

Flower Publishing Inc. v Lindquist

2011 NY Slip Op 30936(U)

March 30, 2011

Supreme Court, New York County

Docket Number: 116621/10

Judge: Judith J. Gische

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.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Flower Publishing

INDEX NO.

116621/10

MOTION DATE

- v -

Arthur Lindquist, Jr.

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

APR 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

PC scheduled for May 19, 2011 at 9:30am.

Dated: 3/30/11

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
FLOWER PUBLISHING INC.,

Plaintiff (s),

-against-

ARTHUR LINDQUIST, JR. and
ELIAS LEE PRITSOULIS,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 116621/10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
JSC

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers

Numbered

Pltf'S OSC (CPLR 6301) w/ PF affid, summons and complaint, exhs	1
Def's opp w/ RJB affirm, exhs	2
Def Lindquist affirm, exhs (sep back)	3
Def Pritsoulis affirm (sep back)	4

FILED
APR 01 2011
NEW YORK
COUNTY CLERKS OFFICE

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

The plaintiff, Flower Publishing Inc. ("Flower") contends that its former employees, Arthur Lindquist, Jr. ("Lindquist") and Elias Lee Pritsoulis ("Pritsoulis") (collectively "Defendants"), misappropriated confidential information and engaged in unfair competition. The plaintiff commenced this action by filing and serving the summons and complaint, together with the order to show cause, which seeks a preliminary injunction against Defendants, prohibiting them from revealing confidential material, including but not limited to, customer lists, contracts, marketing research and development of plaintiff, forbidding them from soliciting customers and employees of

plaintiff, and forbidding defendants from operating a competing publication in New York County. The Defendants have submitted opposition papers. The court's decision is as follows:

Arguments Presented

Flower publishes the New York City Pocket Travel Guide, The New York City Pocket/Travel Guide, the International Multilingual Guide and the Japanese Guide to New York City. In its complaint, Flower brings three causes of action. In the first cause of action Flower moves for an award of a permanent injunction forbidding the Defendants from revealing confidential material, including but not limited to, customer lists, contracts, marketing research and development of plaintiff and forbidding them from soliciting customers and employees of plaintiff and forbidding defendants from operating a competing publication in New York County. The second cause of action, asks the court to declare each parties rights with regard to the proprietary material that defendants allegedly stole from plaintiff. The third cause of action is for an amount to be determined at a hearing.

Plaintiff hired Defendants, in early 2008, as independent contractors to solicit and sell advertising space in plaintiff's magazines. Upon commencing their employ, Defendants entered into an Independent Contractor Agreement. This agreement between the parties provided, pertinent part, the following:

Article 8: Upon termination the contractor will insure a smooth transition of his accounts to the new contractor and provide follow up list on all accounts present and upcoming.

Article 14: All interoffice meetings, contract, negotiations, marketing, research, developments, or any information about Flower Publishing Inc, is to kept confidential and not discussed with any advertisers for one year after termination. Breaking this agreement is subject to immediate legal

[* 4]

action. No contracts, interoffice meetings, or marketing materials may be taken without written notice from the publisher.

During mid-late 2010, Defendants left Flower to launch "Top Twelve New York," a lifestyle and entertainment guide intended for visitors to New York City. Defendants submit that the advertisers in "Top Twelve New York" are tourist-oriented businesses such as Broadway shows. These advertisers generally provide the artwork used to produce the advertisements in "Top Twelve New York." If they do not provide it, Defendants contract with independent graphic artists to have it made.

Defendants state that they have complied with the Independent Contractor Agreement. Specifically, as relating to Article 8, Pritsoulis contends that his employment was terminated in late August of 2010, as a result of a verbal dispute with Plaintiff; thus he was not afforded the opportunity to introduce other sales people to the customers he was servicing. Lindquist claims that his association with Flower terminated at the end of November 2010. At Plaintiffs' request, Lindquist spent approximately the last two weeks of work introducing another sales person to the advertisers he had been calling.

Flower now alleges that without notice to him or and in contravention to Article 14: (1) Defendants stole copyrighted artwork owned by plaintiff; (2) Defendants launched "Top 12 New York" in direct competition with plaintiff's publications; (3) Defendants have been and continue to solicit advertisers away from plaintiff; (4) Defendants stole contracts belonging to plaintiff and its advertisers; (5) Defendants stole marketing materials; (6) Defendants stole contact lists; (7) Defendants solicited advertisers of plaintiff; (8) Defendants breached their duty to insure a smooth transition

to plaintiff's new contractors; (9) Defendants tortuously interfered with contractors of plaintiff and its advertisers.

Defendants claim that a close examination of the relevant clauses of the Independent Contractor Agreement reveals that it does not contain any restriction on post-termination competition, nor any restriction on contacting or soliciting advertisers post-termination.

Plaintiff alleges, without providing details or specifics, that copyrighted artwork and contracts have been stolen by defendants. Plaintiff's sole bolstering evidence is the submission of a mock-up, which Defendants contend, contained photocopies of two non-copyrighted advertisements. Defendants further submit that the advertisers who were shown the mock-up did not subsequently do business with "Top Twelve New York." Defendants deny that they are using any artwork, contracts, or contact lists of Plaintiff in running their business. Defendants further claim that since the potential advertisers are extremely well known, the artwork, contracts or contact lists are readily available. Flower, however, has not provided details, not even the names of the advertisers whose contracts had been allegedly stolen.

Defendants do, however, admit to receiving a media kit for the use with potential advertisers, at the outset of their work for Flower. They further admits to still having in their possession, but deny having used it at "Top Twelve New York."

Discussion

On a motion for a preliminary injunction, the movant (here the plaintiff) must prove the likelihood of ultimate success on the merits, that they will suffer irreparable harm unless the relief is granted, and a balance of the equities in their favor. See CPLR

[* 6]

§ 6301; Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y.3d 839 [2005]; Aetna Insur. Co., Inc. v. Capasso, 75 N.Y.2d 860 [1990]. The purpose of a preliminary injunction is to maintain the *status quo* so as to insure that a victory is not worthless. See Moy v. Umeki, 10 A.D.3d 604 [2nd Dept 2004]. In applying these requirements, the court must “weigh a variety of factors,” and the matter is committed to the court's sound discretion. Doe v. Axelrod, 73 N.Y.2d 748, 750 [1988]. Although the party seeking a preliminary injunction does not have to provide conclusive proof of its right to such relief, and a preliminary injunction can, in the court's discretion, even be issued where there are disputed facts (Terrell v. Terrell), 279 A.D.2d 301 [1st Dept 2001]), generally a preliminary injunction will be denied unless the relief is necessitated and justified from the undisputed facts. (O'Hara v. Corporate Audit Co., 161 A.D.2d 309 [1st Dept 1990]).

Likelihood of Success on the Merits

As to the first requirement, showing a probability of success on the merits almost always necessitates the presentation of evidence. Speculation and conclusory statements do not suffice. See, e.g., U.S. Re Companies, Inc. v. Scheerer, 41 A.D.3d 152, 154-55 [1st Dept 2007]. Here, Flower cannot demonstrate a probability of success on the merits, given the very limited promises it exacted in the “Independent Contractor Agreement” that is drafted. Thus applying those terms, it is clear that there is no prohibition on competition post termination of the employment relationship. Nor has he factually shown that any art work, copyrighted or otherwise, was stolen from him.

Irreparable Harm

Whether the plaintiff will suffer irreparable injury without preliminary injunctive relief is, of course, a case-specific inquiry. It is often said that harm is not irreparable if

[* 7]

an "adequate remedy at law" exists. See Lesron Junior, Inc. v. Feinberg, 13 A.D.2d 90, 93-94 [1st Dept 1961]; U.S. Re Companies, Inc. v. Scheerer, 41 A.D.3d 152, 155 [1st Dept 2007] (availability of quantifiable money damages precludes finding of irreparable harm). To establish irreparable harm or injury, plaintiff has to offer some proof, for example, that it has lost customer accounts or suffered other losses that cannot be compensated through damages. IVI Environmental, Inc. v. McGovern, 269 A.D.2d 497 [2nd Dept 2000]. Even accepting plaintiff's claims, that Defendants engaged in acts that violated the terms of the Independent Contractor Agreement, plaintiff has not shown that money damages will not sufficiently compensate it for the harm Defendants have allegedly committed. In fact, plaintiffs' third cause of action specifically requests an undetermined punitive sum to be determined at trial.

Balance of the Equities

With respect to the balancing of competing equities, the third traditional requirement for preliminary injunctive relief, the court should be able to conclude that the harm to the plaintiff without the injunction will be greater than the harm to the defendant if the injunction is granted. Nassau Roofing & Sheet Metal Co. v. Facilities Development Corp., 70 A.D.2d 1021, 1022 [3d Dept 1979], *appeal dismissed* 48 N.Y.2d 654.

Here the balance of equities do not appear to tip in plaintiff's favor. While the Defendants have stated a case to bolster their assertions that they are not in competition and if, *in arguendo*, they were, there was no agreement requiring them to refrain from doing so. Plaintiff Flower has not plead with the sufficient specificity necessary to support its claims of theft and tortious interference. For example, it is not

clear what clients, if any, were stolen and what copyrighted artwork was appropriated without plaintiff's permission.

It is well established law that a restrictive covenant against a former employee will be enforced only if reasonably limited temporally and geographically and then only to the extent necessary to protect the employer from unfair competition which stems from the former employee's use or disclosure of information. IVI Environmental, Inc. v. McGovern, at 498. Generally, whether a plaintiff's customer list or other proprietary information constitutes a trade secret is ordinarily a triable issue of fact. Ashland Management Inc. v. Altair Investments NA, LLC, 59 A.D.3d 97 [1st Dept 2008]. Here, not only has plaintiff failed to offer any proof that it there exists an enforceable non-competition agreement, Defendants have come forward with strong arguments that the information they are accused of misappropriating is not proprietary, but widely available, or can be culled from, many sources. IVI Environmental, Inc. v. McGovern, *supra*.

Since plaintiff has not made a threshold showing of likelihood of success on the merits, irreparable harm, or that the equities balance in its favor, Flower's motion for a preliminary injunction is hereby denied.

Conclusion

It is hereby

Ordered that Plaintiff Flower Publishing, Inc.'s motion for a preliminary injunction is denied for the reasons stated in this decision and order; and it is further

Ordered that Defendants shall return all remaining materials from the Flower media kit still in their possession; and it is further


Ordered that this case is hereby scheduled for a **Preliminary Conference** on **May 19, 2011 at 9:30 a.m.**; and it is further

Ordered that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

Ordered that this constitutes the decision/order of the court.

Dated: New York, New York
March 30, 2011

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
APR 01 2011
NEW YORK
COUNTY CLERK'S OFFICE