SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 100155/09
Motion No.: 004

NICHOLAS BARBARO

Plaintiff

against

THOMAS SPINELLI,
DONNA SPINELLI a/k/a DONNA MAZZAFERRO,
ALLSTATE FUNDING SERVICES, INC.,
MATIZ MALDONADO,
BUSINESS CLUB NETWORK,
HOWARD TAPS and
ILLUMILUNA, INC. d/b/a PLI

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants Heino Taps a/k/a Howard Taps and Matiz Maldonado move for summary judgment declaring that a restrictive covenant held by a company in which they are part-owners is unenforceable pursuant to CPLR 3212. Defendants' motion is denied with leave to renew.

FACTS

This is an action to enforce a restrictive covenant, entered into by the parties, to prevent Defendants from engaging in business in violation of the covenant. Defendants Howard Taps ("Taps") and Matiz Maldonado ("Maldonado") along with Plaintiff Nicholas Barbaro ("Barbaro") entered into a shareholder agreement (the "Agreement") in March of 2008. The Agreement governed the relationship of the parties as equal shareholders in a Florida corporation called Lifebulb

International, Inc. ("LI" or the "Company"), which was created to distribute high-efficiency lighting products. Within the Agreement was a restrictive covenant that prevented any of the shareholders from competing with LI while they owned stock in the company or within two years of their sale of such stock.

LI only entered into a single transaction, in August 2008, that involved the sale of light bulbs to a town in Mexico called Villahermosa. After this sale, Barbaro was allegedly "frozen out" of the business, and the profits from the lone transaction were never distributed to Barbaro. LI was thereafter administratively dissolved for failure to file an annual report with the Florida Secretary of State. After LI was administratively dissolved, Taps and Maldonado allegedly continued transacting business in the same industry that LI was involved in through other companies that were independently owned by the defendants.

DISCUSSION

Defendants allege that the restrictive covenant is unenforceable because it is overly broad in scope, LI has no trade secrets or confidential customer lists to protect, and the defendants' services are not unique.

Where discovery is incomplete, the court may properly refuse to grant summary judgment.[1] A party should be permitted a reasonable opportunity for disclosure prior to the determination of a motion for summary judgment.[2] Moreover, where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.[3]

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[1] *Listworks Corp. v. LCS Indus, Inc.*, 155 A.D.2d 305 [1st Dept 1989]

[2] *Urcan v. Cocarelli*, 234 A.D.2d 537 [2d Dept 1996]

[3] *Juseinoski v. N.Y. Hops. Med. Ctr. of Queens*, 29 A.D.3d 636 [2d Dept 2006]

Full discovery has not been completed in this case. Defendants have allegedly failed to respond to the plaintiff's demand for additional documents, which was served on February 2, 2010. These documents allegedly would provide insight into the defendants' alleged use of separate entities to engage in the distribution of high efficiency lighting products in the geographical territory provided for in the Agreement. These documents would also shed light on the defendants' alleged use of potential customer lists that were developed for LI's exclusive use. As the inquiry into the reasonableness of a restrictive covenant is decidedly fact intensive and decided on a case by case basis by a totality of the circumstances, this court cannot summarily decide the validity of the restrictive covenant at this time while full discovery has yet to be completed.[4]

Had this court reached the merits of this case, Defendants' motion would nevertheless have been denied because an issue of fact remains as to whether the restrictive covenant continued in force even after LI's dissolution.

Defendants allege that summary judgment declaring that the restrictive covenant cannot be enforced should be granted in their favor because the company that held the right to enforce it has been dissolved, is now defunct, and thus could not have any legitimate business interests to protect.

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact" (CPLR §3212[b]). "A movant for summary judgment must demonstrate entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact."[5] "Moreover, in deciding the motion, the court is required to accept the opposing party's version of the facts as true."[6] Summary judgment is a drastic remedy and "should not be granted where there is any doubt as to the existence of a material and triable issue of fact."[7] Issue

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[4] *Greenwich Mills Co. v. Barrie House Coffee Co.*, 91 A.D.2d 398, 402 [2d Dep't 1983]

[5] *Washington v. Community Mutual Savings Bank*, 308 A.D.2d 444 [2d Dept 2003]

[6] *Rizk v Cohen*, 73 N.Y.2d 98 [1989]

[7] *Jablonski v. Rapalje*, 14 A.D.3d 484 [2d Dept 2005]

finding, rather than issue determination constitutes the key to the procedure.[8] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[9]

Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.[10]

A restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee."[11] "[R]estrictive covenants relating to employment are not favored, and will be deemed unenforceable unless reasonable in scope, duration and geographical area and either necessary to protect the employer from unfair competition that stems from the employee's use or disclosure of trade secrets or confidential customer lists or related to an employee whose services are unique or extraordinary."[12] Whether a customer list is a trade secret or readily ascertainable from public sources is an issue of fact.[13]

The restrictive covenant at issue states:

> "Each of the shareholders , for and on behalf of himself and any person or entity which he controls, and each of BCN and PLI, for and on behalf of itself and each of

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[8] *Anyanwu v. Johnson*, 276 A.D.2d 572 [2d Dept 2000]

[9] *Makaj v. Metro. Transp. Auth.*, 18 A.D.3d 625 [2d Dep't 2005]

[10] *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]

[11] *Reed, Roberts Assocs. v. Strauman*, 40 N.Y.2d 303, 307 [1976]

[12] *Columbia Ribbon & Carbon Mfg. Co. v. A-1- A Corp.*, 42 N.Y.2d 496, 499 [1997]; *Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 234 A.D.2d 200 [1st Dept 1996]

[13] *Suburban Graphics Supply Corp. v. Nagle*, 5 A.D.3d 663 [2d Dept 2004]

> its shareholders, partners, members, officers, director, agents and employees, hereby covenants and agrees not to establish, open, be engaged in, nor in any manner whatsoever become interested, directly or indirectly, as employee, owner, partner, member, agent, stockholder, director or office, or otherwise, in any business, trade or occupation which competes with the business of LI for the period and within the area hereinafter set forth.
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> "The foregoing covenant not to compete shall remain in full force and effect for each party hereto for the following time periods: (a) during the entire time that such party is either record owner or beneficial owner of any shares in LI or otherwise a party to this Agreement, as amended from time to time; (b) for a period of two (2) years after the sale or disposition of all of such party's shares in lI or after such party otherwise ceases to be a party to the Agreement.
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> "The foregoing covenant not to compete shall be effective within the following geographical area: Mexico, Latin America and the United States."

Defendants have provided sufficient evidence to satisfy its initial burden. The right of a corporation to sue or be sued following its dissolution is limited to obligations in existence at the time of its dissolution.[14] The Company holding the restrictive covenant has been dissolved for two years.[15] Since the alleged breach of the restrictive covenant occurred after the company had undergone dissolution, as opposed to prior to or during dissolution, the Company cannot enforce the restrictive covenant at issue.[16]

Since the defendants have satisfied their initial burden, the burden shifts to the plaintiff to establish a triable issue of material fact.[17]

LI is a Florida corporation. As such, this court will apply Florida corporate law in

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[14] *Lorisa Capital Corp. v. Gallo*, 119 A.D.2d 99 [2d Dept 1986]

[15] Exhibit G, Defendant's Notice of Motion

[16] *Moran Enters., Inc. v. Hurst*, 2009 NY Slip Op 7807 [2d Dept 2009]; *Lorisa Capital Corp.*, supra

[17] *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]

determining whether the proper procedure for dissolution was followed. Plaintiff alleges that LI has only been administratively dissolved and has not gone through any formal dissolution and winding up procedures. Since LI has only been administratively dissolved, it still has the capacity to enforce the restrictive covenant because, unlike a company that has gone through formal dissolution, LI can be reinstated at any time by tendering payment of all outstanding fees to the Florida Secretary of State.

A corporation may be administratively dissolved for failure to pay any number of fees or file an annual report.[18] A corporation administratively dissolved **continues its corporate existence** but may not carry on any business.[19] In order to be reinstated following administrative dissolution, the registered agent of the corporation or an officer or director must simply submit a reinstatement form along with all past due fees.[20] Once the reinstatement process is completed, the reinstatement is retroactively effective as of the date the corporation was administratively dissolved.[21]

In order for a corporation to be dissolved under Florida law, the board of directors must recommend dissolution to the shareholders, the shareholders entitled to vote must approve the dissolution either by vote or written consent, and all shareholders must be notified of the dissolution proceedings whether or not entitled to vote.[22] The corporation must then submit articles of dissolution to the Florida Secretary of State.[23]

Plaintiff has satisfied his burden of establishing the existence of a triable issue of fact. There

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[18] Fla. Stat. § 607.1420

[19] Fla. Stat. § 607.1421(3)

[20] Fla. Stat. § 607.1422(1)

[21] Fla. Stat. § 607.1422(3)

[22] Fla. Stat. § 607.1402

[23] Fla. Stat. § 607.143

has been no vote for dissolution by the shareholders, the plaintiff has not been notified of any dissolution proceedings, and articles of dissolution have not been filed with the Florida Secretary of State. Also, the defendants' own papers suggest LI was merely administratively dissolved for failure to file an annual report.[24] Therefore, the plaintiff has established a triable issue of material fact as to whether LI has, in fact, been formally dissolved, and whether the defendants remain parties to the Agreement.

CONCLUSION

The discovery process has not been completed. A triable issue of material fact exists concerning the status of LI, and the extent of the defendants' involvement in the high efficiency lighting business in Mexico using a customer list developed by LI is uncertain. Therefore, summary judgment declaring the restrictive covenant to be unenforceable would be premature.

Accordingly, it is hereby:

ORDERED, that Defendants Howard Taps and Matiz Maldonado's motion for summary judgment declaring the restrictive covenant contained in a shareholder agreement with Plaintiff Nicholas Barbaro to be unenforceable is denied with leave to renew upon completion of discovery; and it is further

ORDERED, that Defendants produce the documents requested by Plaintiff in the February 2, 2010 Supplemental Demand for Discovery and Inspection forthwith; and it is further

[24] Exhibit G, Defendant's Notice of Motion

ORDERED, that the parties return to DCM Part 3 on Wednesday, August 25, 2010 at 9:30a.m. for a compliance conference.

ENTER,

DATED: June 29, 2010

Joseph J. Maltese
Justice of the Supreme Court

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