

Hovanec v Koos

2010 NY Slip Op 30592(U)

March 15, 2010

Supreme Court, Nassau County

Docket Number: 023197-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
VICTOR HOVANEK and SRW ENTERPRISES, INC.,

Plaintiffs,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

-against-

**Index No: 023197-09
Motion Seq. Nos: 2 & 3
Submission Date: 1/14/10**

MARTIN KOOS,

Defendant.

-----X

Papers Read on these Motions:

- Notice of Motion, Affidavit in Opposition and Exhibit.....X**
- Defendant's Memorandum of Law.....X**
- Notice of Cross Motion, Affidavit in Opposition/Support,
Affirmation in Opposition/Support and Exhibits.....X**
- Affidavit in Opposition to Cross Motion.....X**
- Reply Affirmation and Exhibits.....X**

This matter is before the court on 1) the motion filed by Defendant Martin Koos on December 18, 2009, and 2) the cross motion filed by Plaintiffs Victor Hovanec and SRW Enterprises, Inc. on January 12, 2010, both of which were submitted on January 14, 2010. For the reasons set forth below, the Court 1) grants Plaintiff's motion to dismiss the Verified Complaint to the extent that the Court dismisses the second cause of action which seeks an accounting; and 2) refers Plaintiff's cross motion to adjudge Defendant in contempt to a hearing which will take place before the Court on April 7, 2010 at 9:30 a.m. and directs **counsel and the parties** to appear before the Court on that date at that time.

BACKGROUND

A. Relief Sought

Defendant Martin Koos (“Koos” or “Defendant”) moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Verified Complaint (“Complaint”).¹ Plaintiffs Victor Hovanec (“Hovanec”) and SRW Enterprises, Inc. (“SRW”) (collectively “Plaintiffs”) oppose Defendant’s motion.

Plaintiffs cross move for an Order, pursuant to Section 753 of the New York Judiciary Law, adjudging Defendant to be in contempt of this Court’s Temporary Restraining Order (“TRO”) dated January 16, 2009.

B. The Parties’ History

The Complaint alleges as follows:

Hovanec is an individual, and SRW a corporation, with its residence and principal place of business respectively at 38 Birch Street, Port Washington, New York. Koos resides at 455 Macatee Place, Mineola, New York (“Defendant’s Address”).

On August 25, 2006, Hovanec and Koos entered into a contract of sale (“Contract”), pursuant to which Hovanec agreed to purchase Koos’ franchise window treatment business known as “Budget Blinds” for the price of \$150,000 (“Sale”). In conjunction with the Sale, Koos gave Hovanec a Bill of Sale dated August 25, 2006. That Bill of Sale was assigned to SRW, a corporation owned by Hovanec and his wife, on or about September 26, 2006.

The Contract and Bill of Sale (Exs. 1 and 2 to Prior Application) contain restrictive covenants (“Restrictive Covenants”). The Restrictive covenant in the Contract, set forth in paragraph 8 of that document, provides as follows:

The SELLER [Koos] will execute restrictive covenants at closing that he will not re-establish, re-open, become engaged in, or in any other manner whatsoever become interested, directly or indirectly, either as employee, owner, partner, agent, stockholder, director or officer of a corporation, or otherwise in any capacity, in any business involved [in] the sale of window treatments competitive with or similar to the business being sold in Nassau County, New York for a period of five (5) years. The covenant shall be delivered at closing by the SELLER.

¹ The Court has reviewed a copy of the Complaint, which was an exhibit to the prior Order to Show Cause (“Prior Application”), Motion Sequence Number 1, filed by Plaintiffs. On December 10, 2009, the Court referred the Prior Application to trial.

The Bill of Sale contains the following restrictive covenant:

AND the Transferor [Koos] further covenants and agrees to and with the Transferee [Hovanec], not to re-establish, re-open, be engaged in, nor in any manner whatsoever become interested, directly or indirectly, either as employee, as owner, as partner, as agent or as stockholder, director or officer of a corporation, or otherwise, in any business, trade or occupation similar to the one hereby sold, within the area bounded - Nassau County for a term of five (5) years from the date of these presents.

The Bill of Sale describes the business as “sale of window treatments.”

The Complaint alleges that Koos, on or about March 6, 2009, began doing business under the name “Blinds for You” from his Address, which the Court judicially notes is in Nassau County. The Complaint alleges that Koos’ operation of “Blinds for You” violates the terms of the Restrictive Covenants.

The Complaint contains two (2) causes of action. In the first, Plaintiffs allege that Defendant is in breach of the Contract. In the second, Plaintiffs allege that Defendant has deprived Plaintiffs of business opportunities and seek an Order compelling Defendant to account for the revenues he received as a result of his violation of the Restrictive Covenants. Plaintiffs seek 1) an order permanently enjoining Defendant from breaching the terms of the Restrictive Covenants; 2) damages, 3) an Order directing an accounting and, upon that accounting, an award of money damages, and 4) costs and counsel fees.

In the Prior Application filed November 16, 2009, Plaintiffs moved for an Order enjoining the Defendant from breaching the Restrictive Covenants. The Court signed a Temporary Restraining Order (“TRO”) on November 16, 2009 which directed that it was:

ORDERED, that pending a return date and determination of the instant motion, the Defendant, his agents, employees or anyone or any entity under his control and direction, be stayed, restrained, and enjoined from in any manner, including sales through internet or on-line means, engaging in the sale, installation, marketing or providing advice in connection with the sale and installation of window treatments within the County of Nassau, State of New York[.]

Plaintiffs provide an Affidavit in Support of Hovanec, dated December 22, 2009, in which he affirms as follows:

The scope of the business that Plaintiffs purchased from Defendant included, but was not limited to, the purchase and installation of window treatments in the nature of curtains, blinds,

valances, drapes, shades, cornices and hardware and accessories used to install these items and finish the window treatment in the manner the customer requests. While conducting an internet search to learn more about his competitors, Hovanec discovered sales coupons (“Coupons”) promoted by Valpak, an internet marketing distributor, at the website “Valpak.com.” Hovanec avers that Valpak issued these Coupons for the benefit of a company called “Custom Blinds for You,” and the Coupons contained the Defendant’s Address and telephone number. Copies of these coupons are annexed as Exhibit 4 to the Prior Application. Hovanec also conducted a search at the Office of the Nassau County Clerk and discovered that Defendant had filed a Certificate of Doing Business (“Certificate”) on March 6, 2009 for a business called “Blinds for You” (Ex. 5 to Prior Application).

Hovanec also affirms, without identifying the source of this information, that after the Sale, Koos worked as an installer for two (2) other Budget Blinds companies in Nassau County New York. Koos allegedly installed blinds for David Driscoll,² the operator of “Budget Blinds of Nassau,” and for Arlene Murphy, the operator of “Budget Blinds of Bellmore.” Plaintiffs do not provide affidavits of Mr. Driscoll or Ms. Murphy.

Hovanec affirms, further, that after the Sale, Koos continued to offer Coupons to potential customers in thirteen (13) towns in Nassau County. In support, Hovanec provides copies of twelve (12) Coupons (Ex. 2 to cross motion) distributed in New Hyde Park, Glen Head, Greenvale, Great Neck, Locust Valley, Glen Cove, Albertson, Old Westbury, Roslyn, Roslyn Heights, Sea Cliff, Syosset and East Norwich that were apparently printed from the internet on December 10, 2009. Hovanec submits that Koos’ failure to take steps to remove these Coupons demonstrates Koos’ intent to continue to market his window treatment businesses, in violation of the Restrictive Covenants and the TRO.

Hovanec submits an Affidavit in Opposition dated January 6, 2010 as well as the Affidavit in Opposition dated December 7, 2009 that he submitted in response to the Prior Application. In the December 7, 2009 Affidavit in Opposition, Hovanec affirmed as follows:

Hovanec never personally, nor through his business “Blinds for You,” sold window treatments in Nassau County after August 26, 2006. Hovanec submits that the only reason that his Address is on the Valpak Coupon is because Valpak automatically posts the vendor’s address

² David Driscoll is not related to or known by the undersigned.

on a Coupon. In support thereof, Hovanek provides a letter on Valpak letterhead (“Valpak Letter”) (Ex. A to Aff. in Opp.) stating, *inter alia*, that 1) Koos of Custom Blinds for You advertised with Valpak for the months of May through August of 2009; 2) during those months, Koos mailed Coupons to 30,000 homes in the following locations in Suffolk County: Cold Spring Harbor, Huntington, Melville and Dix Hills; 3) during those months, Koos never mailed Coupons to locations in Nassau County; 3) the Coupons “come automatically with a web presence on Valpak.com. [and Koos] was never notified of the internet presence as it is automatically posted and is not shown on the agreement.”

Koos also affirms that he filed the Certificate with his Address to designate a location for service, and not because he solicited customers from his Address. Koos avers that “Blinds for You” never sought any customers in Nassau County.

In their Reply Affirmation, Plaintiffs dispute Defendant’s claim that he does not have, and has never had, two window treatment businesses known as “Blinds for You” and “Custom Blinds for You.” Plaintiffs provide a copy of Coupons distributed by Valpak in Huntington, New York, which the Court judicially notes is in Suffolk County, including a Coupon for “Custom Blinds for You” (Ex. 4 to Reply Aff.) containing the Defendant’s Address. Plaintiffs also provide a Valpak Coupon for Bellmore, New York for an entity called “Budget Blinds Nassau County” (Ex. 5 to Reply Aff.) which contains Defendant’s telephone number. Plaintiffs submit that these Coupons demonstrate that Defendant has used Valpak Coupons to promote two (2) window treatment businesses, contradicting Defendant’s assertion (Koos Jan. 6, 2010 Aff. at ¶ 4) that he has never operated a business called “Custom Blinds for You.” Plaintiffs also affirm that, after they served their cross motion upon Defendant, the Valpak Coupons “disappeared from the Valpak internet site, for both Suffolk and Nassau Count[ies]” (Reply Aff. at ¶ 10).

C. The Parties’ Positions

Plaintiffs oppose Defendant’s motion to dismiss the Complaint, submitting that the Complaint states causes of action for breach of contract and an accounting. Plaintiffs argue that the Valpak Letter does not disprove Plaintiffs’ allegations that Defendant continues to operate window treatment businesses in violation of the Restrictive Covenants.

Plaintiffs also submit that they have demonstrated that Defendant has violated the TRO and, therefore, the Court should adjudge Defendant in contempt. Plaintiffs contend that the

Court should reject, as implausible, Defendant's contention that Valpak would provide Coupons offering specific price reductions without first discussing the Coupon's terms with Defendant.

Defendant submit that the Court should dismiss the Complaint because 1) Plaintiffs have failed to allege that Defendant breached the Contract by engaging in the sale and installation of window treatments in Nassau County in violation of the Restrictive Covenants; and 2) Plaintiffs' second cause of action, seeking an accounting, is insufficient both because it is redundant of the breach of contract claim and because Plaintiffs have not alleged a fiduciary relationship and there is, in fact, no fiduciary relationship among the parties in this matter.

RULING OF THE COURT

A. Standards for Dismissal

A motion interposed pursuant to CPLR §3211(a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference that may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). The Court will not, however, presume as true bare legal conclusions and factual claims that are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

In order to maintain an action for an accounting, the party seeking the accounting must establish that a fiduciary or trust relationship exists. *Schantz v. Oakman*, 163 N.Y. 148 (1900); *Akkaya v. Prime Time Transport*, 45 AD3d 616 (2d Dept.2007); and *Darlagiannis v. Darlagiannis*, 48 A.D.2d 875 (2d Dept.1975).

C. Contempt

To sustain a finding of civil contempt based upon a violation of a court order, a movant must demonstrate the existence of an unequivocal mandate (*see Kawar v. Kawar*, 231 A.D.2d 681 (2d Dept. 1996)) and must establish a violation thereof by clear and convincing proof (*see Bickwid v. Deutsch*, 229 A.D.2d 533 (2d Dept. 1996)). There must also be a finding that the conduct complained of was calculated to or actually did defeat, impair or prejudice the rights or remedies of a party to a civil proceeding. *Barkan v. Barkan*, 271 A.D.2d 466 (2d Dept. 2000).

D. Restrictive Covenants

Courts generally disfavor restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment. Courts will only enforce such covenants that are reasonably limited temporally and geographically, and then only to the extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of trade secrets or confidential customer lists. *H & R Recruiters, Inc. v. Kirkpatrick*, 243 A.D.2d 680, 681 (2d Dept. 1997).

E. Application of these Principles to the Instant Action

The Court concludes that the Complaint states a cause of action for breach of contract and, accordingly, the Court denies Defendant's motion to dismiss the first cause of action in the Complaint. In light of the absence of any allegations establishing a fiduciary duty among the parties, however, the Court concludes that the second cause of action seeking an accounting is legally insufficient, and dismisses the second cause of action in the Complaint.

With respect to Plaintiffs' contempt application, the Court concludes that the TRO is an unequivocal mandate of which Defendant had notice. The Court further concludes that there are issues of fact as to whether Defendant violated the TRO necessitating a hearing. Accordingly, the Court directs **counsel and the parties** to appear before the Court for a contempt hearing on April 7, 2010 at 9:30 a.m. at which hearing the Court will determine whether Defendant has violated the TRO and, if so, impose the appropriate penalty for that violation.

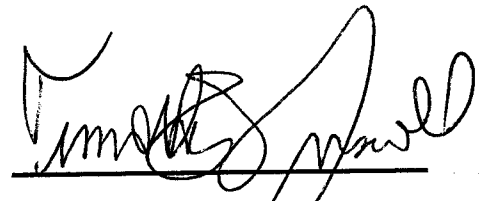
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel and the parties to appear for a contempt hearing before the Court on April 7, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
March 15, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
MAR 18 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE