.’s Franchise Vice President and its owner (Robert Cohen) I would not renew the Franchise Agreement in its original form.” (*see* Atkinson Affidavit in Opposition at ¶¶24,27).

The defendants additionally posit that the type of business currently being conducted at the Porter Road location does not compete with the retail optical stores operated by EVI, and accordingly the plaintiff has failed to demonstrate that it will suffer irreparable harm in the event the injunctive relief is not granted. Dr. Atkinson states that the principal business being operated at the subject location is “his own private practice of optometry” which includes providing “primary healthcare services such as examination and diagnosis of eye diseases such as glaucoma, cataracts and retinal diseases.” (*id.* at ¶¶18,19).

Dr. Atkinson further avers that, in 1995 he became a licensed chiropractor and expanded his business to “include chiropractic patients” and has “added an acupuncturist/massage therapist” (*see* Atkinson Affidavit in Opposition at ¶¶16,18,19,21,34,

38,48). He urges that, “with minimal exception”, there is no retail optical business being conducted and accordingly the franchise locations presently being operated by Dr. Osiak located between 12 and 30 miles away will not be adversely affected. Dr. Atkinson adds that over the last 20 years it was he who was solely responsible for the development, growth and maintenance of the business and neither his relationship with EVI or the presence of a Sterling Optical sign on the front of his store had any significant bearing on the success of his business.

Finally, the defendants argue that if this Court were to grant a preliminary injunction, he will be deprived of “his ability to practice optometry and to treat [his] patients” and therefore a balancing of the equities requires denial of the injunctive relief requested by the plaintiff (*id.* at ¶¶43,44).

### Decision

Where, as here, “an agreement expires by its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provisions as the old” (*North American Hyperbaric Center v The City of New York*, 198 AD2d 148, 1<sup>st</sup> Dept., 1993; quoting *Martin v Campanaro*, 156 F2d 127, 2d Cir 1946; *see also*, *New York Telephone Co. v Jamestown Telephone Corp.*, 282 NY 365, 1940). In the instant matter, as best can be adduced from the record, subsequent to April 8, 1998 when the Agreement expired pursuant to the express terms therein, the parties did indeed comport themselves in a manner consistent with the provisions of the Agreement. EVI continued to provide franchise and advertising support and Dr. Atkinson himself concedes that during the years between 1998 and 2008, he remitted to EVI the requisite advertising and royalty payments as expressly required by the Agreement and continued to display the Sterling Optical sign in the front of his store. Therefore, based upon the conduct as exhibited by the parties herein, this Court finds that the Agreement was renewed by implication for one additional ten year term commencing April 9, 1998 and terminating in April 9, 2008. However, EVI’s assertion that the subject Agreement was renewed yet again via implication for an additional ten year term commencing in April of 2008 is unavailing and utterly belied by the record.

As noted above, EVI argues that the subject Agreement was renewed by implication for an additional ten year term beginning in 2008 and that such renewal resulted from the defendants continuing to operate Store No. 168 under the terms thereof. However, the record demonstrates that the defendants were not acting in accordance with the Agreement,

precipitating the plaintiff to commence the underlying action, wherein EVI particularly alleges that the defendants were in breach of the Agreement for failing to remit required royalty payments and advertising fund contributions. Thus, the evidence, as presented herein, appears to indicate that the defendants were allegedly in breach of the very Agreement under which EVI simultaneously argues they continued to abide.

### *Injunctive Relief*

The Court now addresses the injunctive relief requested by EVI. In consideration of the foregoing determination that the Agreement terminated on April 9, 2008, the restrictive covenant in issue is the post-termination covenant not to compete as embodied in Section 15(D), the substance of which precludes the defendants from operating a retail optical store within a ten (10) mile radius of the location of store No. 168 during the two years following the termination of the Agreement.

It is well settled that a preliminary injunction is a drastic remedy which will not be granted absent a showing by the movant of clear right of entitlement thereto, which is established pursuant to the law and upon the undisputed facts as adduced in the record (*Abinanti v Pascale*, 41 AD3d 395, 2d Dept., 2007; *Peterson v Corbin*, 275 AD2d 35, 2000). The party moving for a preliminary injunction must establish a likelihood of success on the merits, irreparable injury in the event the injunctive relief is denied and that a balancing of the equities favors the granting of the injunction (*Aetna v Capasso*, 75 NY2d 860, 1990; *W.T. Grant Co., v Sgroi*, 52 NY2d 496, 1981). In the particular context of the matter *sub judice*, whether the plaintiff is entitled to injunctive relief as requested herein is predicated upon whether the post termination covenant not to compete is enforceable by this Court.

As a general proposition “negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness” (*Reed, Roberts Associates, Inc., v Strauman*, 40 NY2d 303, 1976). A restrictive covenant is deemed reasonable if: [1] the restraints imposed thereby are not greater in scope than are necessary to protect the legitimate business interests of the party seeking its enforcement; [2] it does not impose an undue hardship against the party against whom it will be enforced and; [3] it is not injurious to the public (*DAR Associates, Inc. v Uniforce Services, Inc.*, 37 F Supp 192, ED NY 1999, *supra*; *Emerging Vision, Inc. v Main Place Optical*, 10 Misc 3d 1071, 2006, *citing BDO Seidman v Hirshberg*, 93 NY2d 382, 1999).

Initially, the Court inquires as to whether EVI possesses a legitimate business interest

## EMERGING VISION, INC.

Index no. 20598/08

and whether the scope of the post-termination restrictive covenant is sufficiently tailored to protect such an interest. It has been held that the prevention of, and protection from, unfair competition has been recognized as a legitimate business interest which a franchise may guard against through the mechanism of a restrictive covenant (*DAR Associates, Inc. v Uniforce Services, Inc.*, 37 F Supp 192, ED NY 1999, *supra*; see also *Baker's Aid v Hussmann Foodservice Co.*, 730 F Supp 1209, ED NY 1999). Here, the record demonstrates that for over a period of 20 years the defendant benefitted from a relationship with EVI, by attending training seminars, as well as by procuring and utilizing operations manuals containing procedures specifically developed by EVI for operating a Sterling Optical franchise. Moreover, while Dr. Atkinson staunchly avers that the success of his business was solely the result of his own efforts, the Court find incredulous that no benefits inured to the defendants during the substantial life of the relationship with the Sterling Optical franchise, a nationally recognized brand in the business of providing eye exams, glasses and contact lenses.

Thus, in this Court's view, to now permit the defendants to employ the knowledge and know-how garnered directly from the protracted relationship with EVI in the operation of a non-Sterling retail optical store at the *exact* location of Store No. 168 would constitute unfair competition, against which EVI is entitled to protection via the provisions as contained in the covenant. Additionally, EVI's loss of customer good will and business opportunities as a result of defendant selling eyeware and related products can constitute irreparable harm sufficient to grant injunctive relief (*O.D.F. Optronics Ltd. v Remington Arms Co., Inc.*, 2008 WL 4410130, SD NY 2008).

As to the scope of the restriction, the Court finds that the post termination covenant not to compete to be reasonable in geography and duration so as to protect EVI's customer relationships, good will and to prevent the defendants from capitalizing upon the long term franchise relationship with EVI and to use the knowledge garnered thereby to directly compete with other Sterling Optical franchises in that geographic area (*DAR Associates, Inc. v Uniforce Services, Inc.*, 37 F Supp 192, ED NY 1999, *supra*; *Baker's Aid v Hussmann Foodservice Co.*, 730 F Supp 1209, ED NY 1999).

Finally, by defendant's own admission "with minimal exception, there is no "retail optical" business being conducted at the Porter Road premises" and accordingly the enforcement of the post termination covenant will not visit any undue hardship upon the defendant or prevent him from engaging in his chosen profession (*DAR Associates, Inc. v Uniforce Services, Inc.*, 37 F Supp 192, ED NY 1999, *supra*; *BDO Seidman v Hirshberg*,

EMERGING VISION, INC.

Index no. 20598/08

93 NY2d 382, 1999, *supra*). The Court further notes that the restrictive covenant functions *only* to preclude the defendants from operating a retail optical store and does not bar Dr. Atkinson from practicing optometry, or from providing chiropractic and acupuncture/massage services, all of which he asserts form the majority of his business. Therefore, a balancing of the equities tip in favor of granting a degree of the relief herein requested (*Aetna v Capasso*, 75 NY2d 860, 1990, *supra*; *W.T. Grant Co., v Sgroi*, 52 NY2d 496, 1981, *supra*).

*Customer lists*

“Medical records and notes which contain entries relevant to medical history, examination, treatment or care are property of the health care provider who provided the care or treatment” (*Emerging Vision, Inc. v Main Place Optical, supra*). Dr. Atkinson is a medical provider, licensed to diagnose and treat diseases of the eye. As the customer records in issue were authored and maintained by Dr. Atkinson, he therefore cannot be compelled to turn them over to the plaintiff.

Based upon the foregoing, it is ORDERED that the Plaintiff’s motion for a preliminary injunction is hereby **granted** to the following extent: the defendants are hereby enjoined from operating a retail optical store, center or business which is engaged in the sale of contact lenses, prescriptions and non-prescription eyewear or related eye care products within a ten (10) mile radius of the location of Store No. 168 during the pendency of the action; the defendants are further enjoined, during the pendency of this action, from using the telephone numbers and listings which were used for Sterling Optical Store No. 168; and the defendants are further enjoined and restrained from using the Sterling Optical Operating Manual, marketing materials, or any other confidential material used at Store No. 168 and are hereby directed to return any such material, which remains in their possession, back to EVI.

It is further ORDERED that the preliminary injunction is conditioned upon EVI posting an undertaking in the sum of \$10,000 within 15 days of the date of this Order. Such undertaking shall remain in effect until further order of this Court or by stipulation executed by and between counsel for the respective parties. In the event EVI fails to post the undertaking as directed herein, the within application is **denied** in its entirety.

This constitutes the Decision and Order of the Court.

All application not addressed herein are **denied**.

EMERGING VISION, INC.

Index no. 20598/08

A Preliminary Conference has been scheduled for December 22, 2009 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated NOV 10 2009

*Stephen A. Bucaria*  
J.S.C.

**ENTERED**  
NOV 13 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE