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| <b>Touchpos Solutions, LLC v Tanase</b>  |
| 2012 NY Slip Op 33952(U)   |
| May 3, 2012  |
| Supreme Court, New York County   |
| Docket Number: 150162/11   |
| Judge: Carol R. Edmead   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

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TOUCHPOS SOLUTIONS, LLC,, DAVID  
COOPERMAN AND DAMIAN CAMPBELL,

Plaintiffs,

-against-

Index No. 150162/11

THOMAS TANASE,

Defendant.

-----X  
CAROL R. EDMEAD, J.S.C.:

Plaintiffs TouchPOS Solutions LLC (TouchPOS), David Cooperman, and Damian Campbell move, pursuant to CPLR 6301, for a preliminary injunction barring defendant Thomas Tanase from engaging in business as a member-manager of TouchPOS, communicating with TouchPOS customers or potential customers, or communicating with TouchPOS employees, other than on behalf of Strike Holdings, LLC (Strike) in his capacity as Strike's information technology director. Plaintiffs also seek an order directing that any monies that are due, or that become due, to Tanase as a result of his activities on behalf of TouchPOS be deposited in a separate corporate account, with plaintiffs' attorneys as the escrow agent. Cooperman, Campbell, and Tanase are the three equal member-managers of TouchPOS.

The amended complaint, which borders on the frivolous, alleges one cause of action for breach of fiduciary duty and libel, and another seeking the expulsion of defendant from his membership in the company, on the basis of the allegations set forth in the first cause of action. The factual allegations in the complaint are that Tanase wrote a rude and intemperate e-mail to one James Goldman, an

important customer of TouchPOS, and that he subsequently wrote an e-mail to Cooperman in which he questioned Cooperman's competence. The initially stated grounds for plaintiffs' request for provisional relief was that, if Tanase's rude letter became known to potential customers of TouchPOS, they might decide not to engage the company.

Plaintiffs have now filed what they style a "Supplemental Affirmation," in which they contend that, since the e-mail to Goldman, Tanase has: (1) changed the user name and password used to access the TouchPOS account at TD Bank, without informing Cooperman or Campbell; (2) sought to compromise TouchPOS's "ownership of the management" of its internet domain name, "www.touchpos.com" (Cooperman Aff. [9/11/12], at 4); and (3) solicited a TouchPOS customer, "Tony's Huntington Inn" (*id.* at 6), to switch to another point-of-supply dealer. With regard to the first of these contentions, Tanase states in his November 3, 2011 affidavit that, sometime in May 2011, he accessed the TouchPOS TD Bank account to check on the balance, and that, when he tried to access the account again several weeks later, he was unable to log in and was advised that he was no longer part of the account. He opines that, if anyone changed the user name and password for the account, it was Cooperman. With regard to the domain name, Tanase states that he has owned it since 2000, long before TouchPOS was formed; that, when TouchPOS was formed, the members decided to use one John Reynolds to provide hosting services for the domain name; that in August 2011, Reynolds advised him that he no longer wanted to be

involved with TouchPOS, because Cooperman was harassing him by repeatedly requesting TouchPOS employee e-mails that were accessible solely from Reynolds's server; and that Tanase persuaded Reynolds to give Cooperman a password that would enable him to access the e-mails through webmail. These statements are fully borne out by the e-mail correspondence between Tanase and Reynolds which is set forth as Exhibits B and C of Tanase's November 3, 2011 affidavit. As for the third contention, Anthony Caltabiano, the president of Glocalt DBA Tonys huntington inn, states in a September 15, 2011 e-mail to Tanase:

Although I would prefer to no longer do business with your partner Dave Cooperman, I took your advice and did not change Dealers.

Tanase Aff. (11/3/11), Exh. A.

Finally, with regard to Goldman, who is a principal of the Brother Jimmy's restaurant chain, Tanase avers in his August 31, 2011 affidavit, and Cooperman acknowledges, that Brother Jimmy's remained a TouchPOS customer, as of that date.

It is elementary that a party moving for a preliminary injunction must show, among other things, a likelihood that it will prevail on the merits at trial, and that it will suffer irreparable harm absent provisional relief. See e.g. *Scotto v Mei*, 219 AD2d 181 (1st Dept 1996). Plaintiffs have shown neither that they have suffered any damages, as a result of any action on the part of Tanase of which they complain, nor that they are likely to suffer any such damages. Robert Goldberg, an Illinois attorney who has submitted an affirmation in support of plaintiffs' motion,

describes the nature of TouchPOS's business and states that companies such as TouchPOS thrive on word-of-mouth referrals from end users of its services. He says nothing pertaining to the specific facts of this case.

Nor have plaintiffs shown that they are likely to prevail on the merits. Plaintiffs have not suggested that defendant's intemperate e-mail to Goldman was intended to drive Goldman away from TouchPOS. Plaintiffs have adduced no case, and this court knows of none, in which a manager's rude letter to one of his company's customers, standing alone, has been held to constitute a breach of fiduciary duty. Nor do the allegations in plaintiffs' supplementary papers, offered to show additional acts taken by Tanase in violation of his fiduciary duties, and all sharply disputed, entitle plaintiffs to provisional relief. See *Essa Corp. v J. Thomas Realty Corp.*, 70 AD3d 483 (1st Dept 2010).

As for libel, neither the amended complaint, nor the Supplementary Affidavit, quotes any statement concerning Cooperman that was made to anyone other than Cooperman and an unidentified "Vin," or gives any grounds for the court to believe that any such statements were anything more than non-actionable opinion.

Accordingly, it is hereby

ORDERED that the motion for a preliminary injunction is denied. And it is further


ORDERED that counsel for all parties appear for a Preliminary Conference before Justice Carol R. Edmead, Supreme Court, New York County, Part 35, 60 Centre Street, New York, Room 438 on Tuesday,

June 5, 2012 at 2:30 p.m. And it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for defendant.

Dated: May 3, 2012

ENTER:



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**