

Not Just kidding, Ltd. v Peruzzi Hair Salon, Inc.

2010 NY Slip Op 32098(U)

July 22, 2010

Supreme Court, Nassau County

Docket Number: 026264/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

NOT JUST KIDDING, LTD. d/b/a PERUZZI SALON
& SPA and NADINE MALONE,

Plaintiff,

INDEX NO.: 026264/2009
MOTION DATE: 06/29/2010
MOTION SEQUENCE: 002

-against-

PERUZZI HAIR SALON, INC. d/b/a PERUZZI
HAIR SALON and BRENDA PERRUZZA,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affidavits, Affirmation, December 29, 2009 Court Order, and Exhibits Annexed	1
Affidavits in Opposition to Motion for Contempt & Exhibits Annexed	2
Reply Affirmation of Kenneth M. Keith & Exhibit Annexed	3
Letter of Richard Gabriele, Esq. dated February 23, 2010	4

PRELIMINARY STATEMENT

Plaintiffs have moved, by Order to Show Cause, for an Order holding defendants in contempt for disobedience of an Order of the Court.

BACKGROUND

Plaintiff Not Just Kidding, LTD. d/b/a Peruzzi Hair Salon (“Plaintiff Salon”) is a hair salon operating at 68 New York Avenue, Huntington, New York. Plaintiff Nadine Malone (“Malone”) and defendant Brenda Perruzza (“Perruzza”) were partners of Plaintiff Salon.(J. Vaughn Affidavit, para 5). A dispute arose between Malone and Perruzza, and, sometime in November 2009 or soon thereafter Perruzza opened a competing hair salon (“Defendant Salon”)

at 76 New York Avenue, Huntington, New York. (Peruzza Affidavit in Opposition, para 5).

Plaintiffs brought suit against defendant Salon and Perruzza in late December 2009, and sought a temporary restraining order preventing, inter alia, defendants' use of the name "Perruzzi" in connection with the operation of Defendant Salon. A hearing was held before Justice Palmieri who granted, in part, plaintiffs' request. (See Order to Show Cause, Attached Order entered December 30, 2009). A copy of the transcript of the hearing before Justice Palmieri is attached to Peruzza's affidavit. (See Peruzza Affidavit in Opposition, Exhibit B).

Plaintiffs argue Justice Palmieri's Order was clear and defendants should be held in contempt for violating the terms of the Order. Defendants claim they have not violated the terms of the Order. Defendants also claim the Order did not prevent the defendants' use of the term "Perruzza."

The Court's Order included the following terms.

Defendants ... either individually or acting as agent for any other person or entity, are enjoined and restrained, pursuant to N.Y. Gen. Bus. Law § 133, from using in its business the name "Peruzzi Salon", or any other simulation, derivation or approximation thereof, either alone or in conjunction with other words, in connection with the business of hair cutting and styling services;

Defendants ... either individually or acting as agent for any other person or entity, shall not make use of the name 'Peruzzi' including any use of that style and typeface used by the plaintiff, or any simulation thereof in or about its business, establishment, stationary, listings, telephone books, signs, advertising, and wherever else same may appear;

Defendants ... either individually or acting as agent for any other person or entity, are enjoined and restrained from using any of [Plaintiff Salon's] confidential information, including but not limited to customer lists, supplier lists, customer and supplier information, job orders, templates and pricing information and other such proprietary information but this shall not prevent individual employees at defendant corporation, including Brenda Peruzza, from contacting customers for whom they previously had rendered services; (See Order to Show Cause, Attached Order entered December 30, 2009)

During the hearing, Judge Palmieri stated:

I am going to issue [a] TRO, you will get it in writing, but let me go through the broad brushstrokes here. ... The TRO will prohibit the use of the name Peruzzi, that is with the P-E-R-U-Z-Z-I and ... , the font and style of the sign. It will not prohibit Ms.

Perruzza from using her name Perruzza.

The fourth [so ordered] we will modify by permitting employees of the [Defendant Salon] to contact their individual customers.

(See Peruzza Affidavit in Opposition, Exhibit B).

In accordance with the conditions of Justice Palmieri's Order, plaintiffs posted a \$5,000.00 undertaking with the Nassau County Treasurer on December 30, 2009.(Keith Affirmation, para 8).

Plaintiffs argue the affidavit of Peggy Vaughan ("Peggy") supports their claim that defendants violated the TRO. Peggy went to the Defendant Salon on January 20, 2010. (Peggy Vaughan affidavit, para 2). On that date the sign outside Defendant Salon stated "Brenda Peruzza Salon." However, Peggy saw business cards displayed in the salon with the words "Perruzzi Hair Salon." (*Id.* at para 3. See also Order to Show Cause Exhibit A) In addition, Peggy purchased a \$40.00 gift certificate.(See Order to Show Cause, exhibit B). The gift certificate stated, in part,

This Certificate Entitles Bearer To:

Service: Brenda Perruzza Salon

Salon Name: Peruzzi Salon. *Id.* at exhibit B)

Peggy also received a credit card receipt for the \$40.00 gift certificate which contained the name "Peruzzi Originale" at the top of the receipt.(*Id.* at exhibit C, See also Peggy Affidavit, Para 5)

Plaintiffs contend the statements of Jessica Vaughan ("Jessica") in her affidavit demonstrate another TRO violation.(See Jessica Vaughan Affidavit). On January 7, 2010, Jessica claims she received a phone call from "Suzanne" who identified herself as calling from "Peruzzi," stated that the new location was at "76 New York Avenue," and provided a new phone number.*Id.* Jessica says she was led to believe that Plaintiff Salon had been relocated. Jessica was never a customer of Defendant Salon or Brenda Perruzza, and does not know why she was called.

Plaintiff's attorney, Kenneth Keith, states that he called Defendant Salon on Monday January 11, 2010 at 2:40 PM and received the following voice message:

Hi. You've reached Peruzzi Hair Salon. Come and visit Brenda and her talented staff just two doors down at our bigger and more beautiful location. (Keith Affirmation, para 11).

Defendants make several arguments in response to plaintiffs' contentions. Defendant Peruzza argues Justice Palmieri's Order specifically allowed her and Defendant Salon to use the name Perruzza. (Perruzza affidavit in opposition, para 5). She further contends Order permitted Peruzza and other hairdressers to contact and solicit their prior customers. (*Id.* at para 6). Perruzza claims business cards identifying Defendant Salon as "Peruzzi Hair Salon" are not displayed within Defendant salon, but are kept in a "closed drawer". (*Id.* at para 8). These business cards are "sometimes given to pre-existing customers to record appointment dates", but aren't used to solicit customers. *Id.* She further argues the gift certificate cannot cause confusion with the Plaintiff Salon as "it plainly states that the service is to be provided by the 'Brenda Perruzza Salon.'" (*Id.* at para 9). Perruzza argues the gift certificate receipt refers to "Peruzzi Originale," a jewelry business she established in 2002, and does not contain the statement "Perruzzi Hair Salon." (*Id.* at para 10).

Perruzza further acknowledges her receptionist's name is Suzanne Amendola ("Amendola"), and that Suzanne contacted Perruzza and other employees' clients. However, she disputes that Suzanne ever called Jessica Vaughan. (*Id.* at para 11, See Amendola affidavit, para 4). She further argues that she instructed Suzanne and other employees to say the name "Perruzza" on the phone, emphasizing the final "a," after the TRO hearing. *Id.* Amendola states that when she made phone calls she never told anyone that Defendant Salon was the new location for Plaintiff Salon. (Amendola Affidavit, para 6). Amendola's affidavit, which was sworn before the Notary Public on February 11, 2010, states the phone message at Defendant Salon was "changed within the last several weeks."

DISCUSSION

"A party is obligated to comply with a court order, however incorrect the party may consider that order to be, until that order is set aside, either by appeal or otherwise" (*Gloveman Realty Corp. v. Jefferys*, 29 A.D.3d 858 [2d Dept 2006]). "A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court." (*Chambers v. Old Stone Hill Road Associates*, 66 A.D.3d 944, [2d Dept 2009]). To prevail on such a motion, "the movant

must establish, by clear and convincing evidence (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct.”(*Town of Riverhead v. T.S. Haulers, Inc.*, 68 A.D.3d 1103, [2d Dept 2009]).

In the case at bar, plaintiffs allege the following four instances of violations subsequent to the Court’s Order.

- 1) Defendants displayed and distributed business cards containing the name “Peruzzi”(Order to Show Cause, P. Vaughan Affidavit, exhibit A);
- 2) Defendants sold a gift certificate where both the gift certificate and the receipt contained the name “Peruzzi.”(*Id.* at P. Vaughan Affidavit, Exhibit B,C);
- 3) Jessica Vaughan received a call from a person claiming to be from “Peruzzi” explaining that the new address was Defendant Salon’s address.
- 4) Plaintiff’s attorney called Defendant Salon on January 11, 2010, almost two weeks after the Court Order, and listened to a voice message which identified Defendant Salon as “Peruzzi Hair Salon.”

The Order clearly and unequivocally prohibited defendants’ use of the “Peruzzi” name in furtherance of the Defendant Salon’s business.

Peggy Vaughan states she saw business cards with the name “Peruzzi Hair Salon” displayed in Defendant Salon on January 20, 2010. Peruzza in her response acknowledges that these cards are kept in a closed drawer, and are “sometimes given to pre-existing customers to record appointment dates.” The Order stated “Defendants ... shall not make use of the name ‘Peruzzi’ ... or any simulation thereof in or about its business, establishment, stationary, ... advertising, and wherever else same may appear.” Distributing these business cards containing the name “Peruzzi” to record appointment dates was a violation of the Court’s Order.

The gift certificate received by Peggy Vaughan on January 20, 2010, contained the statement “Salon Name: Peruzzi Salon.” The receipt for this gift certificate contained the name “Peruzzi Originale” which defendant Perruzza claims refers to a jewelry business she set up in 2002. Both the gift certificate and the receipt both used the “Peruzzi” name in clear violation of the Court Order.

Jessica Vaughan states in her affidavit she received a phone call from a “Suzanne” calling from “Peruzzi,” who was in fact calling from Defendant Salon. “Suzanne Amendola,” who worked at defendant salon, stated that while she called prior customers of Perruzza and other hairstylists, she never called Jessica Vaughan based on her calling list, and that she stated she was calling from “Perruzza” in her calls, not “Peruzzi.” The Order prohibited Defendant Salon from “using any of [Plaintiff Salon’s] confidential information, including but not limited to customer lists.” But, it did not prohibit employees of Defendant Salon from contacting former customers. There is no evidence that Amendola used any of Plaintiff Salon’s confidential customer lists, and it is disputed whether she used the name “Peruzzi” in her call with Jessica Vaughan. The evidence is not clear and convincing that phone calls from Defendant Salon violated the Court’s Order.

Plaintiff’s attorney, Kenneth Keith states that on January 11, 2010, he called Defendant Salon, and received a recorded message identifying Defendant salon as “Peruzzi Hair Salon.” Defendant Perruzza does not outright deny this allegation but rather, while implicitly acknowledging the prior existence of this message, states that the message was changed after the Court’s Order. Suzanne Amendola’s claim that the message was changed several weeks prior to her February 11, 2010 affidavit, also supports the veracity of the claim that the message identifying Defendant Salon as “Peruzzi Hair Salon” remained the answering message until at least January 11, 2010. The Order was clear that defendants were “enjoined and restrained ... from using in its business the name ‘Peruzzi Salon’, or any other simulation, derivation, or approximation thereof.” There is clear and convincing evidence “Peruzzi Hair Salon” was used as part of Defendant Salon’s telephone voice message subsequent to, and in violation of, the Order.

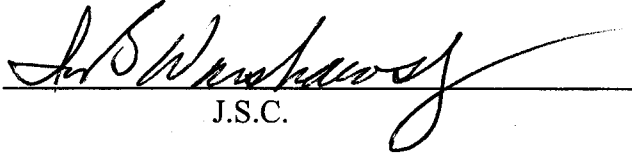
In sum, the evidence is clear and convincing that defendants violated the Order by giving clients business cards with the “Peruzzi” name, giving at least one gift certificate and credit card receipt with the “Peruzzi” name, and having a phone voice message with the “Peruzzi” name. Given the fact the Defendant Salon was located only two doors away from Plaintiff Salon, and Defendant Salon has the nearly identical name “Perruzza Hair Salon,” the conclusion is inescapable that the foregoing violations of the court Order prejudiced Plaintiff Salon.

Defendants are in contempt of court. Plaintiff has not established direct damages as a result of the actions of the defendant. Where actual loss or injury has not been shown, “. . . a fine may be imposed, not exceeding the amount of the complainant’s costs and expenses, and two hundred and fifty dollars in addition thereto, . . .” The matter is referred to Court Attorney/Referee Thomas Dana for a hearing and determination of the costs incurred by plaintiff in connection with this application on September 8, 2010, at 10:00 A.M., Room 206, Second Floor.

Counsel for plaintiff shall serve defendant and file with the Clerk of the Court a Note of Issue and pay all appropriate fees for the filing thereon on or before August 23, 2010.

This constitutes the Decision and Order of the Court.

Dated: July 22, 2010


J.S.C.

ENTERED
JUL 28 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE