

Aremac Holdings Corp. v Berkowitz

2010 NY Slip Op 30366(U)

February 25, 2010

Supreme Court, Albany County

Docket Number: 783-10

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

AREMAC HOLDINGS CORPORATION,
d/b/a NATIONAL LAW ENFORCEMENT
SUPPLY CORP.,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 783-10
RJI NO. 01-10-99428

ROBERTA G. BERKOWITZ and
PRENDO FORENSICS, LLC,

Defendant.

Supreme Court Albany County All Purpose Term, February 10, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

After twenty five years of employment with Aremac Holdings Corporation (hereinafter “Aremac”) and its predecessor, on October 9, 2009 Roberta Berkowitz (hereinafter “Berkowitz”) resigned. At the time she resigned Berkowitz was President of National Law Enforcement Supply Corp., a division of Aremac, which sells law enforcement products to law enforcement agencies. Thereafter, as readily admitted by Berkowitz, she formed Prendo Forensics, LLC (hereinafter “Prendo”) to sell forensic supplies to law enforcement agencies.

Plaintiff commenced this action against Defendants asserting causes of action for misappropriation of trade secrets, breach of fiduciary duties, fraud, unfair competition, and tortious interference with business relationships. Defendants have answered, and Plaintiff now moves for a preliminary injunction to enjoin Defendants from “soliciting, contacting or otherwise communicating with Plaintiff’s customers, or otherwise using Plaintiff’s confidential business information and/or trade secrets.” Defendants oppose the motion. Because Plaintiff failed to demonstrate its entitlement to a preliminary injunction, its motion is denied.

“Preliminary injunctive relief is a drastic remedy which is not routinely granted.” (Marietta Corporation v. Fairhurst, 301 A.D.2d 734, 736 [3d Dept. 2003]). It is well settled that in order to prevail on a motion for a preliminary injunction, the movant has the burden of demonstrating “a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” (Green Harbour Homeowners' Ass'n, Inc. v. Ermiger, 67 AD3d 1116 [3d Dept. 2009] quoting Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839 [2005]; Cooperstown Capital, LLC v. Patton, 60 AD3d 1251 [3d Dept. 2009]; CPLR § 6301). “Preliminary injunctive relief... will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers.” (Koultukis v. Phillips, 285 AD2d 433, 435 [1st Dept. 2001]; see also Rick J. Jarvis, Associates Inc. v. Stotler, 216 AD2d 649, [3d Dept. 1995]).

On this record, Plaintiff failed to sufficiently demonstrate its likelihood of success on the merits. The only proof Plaintiff submits is its president’s affidavit, an e-mail from Berkowitz to an unidentified recipient, and Plaintiff’s attorney’s affirmation that establishes the uncontested

fact of Prendo's formation.¹ Plaintiff's president's affidavit is replete with hearsay allegations about Berkowitz's contacts with Plaintiff's clients, offering no justification for their admission. Similarly, no foundation is provided for the admission of the e-mail. Plaintiff's president's affidavit speculates, "upon information and belief", that Berkowitz stole Plaintiff's customer lists and is using Plaintiff's pricing information, but offers no proof to substantiate such claims. On this record, Plaintiff has established no wrongdoing by Defendants to demonstrate the merits of its causes of action sounding in breach of fiduciary duties, fraud, unfair competition or tortious interference.

Similarly unavailing, on this record, is Plaintiff's proof that its "customer lists and/or pricing information are properly considered trade secrets." "[C]ustomer lists are generally not considered confidential information... [to obtain confidential status Plaintiff must] demonstrate that its customers are not known in the trade and are discoverable only by extraordinary efforts." (H. Meer Dental Supply Co. v. Comisso, 269 AD2d 662, 663 [3d Dept. 2000] quoting Empire Farm Credit v Bailey, 239 AD2d 855 [3d Dept 1997][internal quotations omitted]). Plaintiff established that its customers are "law enforcement departments". Contrary to Plaintiff's claims, no extraordinary effort is required to obtain a law enforcement department's contact information. These are governmental entities, whose contact information is widely distributed. Likewise, Plaintiff's claim that "there are no publicly available directories" is belied by Berkowitz's submission of a portion of the "National Directory of Law Enforcement Administrators", 45th

¹ To the extent that Plaintiffs' reply attempts to "belatedly add new assertions which should have been included in the [original motion]" they are not considered. (Crawmer v. Mills, 239 AD2d 844-845 [3d Dept.1997]; Albany County Dept. of Social Services v. Rossi, 62 AD3d 1049 [3d Dept. 2009]; Roanoke Sand & Gravel Corp. v. Town of Brookhaven, 24 AD3d 783 [2d Dept.2005]).

Edition. Plaintiff's reply fails to contradict Berkowitz's showing of public availability, despite its speculative claim that Berkowitz took e-mail address and contact information relative to its customers. Plaintiff's unsupported and conclusory allegations fail to sufficiently demonstrate that its customer information is not "readily discoverable through public sources." (Id., see also Battenkill Veterinary Equine P.C. v. Cangelosi, 1 AD3d 856 [3d Dept. 2003]). Additionally, tellingly absent from Plaintiff's reply is a refutation of Berkowitz's allegation that Plaintiff "has no pricing formula" which she could have taken. (emphasis in original) As such, on this record, Plaintiff failed to demonstrate the likelihood of success of its misappropriation of trade secrets claim.

Plaintiff's failure to "demonstrate a likelihood of success on the merits" for any of its causes of action requires denial of its motion for a preliminary injunction. (Widewaters Route 11 Potsdam Co., LLC v. Town of Potsdam, 51 AD3d 1292 [3d Dept. 2008]).

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
February 25, 2010


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated February 5, 2010, Affidavit of Todd Kletter, dated February 2, 2010, and attached Exhibit 1, Affirmation of Melanie LaFond, dated February 4, 2010, with attached Exhibits 1-2.
2. Affidavit of Roberta Berkowitz, dated February 9, 2010, with attached Exhibits A-C.
3. Affidavit of Todd Kletter, dated February 16, 2010, and attached Exhibits A-E, Affidavit of Stuart Kletter, dated February 15, 2010.