

M&M Business Serv., Inc. v Munson

2010 NY Slip Op 33837(U)

June 18, 2010

Sup Ct, Suffolk County

Docket Number: 15085/2009

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY



PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

M & M BUSINESS SERVICES, INC. d/b/a
MULTI BUSINESS SERVICES,

Plaintiff,

-against-

LAURIE R. MUNSON and LAURIE R.
MUNSON d/b/a LAURIE R. MUNSON
ACCOUNTING AND TAX SERVICES,

Defendants.

ORIG. RETURN DATE: MAY 18, 2009
FINAL SUBMISSION DATE: NOVEMBER 19, 2009
MTN. SEQ. #: 003 (002)
MOTION: MD

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Upon the following papers numbered 1 to 6 read on this motion _____
FOR A PRELIMINARY INJUNCTION

Order to Show Cause and supporting papers 1-3; Opposing Affidavits and supporting papers
4-6; it is,

ORDERED that this motion by plaintiff M & M BUSINESS SERVICES, INC. d/b/a MULTI BUSINESS SERVICES ("plaintiff") for an Order, pursuant to CPLR 6301, granting a preliminary injunction against defendants LAURIE R. MUNSON ("defendant") and LAURIE R. MUNSON d/b/a LAURIE R. MUNSON ACCOUNTING AND TAX SERVICES (collectively "defendants"), enjoining and restraining defendant, her agents, servants, or any other individual or entity acting on her behalf, from soliciting, servicing, or contacting customers and clients of plaintiff individually and in any corporate capacity, upon the ground that a preliminary injunction is necessary to protect plaintiff's business interest and to avoid plaintiff sustaining irreparable harm while this action is pending before the Court, is hereby **DENIED** for the reasons set forth hereinafter.

Plaintiff has filed the instant application, by Order to Show Cause signed on April 29, 2009 (Pitts, J.), for a temporary restraining order and a preliminary injunction against defendant as described hereinabove. Justice Pitts denied plaintiff's application for a temporary restraining order in the Order of April 29, 2009.

Plaintiff informs the Court that it has been in business of federal and state income tax preparation since 1982, and has prepared more than 30,000 tax returns for its approximately 1,800 clients. Plaintiff further informs the Court that it has developed its client list through advertising, word of mouth, customer referrals and client networking. Plaintiff alleges that during the course of defendant's employment with plaintiff, defendant copied and/or downloaded plaintiff's entire customer list and began personally soliciting plaintiff's customers. For example, plaintiff claims that defendant, without plaintiff's knowledge, prepared payroll reports and federal quarterly tax returns for Atlantic Landscape Services ("Atlantic"), a client of plaintiff, using plaintiff's software, computer, and office supplies, while keeping the entire fee for herself.

In addition, plaintiff alleges that while still employed with plaintiff, defendant assisted her brother, non-party Robert Trunco, in e-filing 244 tax returns using plaintiff's federal tax identification number, while also keeping the fees for herself. As a result, plaintiff contends that not only did it lose \$18,300 in revenue, it is now responsible to the Internal Revenue Service and New York State Department of Taxation and Finance for those tax returns. Moreover, plaintiff indicates that after defendant left her employment, 129 "longtime" clients of plaintiff discontinued plaintiff's services, thereby depriving plaintiff of approximately \$26,000 in revenue.

In opposition, defendant alleges that she began full-time employment with plaintiff in January 2002. Over the years, defendant claims that she developed a close personal relationship with an owner of plaintiff, Diana Draizen, and even personally assisted plaintiff financially during difficult times. Defendant informs the Court that she left her employment with plaintiff on April 30, 2007, and went to work for Atlantic in May 2007. It was at this time defendant claims that she prepared the payroll reports and federal quarterly tax returns, because "Atlantic had no reason to retain [plaintiff] since I was already Atlantic's full time employee." However, the Court notes that the subject payroll reports and federal quarterly tax returns list plaintiff as the preparer thereof.

Further, defendant contends that in October 2007, Ms. Draizen telephoned defendant and asked defendant to return to work in plaintiff's office. Defendant agreed to again work for plaintiff, but on a part-time basis as she remained an employee of Atlantic. Thereafter, Ms. Draizen allegedly asked defendant's brother, Mr. Trunco, for a \$20,000 loan, to which he agreed. Defendant alleges that on December 26, 2007, Mr. Trunco loaned Ms. Draizen \$20,000, and at that time it was agreed that Mr. Trunco could use plaintiff's tax preparation software at no cost. Defendant indicates that no promissory note was executed in connection with the loan. Defendant again ended her employment with plaintiff on March 17, 2008, after a dispute with Ms. Draizen.

Defendant argues that the affidavit of Edward Draizen submitted in support of the instant application is "a collection of lies and distortions," and not based upon personal knowledge. Furthermore, defendant denies copying or downloading plaintiff's entire customer list; denies that she has obtained 129 former clients of plaintiff; and denies doing business "on the side" while employed by plaintiff. In addition, as noted hereinabove, defendant contends that Mr. Trunco was authorized to use plaintiff's software, and that the software was used for Mr. Trunco's clients, not plaintiff's. In support of the foregoing, defendants have submitted an affidavit of Mr. Trunco. Finally, defendant alleges that she had no employment agreement with plaintiff, and no restrictions on her right to compete with plaintiff after she ended her employment.

Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (see *Uniformed Firefighters Assn. of Greater N. Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction pursuant to CPLR 6301, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (see *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2007]; *Gerstner v Katz*, 38 AD3d 835 [2007]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (see *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [1998]). Where the facts are in sharp dispute, a temporary

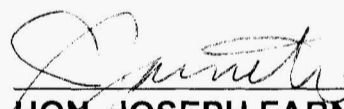
injunction will not be granted (*see Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348, *supra*).

The Court has weighed the elements necessary for the granting of a preliminary injunction, and finds that plaintiff has not sustained its burden. Plaintiff has described circumstances wherein defendant allegedly copied plaintiff's customer lists, solicited plaintiff's customers, and kept fees due to plaintiff, but defendant has refuted plaintiff's allegations with the specificity recited hereinabove. The Court notes that the parties herein did not enter into any non-compete agreements. Moreover, plaintiff has not demonstrated with particularity any irreparable harm from defendant's alleged conduct, and the conclusory allegations contained in the supporting affidavit are insufficient to demonstrate irreparable injury (*see Neos v Lacey*, 291 AD2d 434 [2002]; *Rockland Dev. Assoc. v Hillburn*, 172 AD2d 978 [1991]; *Kurzban & Son v Board of Educ. of City of N.Y.*, 129 AD2d 756 [1983]; *Kaufman v International Business Machs. Corp.*, 97 AD2d 925 [1983], *affd* 61 NY2d 930 [1984]). Furthermore, "where . . . a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue" (*Price Paper & Twine Co. v Miller*, 182 AD2d 748, 750 [1992]; *Neos v Lacey*, 291 AD2d 434, *supra*).

In view of the foregoing, this application for a preliminary injunction as described hereinabove is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: June 18, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court