SCAN

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x **TRIAL/IAS PART: 20**

SHELDON GLICK, CORY GLICK, and,
ALL AIRE CONDITIONING CO., INC.,

Index No: 012275-11
Motion Seq. No. 1
Plaintiffs, **Submission Date: 10/25/11**

-against-

DIAMOND MECHANICAL CORPORATION,
DIAMOND MECHANICAL SERVICES INC., and
JOHN BUONOCORE,

Defendants.
----------x

The following papers have been read on this Order to Show Cause:

Order to Show Cause, Affidavit in Support,
Affirmation in Support and Exhibits.....x
Affirmation in Opposition, Affidavit in Opposition and Exhibit.....x
Reply Affidavits and Exhibit.....x [1]

This matter is before the court on the Order to Show Cause filed by Plaintiffs Sheldon Glick ("Sheldon"), Cory Glick ("Cory") and All Aire Conditioning Co., Inc. ("All Aire") on August 22, 2011 and submitted on October 25, 2011. For the reasons set forth below, the Court denies Plaintiffs' Order to Show Cause in its entirety and vacates the temporary restraining order issued on August 22, 2011.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 6301, granting them injunctive relief.

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[1] The Court granted Plaintiffs leave to file reply papers with respect to their Order to Show Cause.

Defendants Diamond Mechanical Corporation ("DMC"), Diamond Mechanical Services Inc. ("DMS") and John Buonocore ("Buonocore") (collectively "Defendants") oppose Plaintiffs' motion.

B. The Parties' Background

The Verified Complaint ("Complaint") (Ex. 9 to OSC) alleges as follows:

Plaintiffs Sheldon Glick and Cory Glick ("Glick Plaintiffs") were the owners of 66.66% of the outstanding stock of Diamond Mechanical Services Inc. ("DMS") and the sole shareholders of All Aire. Buonocore was a principal, officer, President, Vice President and employee of Diamond Mechanical Corporation ("DMC"). Buonocore was also an officer and employee, as well as a 33.33% shareholder, of DMS.

Buonocore incorporated Diamond Mechanical Corp. ("Diamond I") on April 23, 2001. Buonocore incorporated DMC in the State of Florida on August 23, 2001. Buonocore incorporated DMS in the State of New York on December 31, 2003. Buonocore dissolved Diamond I on August 3, 2005 and "reincorporated" (Compl. at ¶ 21) Diamond Mechanical Corp. ("Diamond II") in the State of New York on November 25, 2008. Buonocore dissolved Diamond II on February 5, 2010. Buonocore qualified DMC to do business in the State of New York on March 5, 2010. The Complaint alleges that 1) DMC and DMS are related entities; 2) DMC is the alter ego of DMS; 3) DMS is the alter ego of DMC; 4) DMC is a subsidiary of DMS; and 5) DMS is a subsidiary of DMC.

In or about November of 2008, the Glick Plaintiffs entered into an agreement with DMS and Buonocore ("Stock Purchase Agreement") (Ex. 1 to Compl.), pursuant to which the Glick Plaintiffs sold their interests in DMS to DMS. Pursuant to the Stock Purchase Agreement ("SPA"), 1) DMS agreed to pay the Glick Plaintiffs the sum of $200,000 over a 3 year period, in equal monthly installments ("Installment Payments"); 2) after the Installment Payments were made, Buonocore was to be the sole remaining shareholder in DMS; 3) DMS agreed to surrender the DMS telephone number to All Aire; 4) all expiring DMS service contracts would be renewed in the name of All Aire, all existing service contracts being serviced by All Aire would remain the property of All Aire, and DMS would not interfere with the renewals; and 5) DMS and Buonocore agreed not to compete with All Aire for three years ("Non-Compete Clause").

The Non-Compete Clause provides as follows:

> The Purchaser and Guarantor agree that for a period of three (3) years from the date hereof, they shall not compete with [All Aire] in the pursuit of business. Competition shall include solicitation of or doing business with existing customers of [All Aire], or any act of similar or dissimilar nature that would affect [All Aire's] business activities.

SPA at ¶ 19.

The Complaint contains four (4) causes of action: 1) Defendants have breached the SPA by failing to make required payments, competing with All Aire and diverting All Aire's customers; 2) as a result of Defendants' conduct, Plaintiffs have lost numerous customers and accounts, resulting in irreparable harm to Plaintiffs for which injunctive relief is appropriate; 3) DMC has interfered with Plaintiffs' contractual relationship with its customers and contracted with customers of All Aire in violation of the Non-Compete Clause, and have continued to engage in this conduct despite requests by Plaintiffs to cease and desist; and 4) Defendants engaged in fraud when they misrepresented to Plaintiffs that they would abide by the terms of the SPA, including the Non-Compete Clause.

On August 22, 2011, the Court (Asarch, J.) issued a temporary restraining order ("TRO") which directed that, pending the hearing of this motion, the Defendants, their agents, employees and all persons acting under their direction are enjoined and restrained from 1) disclosing and/or utilizing any of the confidential, proprietary and/or trade secrets of All Aire; 2) bidding on any job or project in the New York metropolitan area similar to any service or product provided by All Aire; 3) accepting, directly or indirectly, any job or project from a present or former customer of All Aire; 4) soliciting or otherwise communicating with All Aire's customers; and 5) soliciting any of the current employees of All Aire or hiring, either directly or indirectly, any of All Aire's employees.

In his Affidavit in Support, Cory affirms that he is the Executive Vice President of All Aire. He avers that, as a condition of the formation of DMS in 2003, Buonocore was required to turn over all of the service contracts that were previously handled by Diamond I, to All Aire. It was agreed that 1) DMS would handle only construction and design services; 2) All Aire would be responsible for the service contracts and would have the ability to provide construction and design services for DMS; 3) Diamond I assigned its outstanding service contracts to All Aire to

handle as part of its existing service operation; and 4) All Aire would manage the back-office work associated with the management of DMS.

As the parties' relationship "soured" (Cory Aff. in Supp. at ¶ 5), the parties subsequently entered into the SPA. The day before he entered into the SPA, Buonocore established Diamond II, allegedly "for the sole purpose of competing with DMS and by extension All Aire" (*id.* at ¶ 7). Cory submits that Buonocore selected Diamond II's name, which is similar to DMS, "to confuse and divert customers of DMS to Buonocore's new entity" (*id.*).

Cory also affirms, *inter alia*, that 1) "it is respectfully submitted that" Buonocore took certain proprietary information of All Aire, including contract and pricing structure documents, that allows him to compete with All Aire (Cory Aff. in Supp. at ¶ 8); and 2) Buonocore diverted All Aire's service contracts to his new entity, resulting in a significant loss of revenue to All Aire. Cory makes specific mention of the fact that an entity known as Smythson of Bond ("Smythson"), one of the accounts that Buonocore brought to All Aire when he dissolved Diamond I, cancelled its service contract with All Aire and entered into a new contract with Diamond II. Cory also alleges that Buonocore engaged in similarly improper conduct with Tods Showroom ("Tods"), another former customer of All Aire that is now doing business with DMC.

Cory also avers that on July 27, 2011, his office received two packages containing drawings that were addressed to "John" at "Diamond Mech" (*see* Ex. 8 to Cory Aff. in Supp.). Cory submits that this documentation demonstrates that "defendants are operating a successful business using the Diamond Mechanical name, without having paid plaintiffs for the use of that name" (*id.* at ¶ 18).

In opposition, Buonocore submits that Plaintiffs, in filing this application, are seeking to prevent Buonocore from working in an industry in which he has worked his entire life. Buoncore affirms that he entered into the SPA to buy out the Plaintiffs due to ongoing disagreements among the parties as to the operation of the business. Bunocore affirms that Plaintiffs "basically tied my hands with the running of DMS and were siphoning DMS' business for the benefit of All Aire" (Buonocore Aff. in Opp. at ¶ 8). Buonocore affirms that he entered into the SPA without consulting with an attorney, and "had no choice but to sign the Agreement or be run out of business" (*id.* at ¶ 11). Buonocore affirms that he signed the SPA "under extreme duress" (*id.*).

Buonocore affirms, further, that pursuant to the terms of the SPA, less than a month prior to the actual execution of the Promissory Note, DMS was to execute a Promissory Note and

Buonocore would guarantee that Note for the funds to purchase the shares. Prior to the commencement of the above-captioned action ("Instant Action"), Plaintiffs filed a motion for summary judgment in lieu of complaint in the Supreme Court of Queens County under Index Number 2846-10 ("Queens County Action"). The Queens County Action was stayed as a result of Buonocore's bankruptcy filing ("Bankruptcy"), and Buonocore was discharged in bankruptcy on April 12, 2011. Buonocore submits that Plaintiffs are upset that the Promissory Note was discharged as part of the Bankruptcy and they are therefore unable to collect the balance of the Promissory Note.

Buonocore affirms that, pursuant to the SPA, Plaintiffs retained DMS' business telephone number for use by All Aire. He submits that the Instant Action is an attempt to "take back the business and the good will that was sold to me" (Buonocore Aff. in Opp. at ¶ 27). Buonocore also avers that the Glick Plaintiffs have never complied with the SPA, but now want to enforce it because it inures to their benefit. Specifically, Buonocore affirms that he never received the shares that he purchased, or the resignation and assignment of sellers' status as officers of DMS.

Buonocore also submits that the Non-Compete Clause is invalid because it prevents Buonocore from earning a living. He affirms, further, that he has not violated the Non-Compete Clause because he is not doing business with existing customers of All Aire, and is not using past or present employees of All Aire.

In reply, Sheldon notes that Buonocore has not denied that Defendants have violated the Non-Compete Clause. He also describes as "frivolous" (Sheldon Reply Aff. at ¶ 3) Buonocore's claim that the SPA is invalid and was signed under duress. Sheldon submits that the Cory Affidavit establishes that Buonocore is servicing prior All Aire customers in violation of the Non-Compete Clause. By way of example, Sheldon makes reference to an email from Smythson (Ex. 6 to Cory Aff. in Supp.) in which Smythson confirmed that Buonocore, through one of his Diamond Mechanical entities, was servicing the Smythson account, in violation of the Non-Compete Clause.

Sheldon affirms that Defendants' continued violation of the Non-Compete Clause has resulted in Plaintiffs' loss of "hundreds of thousands of dollars worth of annual service contracts, associated service work and related new construction work" (Sheldon Reply Aff. at ¶ 7). Sheldon submits that injunctive relief is necessary to stop Defendants from harming Plaintiffs further.

C. The Parties' Positions

Plaintiffs submit that they have demonstrated their right to the requested injunctive relief by 1) establishing Defendants' breach of the Non-Compete Clause; 2) documenting Plaintiffs' loss of over $82,000 in service contract work as a result of those breaches; 3) demonstrating irreparable harm without the requested injunctive relief in light of the affirmation that Buonocore took certain proprietary information of All Aire, including contract and pricing structure documents, that allows him to compete with All Aire; and 4) demonstrating that a balancing of the equities favors Plaintiffs in light of Defendants' repeated and persistent violations of the Non-Compete Clause, to the detriment of Defendants, which suggest that Defendants never intended to comply with the Non-Compete Clause.

Defendants oppose Plaintiffs' application, submitting that 1) Plaintiffs have filed this application, not to maintain the status quo, but rather to prevent Defendants from earning a living; 2) there are issues regarding the validity of the SPA, given that a) the SPA was drafted by counsel for Plaintiffs; b) Defendants were not represented by independent counsel; and c) the Non-Compete Clause calls for a "one sided" non competition clause (Tanon Aff. in Opp. at ¶ 14); and c) the SPA is void for lack of consideration in light of Buonocore's assertion that Defendants never received the shares of stock or the resignation of the officers of the corporation as required by the SPA; and 3) Plaintiffs are not in compliance with paragraph 5(c) of the SPA which provides that, upon Defendants' failure to make timely payments on the Promissory Note, Plaintiffs shall arrange for the public or private sale of the stock; Plaintiffs, instead, filed a motion for summary judgment in lieu of complaint pursuant to CPLR § 3213 in the Queens County Action, which was inappropriate in light of the fact that the Promissory Note is a part of the SPA and, therefore, not an instrument for the payment of money only under CPLR § 3213.

RULING OF THE COURT

A. Preliminary Injunction Standards

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v.*

Romaine, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *Abinanti v Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Restrictive Covenants

Powerful considerations of public policy militate against sanctioning the loss of a person's livelihood. *Post v. Merrill Lynch*, 48 N.Y.2d 84, 86 (1979), citing *Purchasing Assoc. v. Weitz*, 13 N.Y.2d 267, 272 (1963). This policy is so potent that covenants tending to restrain anyone from engaging in any lawful vocation are almost uniformly disfavored, and are sustained only to the extent that they are reasonably necessary to protect the legitimate interests of the employer, and are not unduly harsh or burdensome to the one restrained. *Id.* at 87, citing, *inter alia*, *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499 (1977).

Restrictive covenants contained in employment contracts are disfavored by the courts and are to be enforced only if reasonably limited temporally and geographically, and to the extent necessary to protect the employer's use of trade secrets or confidential customer information. *Gilman & Ciocia, Inc. v. Randello*, 55 A.D.3d 871, 872 (2d Dept. 2008).

C. Application of these Principles to the Instant Action

The Court denies Plaintiffs' Order to Show Cause in its entirety. Plaintiffs have established a likelihood of success in demonstrating that Defendants violated the Non-Compete Clause, assuming *arguendo* its enforceability. The Court concludes, however, that there exist issues regarding the enforceability of that provision, given its significant length of three (3) years, and the very real possibility that it would result in a significant limitation on Buonocore's ability to earn a living. Although the Court is mindful that the relationship between Plaintiffs and Buonocore was not technically an employer-employee relationship, the same concerns are present where, as here, enforcement of the Non-Compete Clause may be unduly harsh or burdensome to Buonocore. The Court noes further that the Non-Compete Clause in the SPA, which is dated November 26, 2008, expires by its terms on November 26, 2011. Thus, Defendants are not bound by the Non-Compete Clause after November 26, 2011.

The Court also denies Plaintiffs' Order to Show Cause based on its conclusion that Plaintiffs' injury is compensable by money damages. Plaintiffs have alleged that Defendants' conduct has resulted in a loss of revenue to Plaintiffs, and Plaintiffs have quantified their alleged damages. Moreover, Plaintiffs have not provided the basis for their claim that Buonocore took copies of service contract documents and other documentation from Defendants, on which Plaintiffs rely in arguing that they will suffer irreparable injury without the requested injunctive relief.

In light of the foregoing, the Court denies Plaintiffs' Order to Show Cause in its entirety and vacates the TRO.

All matters not decided herein are hereby denied.

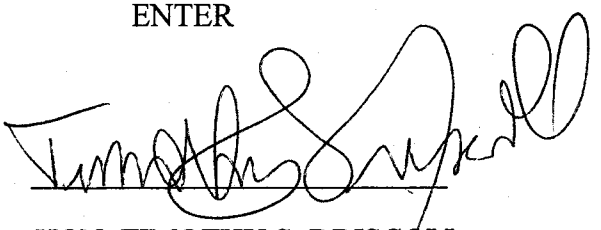
This constitutes the decision and order of the Court.

The Court reminds counsel **and the parties** of their required appearance before the Court on December 2, 2011 at 9:30 a.m. for a conference.

ENTER

DATED: Mineola, NY

November 10, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.