

In the Game Fitness Corp. v Monzillo

2010 NY Slip Op 30348(U)

January 26, 2010

Supreme Court, Suffolk County

Docket Number: 33167/09

Judge: Joseph C. Pastorella

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**SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY**

PRESENT:
HON. JOSEPH C. PASTORESSA

Mot Seq: #001-MD

IN THE GAME FITNESS CORP.,

Plaintiff(s),

ATTYS FOR PLAINTIFF(S):
THE RICHARD L. ROSEN LAW FIRM, PLLC
110 E. 59TH STREET, 23RD FLR.
NEW YORK, NY 10022

-against-

MICHAEL MONZILLO,

Defendant(s),

ATTYS FOR DEFENDANT(S):
TARTAMELLA, TARTAMELLA & FRESOLONE, PLLC
235 BROOKSITE DRIVE
HAUPPAUGE, NY 11788

X

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Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>1</u>
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Affidavit (Affirmation)	_____
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Upon the foregoing papers, the plaintiff moves for an order enjoining and restraining defendant, Michael Monzillo ("hereinafter "Monzillo"), from continuing to allegedly violate a non-competition agreement he entered into with the plaintiff, In the Game Fitness Corp., ("hereinafter" "In the Game Fitness") his former employer, by performing personal training services within a ten (10) mile radius or by continuing to solicit, directly or indirectly, personally or in writing, by himself or through any representative, agent, individual or entity, plaintiff's clients.

The complaint sets forth that the plaintiff is a franchisee of Fitness Together Franchise Corporation (hereinafter "FTF") and that it operates a fitness facility located at 156 East Main Street, Port Jefferson, New York offering personal fitness training to its members in exchange for members paying membership fees. The franchise agreement requires that the plaintiff enter into non-compete agreements with any trainer it hires.

The plaintiff hired the defendant Monzillo as a trainer for the facility on October 17, 2008 whereby the plaintiff alleges that the defendant Monzillo signed an agreement dated October 17, 2008, which contains, among other things, a covenant that the defendant shall not solicit or provide personal fitness training to any clients or former clients of the plaintiff within a ten (10) mile radius of any FTP franchises located in Suffolk County, New York for a period of one (1) year following termination of employment with the plaintiff.¹ The plaintiff terminated the defendant Monzillo's

¹ The plaintiff avers that the defendant signed the agreement on October 17, 2008 the day he was hired as a trainer, however, the defendant avers that he signed the agreement one or two

employment on February 10, 2009. The defendant Monzillo subsequent to being terminated sent an electronic message (email) on February 15, 2009 to approximately eight (8) members of the plaintiff for whom the defendant Monzillo provided personal training to in the course of his employment. The defendant Monzillo's email that he sent on February 15, 2009 stated the following: "Good morning! I want to take this opportunity to say that I'm sorry about my departure from Fitness Together. I truly enjoyed meeting and working with you! I hope that in the time we spent together, I inspired you to reach your goals and be the best that you can be!! If you have any questions, or would just like to talk, please feel free to contact me at xxx-xxxx. Mike Monzillo"

The plaintiff's complaint alleges the following causes of action: injunctive relief; breach of contract; and tortious interference. The plaintiff argues that the defendant Monzillo breached the agreement between the parties by soliciting current and former members of the plaintiff's facility and by providing personal training services to clients within a ten (10) mile radius and within one (1) year of the agreement. The plaintiff further argues that the defendant interfered with the plaintiff's contractual relationship with their members following the termination of his employment with the plaintiff.

Alesha Cirillo, a 50% shareholder in the plaintiff corporation, sets forth in her supporting affidavit that during the defendant Monzillo's employment with the plaintiff he was introduced to numerous members of the plaintiff for whom he provided personal training services on behalf of the plaintiff and that subsequent to the defendant Monzillo's email to members that several members either contemporaneously, or immediately thereafter terminated their memberships with the plaintiff. Ms. Cirillo avers that following the defendant Monzillo's employment with the plaintiff that between five (5) to ten (10) members began receiving personal training from the defendant Monzillo causing the plaintiff to suffer substantial economic harm consisting of losing monthly membership fees, losing automatic renewal memberships, and having to return membership fees to members. The plaintiff further alleges that the defendant Monzillo is providing personal fitness training to former members, active members, and persons that were not members at Monzillo's home located at 30 Fairmont Avenue, Medford, New York and a competing facility known as "Energy Fitness" located at 556 Route 25A, St. James, New York, both within a ten (10) mile radius of the plaintiff.

The defendant Monzillo avers in an affidavit that he resides at 30 Fairmont Avenue, Medford, New York. Mr. Monzillo avers that he did not solicit any members of the plaintiff and that when he sent the email to the members that he simply wanted to "thank them for the opportunity to meet them and for the opportunity to hopefully have a positive impact on their lives". The defendant Monzillo avers that he did not take any list of members emails from the plaintiff or memorize the member's emails but rather that they were provided to him by the plaintiff through the course of his employment when scheduling personal training sessions with members. The defendant Monzillo further avers that he did not send any follow up emails and never initiated contact to any of the members after the email was sent. Mr. Monzillo avers that he never worked in any capacity and never provided any fitness training to anybody at Energy Fitness. Mr. Monzillo acknowledges that he filled out an application of employment with Energy Fitness and was interviewed, however, before being offered employment he accepted employment with the plaintiff on or about October 2008. Mr. Monzillo further avers that he is currently training clients at his home and disputes that his home is located within a ten (10) mile radius of the plaintiff's business location attaching to his opposition papers a mapquest printout, which alleges that his home is 10.83 miles away. The defendant avers that to grant the preliminary injunction would prevent him from earning a living and that the services that he provided to members at In The Game Fitness were typical and ordinary

weeks after commencing work as a trainer at the facility.

services that any fitness trainer provides to a client and that he possess no trade secrets or client lists of the plaintiff. In addition, the defendant in opposition submits the affidavit of Michael Fox, General Manager of Energy Fitness, located in St. James, New York. Mr. Fox states that the defendant Monzillo was never an employee and never provided fitness training services to anyone at Energy Fitness in St. James, New York.

The plaintiff in reply submits an affidavit of Alesha Cirillo which in relevant part avers that based on two different methods that the actual distance between the plaintiff's business and the defendant's home is 8.77 and 8.7 miles respectively. Ms. Cirillo avers that out of the approximate ten (10) members that were contacted by the defendant via email six(6) of those members including Gladys Gentile, Patrick Llama, Marion Bernholz, Margaret Dyson, Mick Seymour and Christina Seymour expressly stated to In the Game Fitness staff that they were terminating their membership because Mr. Monzillo was no longer employed there and that two of those members, Patrick Llama and Marion Bernholz, indicated that they were leaving because they were continuing there training with Mr. Monzillo. Ms. Cirillo avers that on more than one occasion she has personally observed the defendant Monzillo's car parked at Energy Fitness training facility in St. James, New York and that Mr. Monzillo has been training individuals within a ten (10) mile radius of the plaintiff's facility. Ms. Cirillo points out that there are numerous places outside the radius area where Mr. Monzillo could work as a personal trainer. In addition, Ms. Cirillo avers that plaintiff lost approximately one third (1/3) of its full time members after the defendant Monzillo's departure and had to borrow approximately \$60,000 to reinvest in the company to keep the business afloat. Ms. Cirillo further avers that trainers maintain an exclusive clientele and that the "success of each trainer is dependant upon establishing trust, through one on one relationship with each of his or her clients". Ms. Cirillo goes onto aver that a personal trainer has a unique set of knowledge and training based on their "marketing success" and "the notoriety of the particular training certifications they obtain through course work and examination". Ms. Cirillo avers that the plaintiff's client list was known to the defendant Monzillo.

The plaintiff attaches an affidavit of Jennifer Lang (business partner with Ms. Cirillo) which avers in relevant part that on February 4, 2009 the defendant Monzillo stated to her that "Mike" (presumably Mike Fox) from Energy Fitness wanted him to work for Energy Fitness and that defendant Monzillo expressed concern that the ten (10) mile radius clause in the agreement was preventing him from working there. Ms. Lang further avers that on April 10, 2008 she received a phone call from Ms. Cirillo asking her to call Energy Fitness to confirm that the defendant Monzillo was training there after allegedly seeing his car in the parking lot, whereupon she avers that she placed a call to Energy Fitness and spoke to an employee named "Frank" who informed her that defendant Monzillo was providing training services at Energy Fitness to clients on Saturdays. The plaintiff submits in support an unsigned statement of Benjamin Sorin which the court will not consider evidentiary evidence since it is not signed and notarized.

Restrictive covenants in the employment context are disfavored as there are "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood" Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp., 42 NY2d 496, 499; Reed, Roberts Assoc., Inc. v Strauman, 40 NY2d 303, 307; JAD Corp of America v Lewis, 305 AD 2d 545; Savannah Bank, N.A. v Savings Bank of the Fingerlakes, 261 AD2d 917. The general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate itself from competition (see, American Broadcasting Companies, Inc. v Wolf, 52 NY2d 394, 404; and Walker Karl, Inc. v Wood, 137 AD2d 22).

In BDO Seidman v Hirshberg, 93 NY2d 382, 712 NE 2d 1220, 690 NYS 2d 854), the Court of Appeals set forth the "modern, prevailing common-law standard of reasonableness" for the enforceability of employee non-compete agreements (id. at 388). "A restraint is reasonable only if

it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public” (id. at 388-389). Moreover, a non-compete agreement must also be reasonably limited temporally and geographically (see, Elite Promotional Mktg., Inc. v Stumacher, 8 AD3d 525).

The first prong of the test is limited to misappropriation of the employer’s trade secrets or confidential client lists, or protection from competition by a former employee whose services are unique or extraordinary (see, Reed, Roberts Assoc. v Strauman, supra at 308). A trade secret is defined as any formula, pattern, device or compilation of information which is used in one’s business, and which gives the owner an opportunity to obtain an advantage over competitors who do not know or use it (see, Ashland Mgt. Inc. v Janien, 82 NY2d 395). A trade secret must first of all be secret. Where the information at issue is public knowledge, or could be acquired easily and duplicated, it is not a trade secret (see, Ashland Mgt. Inc. v Janien, supra; Starlight Limousine Service, Inc. v Cucinella, 275 AD2d 704). Trade secret protection will not be accorded to customer lists where the names and addresses of customers are readily ascertainable (Leo Silfen, Inc. v Cream, 29 NY2d 387), or where client information is scattered throughout the office in unlocked files (see, Frederic M. Reed & Co., Inc. v Irvine Realty Grp., Inc., 281 AD2d 352). Information from publicly available sources is not entitled to trade secret protection (see, JAD Corp of America v Lewis, supra). It is well settled that an employee’s recollection of information pertaining to specific needs of particular customers is not confidential (see, Buhler v Michael P. Maloney Consulting, Inc., 299 AD2d 190; Investor Access Corp. v Doremus & Co., Inc., 186 AD2d 401). Insofar as the restrictive covenant is concerned, its reasonableness must be measured by the circumstances and context in which enforcement is sought (Reed, Roberts Assoc. v Strauman, supra at 307).

To make a claim for tortious interference, a plaintiff must show that the defendant interfered with the plaintiff’s business relationships with the sole purpose of harming the plaintiff or by means that were unlawful or improper (see, Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183; Jurlique, Inc. v Aistral Biolab Pty., 187 AD2d 637; Silfer-Weickel, Inc. v Meteor Skelly, 140 AD2d 320). Moreover, in order to sustain a cause of action based on tortious interference there must be a showing of wrongful conduct, which includes, inter alia, fraudulent representations, threats, or a violation of a duty of fidelity owed to the plaintiff by reason of a confidential relationship between the parties (see, Out of Box Promotions v Kosehitzki, 55 AD3d 575; Baron Assoc., P.C. v RSKCO, 16AD3d 362; Koepfel v Schroder, 122 AD2d 780).

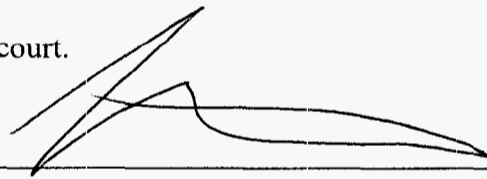
A preliminary injunction is a drastic remedy that should be used sparingly and the movant has the burden of establishing a clear right to this equitable remedy (see, McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc., 114 AD2d 165; Town of Smithtown v Carlson, 204 AD2d 537). To be entitled to a preliminary injunction under CPLR §6301, the movant must establish “(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” (Ruiz v Meloney, 26 AD3d 485, 485-486; see, Lattingtown Harbor Prop. Owners Assn., Inc. v Agostino, 34 AD3d 536; IVI Environmental, Inc. v McGovern, 269 AD2d 497; Khan v Univ. Of N.Y. Health Science Ctr., 271 AD2d 656). “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual” (Ying Fung Moy v Hoho Umeki, 10 AD3d 604, 604). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (see, Matter of Merscorp. v Romaine, 295 AD2d 431). Furthermore, where the facts are sharply disputed, those elements cannot be established and the motion for a preliminary injunction will be denied (see, Digestive Liver Disease, P.C. v Sunil Patel, 18 AD3d 423; Morley Distribs v Merinberg, 216 AD2d 544; Price Paper & Twine Co. v Miller, 182 AD2d 748).

In the instant case, the crucial facts are in sharp dispute. The plaintiff has failed to demonstrate a likelihood of success on the merits based upon the evidentiary submissions.

Specifically, the plaintiff has not established that defendant Monzillo misappropriated trade secrets or confidential customer lists or that his services as a personal trainer were in any manner unique or extraordinary (see, Shannon Stables Holding Co. v Bacon, 135 AD2d 804; Skaggs-Walsh, Inc. v Chmiel, 224 AD2d 680; Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp., supra; Reed, Roberts Assoc., Inc. v Strauman, supra). The plaintiff's evidentiary submissions were mere conjecture and speculation as to the uniqueness or extraordinary services of a personal trainer, and which, nonetheless, were sharply disputed by the defendant Monzillo. The plaintiff failed to show that the defendant Monzillo obtained the list of members from a confidential source of the plaintiff's, and in fact, defendant Monzillo averred that he obtained the member's emails of some ten (10) members through scheduling appointments with them and from his own recollection (Leo Silfen, Inc. v Cream, 29 NY2d 387; Buhler v Michael P. Maloney Consulting, Inc., supra; Investor Access Corp. v Doremus & Co., Inc., supra). In addition, the submissions on the issue of the distance of the plaintiff's business to the defendant's home are in sharp dispute. Furthermore, the plaintiff failed to show that the defendant Monzillo was working for Energy Fitness or training clients at Energy Fitness. The defendant Monzillo provided an affidavit from Michael Fox, General Manager of Energy Fitness, that the defendant Monzillo never worked at Energy Fitness or never provided fitness training services to anyone at Energy Fitness. The plaintiff's evidence of the defendant Monzillo's working at Energy Fitness consisted of mere speculation and hearsay via the affidavit of Ms. Cirillo seeing his car at Energy Fitness and Ms. Lang's affidavit of an out of court conversation between herself and an employee of Energy Fitness. Moreover, the plaintiff has failed to demonstrate irreparable harm if the injunction is denied in that the alleged damages are measurable as amply demonstrated in plaintiff's evidentiary submissions. It is well established that "where...a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue" (Price Paper & Twine Co. v Miller, 182 AD2d 748, 750). Finally, the plaintiff failed to establish that a balancing of equities favors provisional relief since it has not shown that the absence of a preliminary injunction would cause it greater injury than the imposition of the injunction would inflict upon defendant (see, Copart of Connecticut, Inc. v Long Island Auto Realty, Inc., 42 AD3d 420; Lavo Maintenance Corp. v Culkan, 255 AD2d 560; Klein, Wagner & Morris v Lawrence A. Klein, P.C., 186 AD2d 631). The plaintiff also failed to allege let alone establish for purposes of this application that the defendant purposefully interfered with plaintiff's business with the intent to harm it or a showing of wrongful conduct on the part of the defendant. Accordingly, the plaintiff's application for a preliminary injunction is denied.

This shall constitute the decision and order of the court.

DATED: January 26, 2010



HON. JOSEPH C. PASTORESSA