Flood Group of Long Is, Inc. v Henry J. Bosio & Assoc., Inc.
2010 NY Slip Op 30085(U)
January 5, 2010
Supreme Court, Nassau County
Docket Number: 12901/09
Judge: Ute W. Lally

SCAN

MD, MD.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: **HON. UTE WOLFF LALLY**
Justice

THE FLOOD GROUP OF LONG ISLAND, INC.,

Plaintiff,

-against-

HENRY J. BOSIO & ASSOCIATES, INC., ROBERT SCOCCA and MARIE JO BOSIO,

Defendants.

Motion Sequence #1, #2
Submitted November 10, 2009

INDEX NO: 12901/09

The following papers were read on this motion for preliminary injunction and cross-motion for summary judgment:

Order to Show Cause, Affirmation in Support of Preliminary Injunction, Affidavit in Support of Preliminary Injunction.....1-3
Notice of Cross-Motion for Summary Judgment, Affidavit.....4-6
Affirmation in Opposition to Cross-Motion for Summary Judgment, Affidavit in Opposition to Cross-Motion for Summary Judgment..7-9
Reply Affidavit in Support of Motion for Summary Judgment.....10-11

This motion by the plaintiff The Flood Group of Long Island, Inc. for an order Order pursuant to, *inter alia*, CPLR 6301 granting a preliminary injunction prohibiting the defendants, Henry J. Bosio & Associates, Inc., Robert Scocca and Marie Jo Bosio from, among other things, soliciting and or contacting any of the plaintiff's customers, accounts and clients and cross motion by the defendants Henry J. Bosio & Associates, Inc., Robert Scocca and Marie Jo Bosio, for an order pursuant to CPLR 3212 granting summary

judgment dismissing the complaint are disposed as follows:

In June of 2006, the plaintiff Flood Group of Long Island, Inc [the "plaintiff"] (a licensed insurance agency) acquired from codefendant Henry J. Bosio & Associates, Inc ["HBA"], HBA's business assets, including most importantly, HBA's so-called "book of business" which allegedly contained some 2207 policies (Flood Aff., ¶¶ 3-6; Weldon Aff., ¶¶ 7-8; Scocca Aff., ¶ 13).

Significantly, an insurance agent's "Book of Business" contains relevant information relating to an agent's accounts, including, *inter alia*, the names of the insureds, the types of policies which were issued, and the date when policies are due to expire (Weldon Aff., ¶¶ 7-8, 30-31 *see,* Agreement, § 1.1; Bosio Aff., ¶¶ 4-5).

Notably, section 13.1 of the parties' "Purchase and Sale" agreement contains a number of restrictive covenants and provisions prohibiting HBA's then- sole shareholder, Henry J. Bosio, from competing with the plaintiff in the future and thereby diluting the value of the accounts acquired (Flood Aff., ¶¶ 5-12; Bosio Aff., ¶ 17).

Among other things, section 13.1 provides that, for a period of five years post-agreement, the "shareholder" (Bosio) – who later died in December of 2008 – would not solicit or transact business with any of HBA's former accounts or clients; that Bosio would not "transact insurance" business within a 50-miles radius of certain stated locations; that Bosio would refer all insurance inquires arising from its former business activities to Flood; that the accounts and related information Flood acquired by virtue of the purchase agreement were to be considered trade secrets; and that Flood, as purchaser, would be entitled to treble damages, specific performance and/or injunctive relief where appropriate, in the event that any Bosio/HBA violated any of the foregoing non-compete provisions (*see,*

Agreement, §§13.1 [a][e]; 13.2, at 14-17; Flood Aff., ¶¶ 11–14).

According to the plaintiff, co-defendant Robert Scocca (Henry J. Bosio's son-in law) handled the original contract negotiations on behalf of Mr. Bosio, and that after Bosio died, Scocca and his wife, codefendant Marie Jo Bosio (Henry's daughter) operated HBA business as Bosio's successors (Flood Aff., ¶¶ 15-16). Scocca has confirmed that he is the managing member in various entities which Bosio formerly owned and/or in which Bosio had a controlling interest, and that he currently manages the day-to-day affairs of those entities (Scocca Aff., ¶ 9).

In May of 2009, the plaintiff's principal, Terrence Flood, claims to have discovered that Scocca was attempting to transfer certain customer accounts to another insurance agency, in alleged violation of the June, 2006 agreement (Weldon Aff., ¶ 16; Cmplt., ¶ 26). While the plaintiff's opening submissions on the motion do not identify the client accounts involved, or particularize the facts underlying its claims, the client accounts and policies at issue were (with one undescribed exception) entities formerly owned by Mr. Bosio, in which Scocca is now a managing member (Scocca Aff., ¶¶ 10-11; Flood Aff.,¶ 20).

Thereafter, by "cease and desist" letter dated June 1, 2009, the plaintiff formally accused Scocca of placing policies covered by the agreement with a third-party broker, supposedly resulting in lost commissions to the plaintiff of $6,774.81. Based on the foregoing amount, the plaintiff's letter demanded treble, liquidated damages in the sum of $20,324.43 (*see*, Agreement 13.1[e]).

According to Mr. Scocca, however, he originally asked the plaintiff to shop the involved policies at some point in 2008 so as to ascertain whether lower premiums could be secured. It was only after plaintiff allegedly failed to timely act upon his request that

Scocca later acquired the discounted policies from another broker (Scocca Aff., ¶¶ 10-11; Scocca Reply Aff.,¶¶ 3-5).

The defendants rejected the plaintiff's claims as set forth in the demand letter, after which the plaintiff commenced the within action and served a summons and complaint dated July 1, 2009. The plaintiff's complaint recounts in substance the facts as detailed above and interposes claims for preliminary and permanent injunctive relief, liquidated damages; tortious interference with business relations; and "unfair trade" practices.

By order to show cause granted July 14, 2009 (Lally, J.) the plaintiff herein moved for a preliminary injunction, requesting relief directing the defendants to "cease, desist, and refrain from soliciting or contacting any customers, accounts, or clients of the Plaintiff * * * for purposes of soliciting or otherwise directly or indirectly causing any customers, accounts or clients to place insurance business with any person or entity other than the plaintiff, and also generally seeks to enjoin the defendants" from violating "any provision" of the June, 2006 agreement (Pltff's OSC, ¶¶ [b],[c]).

The defendants have since interposed their answer and now cross move for summary judgment dismissing the complaint. The parties' respective applications should be denied.

"A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor" (*Berkoski v. Board of Trustees of Inc. Village of Southampton*, 67 AD3d 840 *see generally, Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 NY3d 839, 840; *Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862; *Doe v.*

Axelrod, 73 NY2d 748, 750; *Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*,65 AD3d 1051).

"To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts" (*Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 AD3d 587 *see, Abinanti v. Pascale*, 41 AD3d 395, 396; *Gagnon Bus Co., Inc. v. Vallo Transp., Ltd.*, 13 AD3d 334, 335).

"While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that 'subvert the plaintiff's likelihood of success on the merits * * * to such a degree that it cannot be said that the plaintiff established a clear right to relief'" (*Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 AD3d 612, *quoting from*, *Milbrandt & Co. v. Griffin*, 1 AD3d 327, 328 *see,* CPLR 6312[c]; *Shasho v. Pruco Life Ins. Co. of New Jersey*, 67 AD3d 663; *County of Westchester v. United Water New Rochelle*, 32 AD3d 979, 980).

The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*Doe v. Axelrod, supra*, at 750; *Dixon v. Malouf, supra; Alexandru v. Pappas*, ___AD3D___, 2009 WL 4455382 [2nd Dept. 2009]; *Tatum v. Newell Funding, LLC*, 63 AD3d 911, 912).

With these principles in mind, and reviewing the non compete provisions as part of the entire purchase agreement (*Riverside South Planning Corp. v. CRP/Extell Riverside, L.P., supra*), the Court agrees that the plaintiff has failed to sustain its burden of, *inter alia*,

demonstrating, upon clear and convincing evidence, a likelihood of success on the merits.

Although the non compete covenant was a material component of the deal, its terms refer exclusively to the "shareholder" (Henry J. Bosio) and, in sum, preclude him from: (1) soliciting, obtaining "or in any way transact[ing] insurance business" with the plaintiff's accounts or customers; (2) from acting as a consultant or advisor with respect to those accounts; and (3) from interfering with the plaintiff's customer relations by inducing those customers to discontinue their relationship with the plaintiff (Agreement, ¶ 13.1[b]).

Here, however, the record suggests that by acquiring coverage for the involved Bosio entities, the defendants were not acting as insurance professionals, brokers or agents; nor were they soliciting or attempting to solicit the plaintiff's "business book" customers, "transacting insurance" business as brokers, or attempting to induce third-party customers to terminate their relationships with the plaintiff. Rather, Scocca was acquiring insurance coverage in his capacity as a principal and manager of the various entities which he either owned and/or managed, *i.e.*, the involved "Bosio" entities.

Although to the extent discernable at this juncture of the proceeding, the agreement precludes the "shareholder" from, *inter alia*, soliciting, interfering with the plaintiff's customers and/or transacting insurance business, it does not expressly require the accounts transferred under the agreement or their managing principals, acting as such, to acquire insurance coverage exclusively from the plaintiff.

Moreover, and apart from the foregoing, the defendants have further undermined "the plaintiff's likelihood of success on the merits" (*Shasho v. Pruco Life Ins. Co. of New Jersey*, *supra*), by pointing out that the non compete provisions were made applicable only

to the Henry J. Bosio, referenced therein as the "shareholder". While the agreement later generally recites (in a different and subsequent paragraph) that it "shall be binding" on the parties' "respective successors," neither Marie Bosio nor Robert Scocca were signatories to the agreement; nor has the plaintiff established for the purposes of its current application, that Scocca or Bosio otherwise agreed to abide by the restrictive covenants contained in the agreement (*cf., Black Car and Livery Ins., Inc. v. H & W Brokerage,nc.*, 28 AD3d 595, 596).

The plaintiff's obscurely framed assertion that Scocca has also attempted to interfere with an undescribed, "non-Bosio" entity covered by the agreement is conclusory and lacking in probative import. (Flood Main Aff.,¶ 20; Reply Aff.,¶ 11). It is settled that when damage claims "are wholly speculative and conclusory," they "are insufficient to satisfy the burden of demonstrating irreparable injury" (*Khan v. State University of New York Health Science Center at Brooklyn*, 271 AD2d 656, 657), since such "harm must be shown by the moving party to be imminent, not remote or speculative" (*Golden v. Steam Heat, Inc.*, 216 AD2d 440, 442 *see also*, *Dixon v. Malouf*, 61 AD3d 630; *Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC*, 42 AD3d 420, 421; *Neos v. Lacey*, 291 AD2d 434, *Kaufman v. International Business Machs. Corp.*, 97 AD2d 925, 926, *affd,* 61 NY2d 930).

The Court further notes that the actual injunction language proposed in the plaintiff's order to show cause is unduly expansive in scope. Specifically, the submitted text would broadly enjoin the defendants from, *inter alia*, soliciting the plaintiff's customers or placing coverage with anyone other than the plaintiffs, and would also nebulously enjoin the

defendants from violating "any provision" of the agreement.

Here, however, the evidence before the Court is that the defendants, as principals of the subject "Bosio" entities, have already purchased stated policies for a discrete coverage period extending into the future. The record as presently constituted does not support an inference that proscribed conduct plainly falling within the scope of the agreement is imminent and thus, that a blanket-type injunction enjoining the defendants from violating "any provision" of the contract is warranted (*see*, *Golden v. Steam Heat, Inc.*, *supra*).

Lastly, and with respect to the defendants' cross motion, while the facts may not support the granting of injunctive relief (*cf.*, *Kaplan v. Queens Optometric Associates, P.C.*, 293 AD2d 449), the Court agrees that upon viewing the evidence "in the light most favorable to * * * [the plaintiff], as is appropriate in the context of * * * [a] motion for summary judgment" (*Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 106), unresolved interpretative issues and questions of fact exist with respect to the precise meaning, scope and application of the non-compete provisions, issues which cannot be summarily resolved upon the pre-discovery record before the Court (*see generally, Harvey v. Nealis,* 61 AD3d 935; *Valdivia v. Consolidated Resistance Co. of America, Inc.,* 54 AD3d 53, 754; *Venables v. Sagona*, 46 AD3d 672, 673).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361]; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489).

The Court has considered the parties' remaining contentions and concludes that they fail to establish the movants' entitlement to the relief sought in their respective applications.

Accordingly, it is

ORDERED, that the motion for an order pursuant to, *inter alia*, CPLR 6301 by the plaintiff The Flood Group of Long Island, Inc. for a preliminary injunction, is denied, and it is further

ORDERED, that the cross motion for an order pursuant to CPLR 3212 by the defendants Henry J. Bosio & Associates, Inc., Robert Scocca and Marie Jo Bosio for summary judgment dismissing the complaint, is denied.

Dated: January 5, 2010

UTE WOLFF LALLY, J.S.C.

TO: Keidel, Weldon & Cunningham, LLP
Attorneys for Plaintiff
925 Westchester Avenue
White Plains, NY 10604

R. B. Schwartz & Associates, PC
Attorneys for Defendant Robert Scocca
6800 Jericho Turnpike, Suite 120W
Syosset, NY 11791

floodgroupofli-bosio,scocca&bosio,#1,#2/preliminaryinjunction