

**Spallholtz v Leone**

2010 NY Slip Op 32292(U)

August 17, 2010

Supreme Court, Nassau County

Docket Number: 008603/2010

Judge: Ira B. Warshawsky

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

E

**SHORT FORM ORDER**

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

**PRESENT:**

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

**TRIAL/IAS PART 8**

**MARY SPALLHOLTZ and CENTRAL GASKET  
AND SUPPLY COMPANY, INC.,**

**Plaintiffs,**

**INDEX NO.: 008603/2010  
MOTION DATE: 06/10/2010  
MOTION SEQUENCE: 001**

**-against-**

**RICHARD LEONE and SUPERIOR GASKET AND  
RUBBER SUPPLY COMPANY,**

**Defendants.**

The following papers read on this motion:

Order to Show Cause, Affirmation & Exhibits Annexed .....	1
Affirmation of Adam W. Weiss in Opposition, Affidavit of Richard Leone in Opposition & Exhibits Annexed .....	2

**PRELIMINARY STATEMENT**

Plaintiff seeks an Injunction to prevent Richard Leone and Superior Gasket from contacting or doing business with their clients. Defendants dispute the authenticity of that portion of the employment termination agreement of February 25, 2010 which contains language in the form of a restrictive covenant, and claims, in addition, that even if he had signed the document in that form, it is overly broad, without geographic restriction, and is therefore unenforceable.

## BACKGROUND

General Gasket and Supply Company is in the business of manufacturing and selling gaskets. The business dates back to 1938 when it was created by the father of plaintiff Mary Spallholtz. In January 2004 defendant Richard Leone became an employee of General Gasket, and remained there until February 25, 2010, when he resigned his position.

According to plaintiff, Leone requested a writing that he was no longer an employee of Central Gasket. They agreed to do so provided he agreed “not to engage in any business that would impact any dealings or business transactions that would have an adverse impact on the above named company for a period of five (5) years”. The document is annexed to the motion papers as Exh. “A”. In Exh. “B”, Ms. Spallholtz’ affidavit, plaintiffs enumerate specific customers of Central Gasket with whom defendants have allegedly made contact.

Defendants disputed Exh. “A” in correspondence dated April 26, 2010, annexed as Exh. “C”. They state there that he did not sign a document in which he agreed to the restriction set forth in the exhibit.

## DISCUSSION

### Injunctive Relief

“To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction.” (*De Fabio v. Omnipoint Communications, et al.*, 2009 WL 3210142 [N.Y.A.D. 2d Dept., 2009]); citing, CPLR 3201, (*Doe v. Axelrod*, 73 N.Y.2d 748, 750 [1988]), (*W.T. Grant v. Srogi*, 52 N.Y.2d 496, 517 [1981]); (*Automated Waste Disposal, Inc., v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 — 1073 [2d Dept. 2008]).

“Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient”. (*Walsh v. Design Concepts*, 221 A.D.2d 454, 455 [2d Dept. 1995]). On the contrary, “(e)conomic loss, which is compensable by money damages, does not constitute irreparable harm”. (*EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 [2d Dept. 2007]). Failure to enunciate non-economic loss constitutes a failure to demonstrate irreparable harm so as to warrant equitable relief in the form of an injunction. (*Automated Waste Disposal,*

supra at 1073.

Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise of a court's formidable equity power in cases where the moving party's position, no matter how emotionally compelling, is without legal foundation. (*Tucker v. Toia*, 54 A.D.2d 322, 326 [4<sup>th</sup> Dept. 1976]).

In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief. (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry. Thus, for example, where a pharmaceutical manufacturer of a non-prescription product was seeking to enforce exclusivity agreement and preliminarily enjoin defendant from importing and marketing the same product, the balance of equities favored defendant, since plaintiff could recover damages, while defendant would have to remove product from the shelves for an indeterminate length of time. (*OraSure Technologies, Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348 [1<sup>st</sup> Dept. 2007]).

Restrictive covenants with respect to employment are subject to specific enforcement to the extent that they are “ ‘ 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’ “. (*Ashland Management Inc. v. Altair Investments NA*, 59 A.D.3d 97 [1<sup>st</sup> Dept. 2008]); citing, (*BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 [1999]). Applying this three-pronged test, the Court determines that the restriction on the conduct of defendant Leone is overly broad to protect the legitimate interests of plaintiffs, and is unduly detrimental to the employee.

Traditionally, greater latitude in the enforcement of restrictive employment covenants has been extended to the “learned professions”, which this matter does not involve. Courts have strictly applied the rule to limit enforcement of broad restraints on competition. For example, employer interests have been limited to protection against misappropriation of the employer's trade secrets or of confidential customer lists, or if the former employee's services are unique or extraordinary. (*Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303, 307 [1976]).

There is no evidence that Leone's skills are unique or extraordinary, or that he purposefully secreted a confidential list of customers. The only justification to preclude an employee from competing with his former employer is unfair competition. (*Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499 [1977]). Contacting three former clients, as the affidavit of plaintiff Spallholtz alleges, is competition, but not necessarily unfair competition. A former employee is capable of fairly competing for an employer's clients by refraining from the use of unfair means to compete. (*BDO Seidman*, supra, at 391).

Most notably, there is absolutely no geographic restriction as to where Leone could work without ostensibly violating the covenant. Depending upon the facts of each case, it is practically possible that a national or even wider area of prohibition would be what is necessary to protect the employer's trade secrets. This does not appear to be so in this action.

The Court is not in a position to determine the claim that the document as signed by Leone did not contain the second paragraph as appears at Exh. "A" to the Order to Show Cause. To the contrary, defendants annex as Exh. "A" to the affidavit of Leone a statement containing a single sentence verifying that he is no longer employed by Central Gasket. Both documents are dated February 25, 2010. The Court concludes, however, that even if it were signed in the form propounded by plaintiff, it is overly broad, in that it contains no geographical limitation, as well as in duration.

Plaintiff's reference to three customers, Sperry Marine Northrop Grumman, Patriot Logistics, and Russell Plastics are hardly trade secrets. Their existence, and the nature of their business could be ascertained by a simple yellow page or internet search. The fact that they did business with plaintiff's customers, standing alone, is not evidence of a post-employment restrictive covenant.

In conclusion, plaintiff has not established likelihood of success on the merits, the occurrence of irreparable harm in the absence of an injunction, or that in weighing the damages to which both parties are exposed, that the balance of equities is in favor of the plaintiff. For the foregoing reasons, the motion for a permanent injunction is denied.

What concerns the court greatly is that either plaintiff or defendant is attempting to perpetrate a fraud upon the court by the submission of the letter which is Exh. "A" in plaintiff's

moving papers and Exh. "A" in defendant's opposition (same as plaintiff's top paragraph sans plaintiff's second paragraph). Said action has been taken either with or without counsel's assistance and/or advice.

The court hereby orders that litigants and their respective attorneys appear for a hearing before me to determine the efficacy of their Exh. "A"s. The court will expect each party to testify under oath and may require the same of their counsel. The hearing shall take place on September 24, 2010, at 9:30 A.M.

The hearing shall be used to determine if sanctions are appropriate for either side, and if this matter should be referred to either the District Attorney's Office or the Grievance Committee for follow-up investigation.

It is **SO ORDERED**.

Dated: August 17, 2010

  
J.S.C.

**ENTERED**  
AUG 20 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE