SHORT FORM ORDER

INDEX
NO.: 32138-07

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 7-22-10
SUBMITTED: 8-26-10
MOTION NO.: 002-MD
003-XMD
004-MOT D

J.E.K.A., INC., ALISON McGOVERN and EFRAIM CARBALLO,

Plaintiffs,

-against-

MAGGIE & FAITH FLOWERS, INC., and MAGDA AWAD and CHRISTOPHER ROSS, Esquire,

Defendants.

CONWAY BUSINESS LAW GROUP, P.C..
Attorneys for Plaintiffs
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Huntington Station, New York 11746

SALVATORE A. GRENCI, ESQ.
Attorney for Defendants Maggie & Faith Flowers, Inc. and Magda Awad
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Lake Grove, New York 11755

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Attorneys for Defendant Christopher Ross, Esq.
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Upon the following papers numbered 1 to 103 read on these motions and cross-motion for summary judgment ; Notice of Motion and supporting papers 1-18; 48-83 ; Notice of Cross Motion and supporting papers 19-27 ; Answering Affidavits and supporting papers 28-42; 84-103 ; Replying Affidavits and supporting papers 43-44; 45-47 ; it is,

ORDERED that the motion by the defendant Christopher Ross, Esq., for summary judgment dismissing the complaint insofar as it is asserted against him is denied; and it is further

ORDERED that the cross motion by the plaintiffs for summary judgment is denied; and it is further

ORDERED that the motion by the defendants Maggie & Faith Flowers, Inc., and Magda Awad for summary judgment dismissing the complaint insofar as it is asserted against them is granted to the extent of dismissing the first cause of action insofar as it is asserted against the

defendant Magda Awad and dismissing the second through fifth causes of action; and it is further

ORDERED that the motion by the defendants Maggie & Faith Flowers, Inc., and Magda Awad is otherwise denied.

This is an action to recover damages for breach of contract and legal malpractice, among other things, in connection with the plaintiffs' purchase of a flower shop known as "Maggie & Faith Flowers" or "M & F Florist" (hereinafter "M & F") from the defendant Maggie & Faith Flowers, Inc. The defendant Magda Awad was the owner and sole shareholder of the defendant Maggie & Faith Flowers, Inc. (hereinafter "the sellers"). The plaintiffs were represented by the defendant Christopher Ross, Esq., in connection with the sale. At issue are the terms of the restrictive covenant in the contract of sale. The plaintiffs contend that they executed an agreement of sale that restricted the sellers from operating a competing business for a period of two years within a three-mile radius of M & F. The restrictive covenant, which survived the closing, provides as follows:

> It is the specific understanding and agreement of the Parties that the Seller and the officers of the corporate Seller agree that they will not 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 for a period of **two (2) years** within a **three (3) mile** radius of the location of the business conducted by the Seller at 136 Carleton Avenue, East Islip, New York 11730.

The sellers operated a second flower shop within the three-mile radius that was known as "Maggie & Faith II" or "M & F Florist II" (hereinafter "M & F II"). M & F II was smaller than M & F and did not service weddings, which were M & F's primary source of business. The sellers wished to continue to operate M & F II at the same location. The sellers contend that the plaintiffs agreed to carve out an exception to the restrictive covenant that allowed them to continue to operate M & F II. The restrictive covenant in the agreement of sale executed by the sellers contains the following additional language:

> *Note well!: The restrictive covenant referred to herein shall be limited only to the wedding accounts of the Seller herein. "Maggie & Faith II" presently located at 102 Carleton Avenue, Islip Terrace, New York shall retain the right to operate said floral business at the aforesaid Islip Terrace address and to perform all tasks and offer all services such as those customarily offered by a florist with the aforesaid exception and shall be authorized to engage in same, become interested, directly or indirectly either as employee, as owner, as partner, as agent or as stockholder, director or officer of Maggie & Faith Flowers, Inc. at the aforesaid location, notwithstanding the fact that said business, trade or occupation is*

> *similar to the one hereby sold. It is also agreed that notwithstanding any term to the contrary herein, Maggie & Faith Flowers, Inc. d/b/a Maggie & Faith II shall expressly retain the rights to perform floral services for Magda Awad's family weddings.* The seller shall have the right to file a "dba" for M & F Florist II or any other dba variant however it shall not have the right to file a dba for M & F Florist.[1]

The plaintiffs deny that they agreed to the aforementioned "note well" provision. They contend that it was removed by their attorney and reinserted by the sellers' attorney without their consent. The plaintiffs' attorney does not recall receiving a copy of the revised contract of sale with the "note well" provision and denies that he ever approved such a revision. The sellers contend that the revised contract was sent to the plaintiffs' attorney and that neither he nor his clients objected thereto. At the closing, the contract was amended to include the hours that the sellers were to be available for training. The contract, however, was not re-executed at the closing. The sellers contend that their attorney read out loud to everyone present at the closing the restrictive covenant, including the "note well" provision. The plaintiffs deny that such a reading occurred.

After the business failed, the plaintiffs commenced this action against their attorney and the sellers. The plaintiffs allege that the M & F's failure was caused by the sellers' competition in violation of the restrictive covenant, the sellers' failure to comply with the training requirements in the contract of sale, and the sellers' use of the plaintiffs' trade name and trade or service mark. The plaintiffs also allege that their attorney failed to exercise the degree of care, skill, and diligence commonly possessed by a member of the legal community. All parties now move for summary judgment.

The defendant Magda Awad has established, prima facie, her entitlement to summary judgment dismissing the first cause of action for breach of contract. Under general principles of corporate law, an individual who signs a corporate contract and indicates the name of the corporation and the nature of her representative capacity on the contract is generally not subject to personal liability (**Metro. Switch Bd. Co., Inc. v Amici Assocs, Inc.**, 20 AD3d 455). The record reveals that the defendant Magda Awad signed the agreement of sale as the President of Maggie & Faith Flowers, Inc. Moreover, the agreement clearly states that it was entered into between the individual plaintiffs and Maggie & Faith Flowers, Inc. (**Id.**). There is no evidence in the record that Awad agreed to be personally liable for any failure by Maggie & Faith Flowers, Inc., to perform the agreement of sale.

In opposition, the plaintiffs attempt to impose personal liability on Awad by piercing the corporate veil. It is well settled that those seeking to pierce the corporate veil bear a heavy burden of showing that the corporation was dominated by the owner with respect to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences (**TNS Holdings v MKI Sec. Corp.**, 92 NY2d 335, 339; **Matter of**

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[1] The last sentence is handwritten.

Morris v New York State Dept of Taxation & Fin., 82 NY2d 135,141). The deposition testimony on which the plaintiffs rely merely establishes that, in the 1990's, well before the sale of M & F in 2006, Magda Awad used corporate funds to pay back a personal loan for the purchase of a time share; that she used the proceeds from the sale of M & F to pay the broker, her lawyer, and other expenses, some of which were personal; that two of her former employees went to work for her after they had left M & F's employ; and that one such employee occasionally worked for her for a few hours on Saturdays while still employed by M & F. The court finds that these isolated incidents fail to demonstrate a pattern or course of conduct sufficient to pierce the corporate veil. That Awad used corporate funds to pay personal expenses does not demonstrate that she abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the plaintiffs (**Id.** at 142). Moreover, there was nothing in the agreement of sale that prevented Awad from hiring her former employees. Contrary to the plaintiff's contentions, the record does not establish that she persuaded her former employees to work for her. Accordingly, the first cause of action is dismissed insofar as it is asserted against the defendant Magda Awad.

The second cause of action for breach of the implied duty of good faith and fair dealing is duplicative of the first cause of action for breach of contract since every contract contains an implied covenant of good faith and fair dealing (*see*, **New York Univ. v Continental Ins. Co.**, 87 NY2d 308, 319-320; **McMahan & Co. v Bass**, 250 AD2d 460, 462; **Apfel v Prudential-Bache Sec.**, 183 AD2d 439, mod on other grounds 81 NY2d 470). Accordingly, the second cause of action is dismissed.

Likewise, the third cause of action, which sounds in tort, is duplicative of the first cause of action for breach of contract. As a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from or in addition to the breach of contract (*see*, **Non-Linear Trading Co. v Braddis Assocs.**, 243 AD2d 107, 118). It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract (*see*, **Clark-Fitzpatrick, Inc., v Long Is. R.R. Co.**, 70 NY2d 382, 389-390). The third cause of action does not allege any additional facts from which a legal duty independent of the parties' contract may be inferred. When, as here, the plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory (*see*, **Sommer v Federal Signal Corp.**, 79 NY2d 540, 552).

In any event, the plaintiffs have failed to establish their claims for unfair competition and tortious interference with prospective business or economic relations. A cause of action based on unfair competition may be predicated upon trademark infringement or dilution in violation of General Business Law §§ 360-k and 360-l (*infra*) or upon the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets (**Out of the Box Promotions v Koschitzki**, 55 AD3d 575, 578). The plaintiffs do not contend that the sellers misappropriated any trade secrets or proprietary information. A claim of tortious interference with prospective business or economic relations requires a showing that the plaintiff would have entered into a business economic relationship but for the defendant's wrongful conduct (*see*, **Vigoda v DCA Prods. Plus**, 293 AD2d 265, 267). The plaintiffs' general

allegations, which fail to identify any specific customers that the plaintiffs would have obtained but for the sellers' purported wrongful conduct, are insufficient to prevail on a claim for tortious interference with prospective business or economic relations (**Id.**; **Kevin Spence & Sons v Boars Head Provisions Co.**, 5 AD3d 352, 354). Accordingly, the third cause of action is dismissed.

The sellers are entitled to summary judgment dismissing the fourth cause of action for trade name and trade or service mark infringement. While the agreement of sale indicates that the plaintiffs purchased the trade name "M & F Florist," there is no evidence in the record that they also purchased the M & F logo or any other trade names. The agreement of sale does not list the logo as one of the assets sold. Moreover, the agreement of sale executed by the sellers specifically reserved to the sellers the right to use the names "Maggie & Faith Flowers, Inc." and "M & F Florist II or any other dba variant."

Absent counterfeiting, injunctive relief is the sole statutory remedy for infringement of a New York registered mark (General Business Law §§ 360-k & 360-l; Haig, Commercial Litigation in New York State Courts, Intellectual Property § 94.4 at 299). However, trademark infringement can also constitute common law unfair competition. To establish a claim for trademark-related unfair competition, the trademark owner must show (1) bad faith and (2) actual confusion (if the owner seeks damages) or the likelihood of confusion (if the owner seeks only injunctive relief) (**Id.** § 94.5 at 301). Here, the plaintiffs seek damages, not injunctive relief. They, therefore, must show bad faith and actual confusion. The court finds that the plaintiffs cannot establish bad faith. As previously noted, the plaintiffs did not purchase the M & F logo and the agreement of sale executed by the sellers specifically reserved to the sellers the right to use the names "Maggie & Faith Flowers, Inc." and "M & F Florist II or any other dba variant." Moreover, the plaintiffs proffer no evidence of actual confusion. Accordingly, the fourth cause of action is dismissed.

The fifth cause of action for unjust enrichment is duplicative of the first cause of action for breach of contract. It is impermissible to seek damages under the theory of quasi contract when, as here, the suing party is seeking to enforce a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties (*see*, **Clark- Fitzpatrick v Long Island Rail Road Co.**, *supra*, 388-389). Accordingly, the fifth cause of action is dismissed.

Sharply disputed issues of fact preclude the granting of summary judgment to any of the remaining parties on the first cause of action for breach of contract and on the sixth cause of action for legal malpractice.

HON. ELIZABETH HAZLITT EMERSON

DATED: November 16, 2010

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J. S.C.