Due Peci, Inc. v Von Vonni Inc.
2012 NY Slip Op 33890(U)
March 23, 2012
Supreme Court, New York County
Docket Number: 650006/2012
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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DUE PECI, INC. d/b/a AGENT R.E.D. INTERNATIONAL, RYAN FISHMAN and EUGENYA PARADA FISHMAN,

Plaintiffs,

-against-

VON VONNI INC. d/b/a VON VONNI and , RAVON and VAHAGN SARGSYAN,

Defendants.

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DECISION AND ORDER
Index No. 650006/2012
Motion Seq. No. 001

O. PETER SHERWOOD, J.:

Plaintiffs Due Peci, Inc. d/b/a Agent R.E.D. International ("Agent R.E.D."), Ryan Fishman and Eugenya Parada Fishman (collectively "plaintiffs") move, by Order to Show Cause, for a preliminary injunction against defendants Von Vonni Inc., Ravon (collectively "Von Vonni") and Vahagn Sargsyan ("Sargsyan") (collectively "defendants") for a preliminary injunction restraining defendants from engaging in any defamatory conduct directed toward plaintiffs, engaging in certain competitive conduct or utilizing or disseminating plaintiffs' confidential proprietary information in violation of provisions of the parties' exclusive Sales Representative Agreement.

On January 5, 2012, the Court executed an Order to Show Cause temporarily restraining, pending the hearing on the Order to Show Cause, defendants and anyone acting on their behalf from engaging in any activity of a defamatory nature about or directed toward plaintiffs. Defendants oppose plaintiffs' motion.

On the return date of the Order to Show Cause, plaintiffs' motion was accepted on submission without oral argument and the parties were permitted to present written letter statements in lieu of oral argument on the Order to Show Cause for injunctive relief. For the reasons set forth below, plaintiffs' motion is granted to the extent indicated herein.

Factual Background

Agent R.E.D. is a New York corporation and fashion industry sales representative that represents clothing designers and garment manufacturers. It operates a showroom and sales office

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to market its clients garments to retail companies both domestically and internationally (Verified Complaint ¶¶ 1, 10; Aff. in Support of Ryan Fishman [Fishman Aff] ¶ 2). Plaintiff Ryan Fishman is a shareholder, director and Chief Operating Officer of Agent R.E.D. ("Fishman"). Plaintiff Eugenya Parada Fishman ("Genie") is a shareholder, director and President of Agent R.E.D. (Verified Complaint ¶ 2; Fishman Aff. ¶¶ 1, 3).

On or about April 26, 2011, Agent R.E.D. and Von Vonni entered into a five-year Agreement under which Agent R.E.D. would act as the exclusive worldwide sales representative and independent selling agent for Von Vonni in exchange for payment of commissions of between 12% and 25% of net invoices on the 30th of the month following shipment of goods by Von Vonni (the "Agreement") (Verified Complaint ¶¶ 10-11). The Agreement bears Genie's signature as President of Agent R.E.D. and Sargsyan's signature as President of Von Vonni.

Defendant Sargsyan is a fashion designer, who is a shareholder, officer and director of Von Vonni, a company he set up to produce and sell goods, primarily women's clothing, which he had designed and which he marketed under various names, including "Von Vonni" and "Raven" (*id.* ¶¶ 7-9).[1] The Agreement also contained provisions concerning confidentiality and non-disclosure of Agent R.E.D.'s proprietary information, and non-competition for a two-year period after termination of the Agreement.

Plaintiffs allege that in November 2011 Sargsyan unilaterally decided to repudiate and terminate the Agreement and began soliciting plaintiffs' customers and selling its goods in violation of the Agreement. In response to Fishman's and Genie's efforts to engage in negotiations to resolve the issues related to his termination of the Agreement, Sargsyan began inundating Fishman and Genie with countless text messages and phone calls accusing them of having "scammed" him and demanding that they immediately repudiate the Agreement (Fishman Aff. ¶¶ 7, 9). Sargsyan also threatened and then proceeded to embark on a verbal and electronic media campaign directed to the fashion industry, including plaintiffs' customers, employees, and business contacts and the general

[1] In his affidavit in opposition to plaintiffs' Order to Show Cause, Sargsyan attests that he was the President and sole shareholder of Von Vonni until it was dissolved in October 2011 and that "Ravon" is a label used for a particular dress for Von Vonni that as of November 2011 is no longer used.

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public, accusing plaintiffs of being con artists, thieves and black mailers and claiming plaintiffs had made unlawful demands and engaged in scams and threats.

Plaintiffs filed this action in response to Von Vonni's and Sargsyan's actions seeking compensatory damages and injunctive relief, inter alia, for breach of the Agreement. Simultaneously with the commencement of this action, plaintiffs brought on this Order to Show Cause to restrain defendants from continuing to engage in conduct of a defamatory nature or to violate the provisions of the Agreement related to confidentiality of proprietary information, non-solicitation of plaintiffs' customers and non-competition with Agent R.E.D.

Discussion

Generally, a preliminary injunction is considered a drastic remedy which should be issued cautiously since it prevents litigants from taking actions that they would otherwise be entitled to take in advance of an adjudication on the merits (*see, Uniformed Firefighters Assn. of Greater N.Y. v City of New York,* 79 NY2d 236, 241 [1992]). Its function is not to determine the ultimate rights of the parties, but rather, to maintain the status quo until a full hearing on the merits can be held (*see, Coinmach v Alley Pond Owners,* 25 AD3d 642 [2d Dept 2006]; *Hightower v Reid,* 5 AD3d 440 [2d Dept 2004]). Nevertheless, a preliminary injunction may be granted when the moving parties seek to permanently restrain the opposing parties from acting or continuing to act, and such act, if committed or continued during the pendency of the legal action, would produce injury to the moving party or make the ultimate judgment ineffectual (CPLR § 6301).

The burden of proof is on the party seeking injunctive relief to make a tripartite showing clearly demonstrating upon the undisputed facts: (1) a likelihood of success upon the merits; (2) irreparable injury to the movant absent granting of a preliminary injunction; and (3) a balancing of equities in its favor (*see, Nobu Next Door v Fine Arts Housing,* 4 NY3d 839, 840 [2005]; *Doe v Axelrod,* 73 NY2d 748, 750 [1988]). Where the facts are in sharp dispute a temporary injunction will generally not issue as the very existence of contrasting facts negates a movant's ability to establish the likelihood of success on the merits (*see, Dhamoon v 230 Park South Apts.,* 48 AD3d 103, 113 [1st Dept 2007]; *Jurlique v Austral Biolab Pty.,* 187 AD2d 637 [2d Dept 1992]).

Conversely, the existence of a factual dispute will not necessarily bar the imposition of a preliminary injunction if it is shown that the granting of a preliminary injunction is necessary to

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preserve the status quo and the party to be enjoined will suffer no greater hardship as a result of its issuance (*see, Melvin v Union College,* 195 AD2d 447, 448 [2d Dept 1993]; *Borenstein v Rochel Properties,* 176 AD2d 171, 172 [1st Dept 1991]). The proof establishing the elements required to be entitled to a preliminary injunction "must be by affidavit and other competent proof, with evidentiary detail" (*Scotto v Mei,* 219 AD2d 181, 182 [1st Dept 1996], quoting *Faberge Intl. v Di Pino,* 109 AD2d 235, 240 [1st Dept 1985]).

Where the granting of injunctive relief would upset the *status quo* and grant some form of the ultimate relief requested, the movant has a heightened burden of demonstrating that extraordinary circumstances warrant the relief (*see Rosa Hair Stylists v Jaber Food Corp.*, 218 AD2d 793, 794 [2d Dept 1995]).

Here, plaintiffs seek to enjoin defendants from:

1. engaging in false and malicious publication of negative and/or defamatory statements against plaintiffs;

2. contacting, soliciting and selling goods directly to customers identified and procured by plaintiffs;[2]

3. competing directly and or indirectly with plaintiffs in violation of the non-compete provision in the Agreement;

4. using and/or disseminating any confidential information of the plaintiffs.

A. *Likelihood of Success on the Merits*

In support of their claim that have established a likelihood of success on the merits, plaintiffs contend that they have established *prima facie* that defendants breached the non-compete, exclusive representation and non-disclosure provisions of the Agreement through Fishman's sworn affidavit, together with the Agreement. Plaintiffs contend that this proof demonstrates that defendants ceased designing, manufacturing and selling goods as agreed and have begun selling goods to customers directly in breach of the exclusivity terms of the Agreement. In addition, plaintiffs contend that they have produced sufficient evidentiary proof that Sargsyan engaged in a public "bad-mouthing"

[2]Annexed as Exhibit "C" to their March 12, 2012 letter submitted by permission of the Court in lieu of oral argument of the Order to Show Cause is a list of Agent R.E.D.'s customers.

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campaign directed against the individual plaintiffs personally and against the corporate plaintiff Agent R.E.D.

The provisions of the Agreement relevant to the instant motion are as follows: Paragraph 1 states that Agent R.E.D. was being contracted by Von Vonni and defined its duties as including "Exclusive sales in the territories and for the stores outlined" in the Agreement and further defined the territory covered by the exclusive sales agreement as "the entire world."

Paragraph 7 of the Agreement provides that the Agreement could be terminated by either party thereto "in writing of termination within ninety (90) days prior to the end of the current term."

Paragraph 9 titled "Confidentiality" states that confidential proprietary information about Agent R.E.D.'s business practices "shall not be disclosed by either party during or after the term of this agreement."

The non-compete provision contained in paragraph 10 of the Agreement states, in relevant part, that: For a period of two (2) years after the termination of this agreement . . . Von Vonni, its officer(s), directors, shareholders, employees, and/or agents, directly or indirectly, . . . shall not conduct any business whatsoever with any of Agent Red [sic] directors, inside sales staff, managed sales representatives operating Agent Red offices or independent sales offices that represent Von Vonni throughout the United States."

In his sworn affidavit, Sargsyan contends that the Agreement at the core of this litigation is not relevant as it was superceded in September 2011 by Fishman, Genie and Sargsyan's formation of a new company titled Visionary Fashion Group LLC ("VSG") to take the place of Von Vonni which was dissolved on October 26, 2011. He further claims that through the creation of VSG the parties intended to terminate the Agreement and to conduct future sales of Sargsyan's goods through VSG beginning in November 2011 and to split the profits therefrom. Although Fishman drafted documents relative to the creation of VSG, including an Operating Agreement, Sargsyan claims he was never given copies of such documents to sign. Sargsyan maintains that he made a capital investment in VSG through the manufacturing of goods at a cost of approximately $200,000.00, but neither Fishman nor Genie made their capital contribution. Sargsyan states further that disputes arose with Fishman concerning Fishman's refusal to provide Sargsyan access to VSG's bank account or records, his demands that Sargsyan make monetary contributions to VSG in ever increasing amounts, and the decrease in sales and business opportunities from October through December 2011 because of these ongoing conflicts. Sargsyan contends that as a result of these disputes, the parties decided shortly after VSG was formed to go their separate ways.

Sargsyan also contends that he did not engage in a "campaign" against plaintiffs, but did express his opinion on his personal Twitter account that plaintiffs were seeking to take his business from him and that they were damaging his business by telling customers that he was out of business. He contends that the statements he made simply expressed his opinion which he believed was truthful and that what was at issue in his response "was an emotional response to plaintiffs' pressured demand for money to 'walk away' from the relationship" (3/2/2012 Letter of Laura M. Dilimentin, Esq.). Sargsyan contends that the majority of Von Vonni's customers originated with him. He also notes that the Agreement contains a provision that all disputes arising from the Agreement would be resolved by arbitration.

Lastly, Sargsyan avers that if enjoined from selling his line of goods, he will lose the life savings he invested in his business and will be unable to afford to support his family, including his parents.

Plaintiffs do not deny that the individual parties formed VSG. However, plaintiffs contend that nothing in the VSG Operating Agreement ("VSG Agreement"), an unsigned copy of which is annexed to defendants' opposing papers as Exhibit "B", terminated the Agreement and, therefore, Agent R.E.D. retained all of its rights thereunder.

With respect to the arbitration clause in the Agreement, plaintiffs contend that defendants have voluntarily waived their right to arbitration, but, in any event, the issue is not ripe for adjudication, as defendants have failed to move to compel arbitration.[3]

Based upon the evidence in this record, it is far from clear that plaintiffs have proffered

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[3]In their letter submission after the return date of the Order to Show Cause, defendants direct the court's attention to a decision in the case *Due Pesci, Inc. d/b/a Agent R.E.D. International v Threads for Thought, LLC,* issued by Honorable Justice Eileen Bransten and which denied Agent R.E.D.'s motion for a preliminary injunction predicated upon a similar exclusive sales agreement involving another fashion designer. Even if the Court were to consider such decision, it would have no real effect upon the determination here as the decision rests, in part, on a lack of privity between plaintiff and one of the parties which Agent R.E.D. was seeking to restrain.

sufficient evidence to demonstrate that defendants have violated the terms of the confidentiality provision of the Agreement by using or divulging any of Agent R.E.D's proprietary information. In addition, the merit of plaintiffs' claim based upon the violation of the non-compete provision of the Agreement is also not free from doubt. It is noteworthy that nowhere in the two-year non-compete provision is any mention made concerning non-solicitation of plaintiffs' customers and, therefore, there is at least some question as to whether any alleged solicitation of former customers of Agent R.E.D. on behalf of defendants, if proved, would be considered a violation of the non-compete provision. There is also the issue as to what inferences may be drawn from the parties' conduct in forming VSB, specifically whether the parties impliedly, if not expressly, agreed that the VSB Agreement, though not fully executed by the parties, would take the place of the Agreement and govern the parties' conduct. Thus, while it may well be that upon the completion of discovery it will be established that a new contract was not formed with the intent to supplant the original agreement, such determination cannot be reached now based upon the current record. Accordingly, since there are key facts in dispute, the motion for a prliminary injunction should not issue

In any event, in actions predicated upon non-compete provisions of an agreement, the ultimate question is whether or not the restraint is reasonable (*see BDO Seidman v Hirschberg,* 93 NY2d 382, 388-389 [1999]). Here, the territory covered by the exclusive sales agreement, and from which the defendants are barred from competing with Agent R.E.D., covers the entire world. The non-compete provision does not appear to be a reasonable restraint in terms of the geographic scope.

B. *Irreparable Injury*

Irreparable injury may be demonstrated by the loss of customers, permanent loss of revenues and loss of good will. Although plaintiffs contends that if a preliminary injunction is not issued they will suffer irreparable harm which would not be compensable with monetary damages, such injury appears speculative. A claim of irreparable injury without substantiation will not suffice to meet the burden of proving irreparable harm (*see Genesis II Hair Replacement Studio, Ltd. v Vallar,* 251 AD2d 1082 [4th Dept 1988]). Here, plaintiffs have failed to adequately demonstrate that they will suffer an injury which monetary damages would be inadequate to repair. While plaintiffs may have a legitimate property right to conduct their business without the wrongful interference of others, plaintiffs have not demonstrated to the court's satisfaction that either its trade secrets or its legitimate business interests are in such danger that injunctive relief is warranted. Indeed, plaintiffs have not made a sufficient showing that defendants conduct has caused it to suffer from a loss of customers, revenue or good will.

C. *Balancing the Equities*

When balancing the equities, a court must determine whether the alleged irreparable injury to be sustained by the plaintiffs is more burdensome to them than the harm caused to defendants through the imposition of the injunction (*Price Paper and Twine Co. v Miller,* 182 AD2d 748, 749 [2d Dept 1992]). Damage to legitimate competitive activity on the part of defendants must be avoided (*id.*). Granting the relief requested by plaintiffs, except with respect to enjoining defendants from engaging in false and malicious publication of negative and/or defamatory statements directed against plaintiffs, might substantially interfere with Sargsyan's livelihood worldwide, while denial would likely have only a minimal effect, if any, upon plaintiffs' business operations which, contrary to plaintiffs' contentions, can be fully compensated by a monetary award. The harm caused defendants by granting the injunctive relief clearly outweighs that alleged by plaintiffs. However, notwithstanding defendants' contention that injunctive relief as to his alleged defamatory conduct need not be granted as he was simply responding emotionally to plaintiffs' actions, the provisions of the temporary restraining order shall be continued during the pendency of this litigation to ensure that there will be no repetition of the conduct complained of here.

D. *Waiver of Right to Arbitrate*

Paragraph 11 of the Agreement provides, in pertinent part, that: "In the event of any dispute arising under or by reason of this Agreement, such disputes [sic] shall be resolved by arbitration in New York in accordance with the then prevailing Commercial Arbitration Rules." Notwithstanding this broad arbitration clause in the Agreement, neither side to this dispute has taken any action to enforce it. Accordingly, the Court concludes that the parties' right to arbitrate has been waived as a result of pursuit of the dispute in court.

Conclusion

Based upon the foregoing discussion, it is hereby

ORDERED that plaintiffs' motion for a preliminary injunction is **GRANTED** to the extent that the temporary restraining order in the Order to Show Cause, dated January 5, 2012, shall continue until the final resolution of this litigation unless amended by order of the court; and it further

ORDERED that, in all other respects, plaintiffs' motion for a preliminary injunction is **DENIED**; and it is further

ORDERED that the attorneys for the parties are directed to appear for a preliminary conference in Part 49, 60 Centre Street, Room 252, on April 25, 2012, at 9:30 a.m.

This constitutes the decision and order of the court.

DATED: March 23, 2012

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.