

**Water Quality Ins. Syndicate v Safe Harbor Pollution
Ins., LLC**

2014 NY Slip Op 30003(U)

January 3, 2014

Supreme Court, New York County

Docket Number: 653001/13

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH
J.S.C.
Justice

PART 54

Index Number : 653001/2013
WATER QUALITY INSURANCE SYNDICATE
VS.
SAFE HARBOR POLLUTION INSURANCE, LLC
SEQUENCE NUMBER : 001
PREL INJUNCTION/TEMP REST ORDER

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits No(s). 1044

Answering Affidavits -- Exhibits No(s). 11-14, 16-20

Replying Affidavits No(s). 21-24, 27, 28, 30, 31, 32

Upon the foregoing papers, it is ordered that this motion is denied with the annexed decision. or otherwise

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

Dated: 1/2/14

SHIRLEY WERNER KORNREICH
J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 54

-----X
WATER QUALITY INSUR. SYNDICATE & RICHARD
H. HOBBIE III, Pres. & CEO,

Plaintiff,

-against-

Index No. 653001/13
Decision & Order

SAFE HARBOR POLLUTION INSUR., LLC, FALVEY
INSUR. GRP., LTD., RUSSELL BROWN, ANTHONY
GERONE, SEAN QUINN, JOSEPH LEOTTA, J. MICHAEL
FALVEY & JOHN DOES 1-10,

Defendant.

-----X
SHIRLEY WERNER KORNREICH, J.:

This is a motion for a preliminary injunction which has its roots in an action claiming misappropriation of trade secrets, unfair competition, breach of fiduciary duty and loyalty, tortious interference with contract, conversion and fraud and seeking a permanent injunction. Plaintiffs now seek a preliminary injunction restraining defendants Russell Brown, Anthony Gerone and Sean Quinn from engaging in the water pollution insurance business and restraining all defendants from: 1) using proprietary information “wrongfully taken” from plaintiffs; 2) “using any and all of the Plaintiffs’ data records and any product information and content relating to Plaintiffs’ business”; and 3) “adopting, using, or advertising any water pollution insurance services and from engaging in the pursuit of Plaintiffs’ customers not authorized by Plaintiffs.” The court has denied plaintiffs’ application for a temporary restraining order. For the reasons that follow, a preliminary injunction is denied.

I. Background

Defendants Brown, Gerone and Quinn were employed by plaintiff Water Quality Insurance Syndicate (WQIS), a syndicate of insurers who issues and administers marine pollution liability insurance. Brown was Executive Vice President and Chief Underwriting Officer for WQIS at the time he left its employ on March 8, 2013. Gerone was Assistant Vice President of Underwriting for WQIS before he left its employ on March 8, 2013, and Quinn was an “at will” employee working as a Claims Manager for WQIS. While still employed by WQIS, Brown, Gerone and Quinn created a Rhode Island entity – Safe Harbor Pollution Insurance LLC (Safe Harbor), a division of defendant Falvey Group.¹

II. Affidavits

A. Defendants

In response to the application, defendants submitted a number of affidavits.

Brown

Russell Brown avers that he is a principal of Safe Harbor, a marine pollution insurance business, and previously had been Executive Vice President and Chief Underwriting Officer at WQIS. He further avers that he holds a degree in Marine Transportation, has a Master BA Certificate from the University of Notre Dame-Mendoza College of Business and has 16 years of underwriting experience. He states that before working for WQIS, he held VP positions with a claims accounting software company and a COFR database company and had managed a worldwide network of spill response surveyors. Also, Brown avers that he had been on the Board of Directors of the American Marine Insurance Forum and had served in the US Navy

¹ These facts were gleaned from the complaint and plaintiffs’ counsel’s affirmation. No affidavits from individuals with personal knowledge were submitted by plaintiffs in their original papers.

Reserve as a Commissioned Officer. Brown contends that his knowledge of the marine pollution insurance business is not derived from WQIS or its proprietary information.

Additionally, Brown explains that the marine pollution insurance business is a small industry in which the identities of the clients are known and in which the vast majority of business is derived from brokers. The potential insured and the broker decide where to place coverage. Brown states that there is no category of or specific information that is confidential or proprietary in the industry because: "There are simply too many variables in potential policy holder needs and in the type and amount of coverage that can be offered to meet them." According to Brown, business acumen and expertise in the field are what matter.

Brown avers that he did not take and is not in possession of any information or documents that belong to WQIS. Moreover, he avers that neither he nor Safe Harbor are using any WQIS information and that he is using publically available information to contact clients.

Gerone

Anthony Gerone avers that he is a principal of Safe Harbor and had worked as an Assistant Vice President and Underwriting Manager at WQIS. He states that he has 14 years of underwriting experience, holds an Ocean Marine Insurance Certificate from the American Institute of Marine Underwriters and is a Certified Marine Insurance Pollution Professional. He contends that his knowledge of the marine pollution insurance business is not derived from confidential or proprietary information belonging to WQIS. Gerone describes the marine pollution insurance industry as small and states that its clients are generally known in the industry or can be found through public sources. Also, he states that business is derived directly from brokers who, together with the insureds, decide where to place coverage "based on the

customer's unique needs." Gerone avers that he has no information or documents belonging to WQIS and that he is using publically available information to communicate with potential clients.

Quinn

Sean Quinn avers that he is Vice President of Safe Harbor. He states that he has 8 years of underwriting experience, holds a degree in Logistics and Intermodal Transportation from the US Merchant Marine Academy and has a certificate in Marine Liabilities from St. John's University. He too contends that: his knowledge of the marine pollution insurance business is not derived from WQIS' confidential or proprietary information; the marine pollution insurance business is a small industry whose potential clients are generally known or available from public sources; that business is derived from brokers and customers; and that such business is dependent upon many variables dictated by the policy holder's needs. He avers that he took no proprietary information or documents from WQIS and that he obtains business through his abilities and with the use of publicly available information.

Leotta

Defendant Joseph Leotta, the Senior Vice President of Business Development at defendant Falvey Insurance Group, Ltd (Favey Group), submitted 2 affidavits. In the first, he states that he has been employed by the Falvey Group for approximately a year and helped establish Safe Harbor. He avers that he did not use any documents or information from WQIS in doing so, but, rather, established Safe Harbor "based only on The Falvey Group's own practices and policies, [his] personal and professional knowledge of the insurance industry, market research that [he] performed and general conversations about the marine pollution insurance

business.” Additionally, Leotta avers that he asked Brown, Gerone and Quinn if they had any confidential or proprietary information belonging to WQIS and they assured him they did not. He ends by stating that neither he nor Safe Harbor are using any documents or proprietary information from WQIS.

In his supplemental affidavit, Leotta avers that he has reviewed the electronic files of the Falvey Group and found a copy of an email defendant Michael Falvey, President of Falvey Group, sent to plaintiff Richard Hobbie, the President and CEO of WQIS on April 23, 2013. The email, which is annexed to the affidavit, assures Hobbie that the Falvey Group has not received and does not possess any WQIS confidential or proprietary information and that any WQIS employees joining the Falvey Group are told not to use or disclose any proprietary information. Falvey closes the email by asking Hobbie to identify any information he believes is proprietary and is possessed or being used by the Falvey Group. Hobbie did not respond to the email.

Defense Counsel

Paul A. Saso, defense counsel submitted an affirmation in which he states that he asked plaintiffs’ counsel to specifically identify any documents or information alleged to be taken and that he would make sure such documentation was returned if it exists. Nothing was identified. Further, Saso states that the WQIS Marine Pollution Insurance Policy Form is available for download on its website. Saso also annexes a news article from a trade magazine entitled “Battle lines drawn in US marine oil spill cover war – Premiums are under pressure as Safe Harbor mounts an assault on WQIS market leadership”.

B. Plaintiffs’ Reply

Although no affidavits were submitted on its Order to Show Cause, in reply, plaintiffs

submitted the affidavits of John Imor, the Information Technology Manager of WQIS, and John H. Ryszetyk III, the Senior Vice President for WQIS. Imor avers that WQIS uses a virtualized computing environment, which allows their personal computers to be portable and permits its data to be accessible from any computer with the appropriate software installation and proper network credentials. One of WQIS' software programs, OMNI, contains the information about customers and the company's insurance policies. In early September, Imor averred, he was asked by Brown to perform a "data dump" – that is, extract the data from the OMNI database into a spreadsheet – and place the spreadsheet file into a portable media storage device. Imor gave the media storage device to Brown.

Ryszetyk avers that WQIS "on average, renews, quotes and binds between 250- 300 pollution insurance policies per month." He states that WQIS uses the OMNI system to manage its information which is both public and proprietary. He claims the "trade secrets" (which Ryszetyk does not define) are the result of WQIS' 42 years of experience servicing a worldwide market. He then explains that WQIS has developed trade secret information in the form of policy renewal dates and premiums charged, which are securely protected. Ryszetyk refers to Imor's affidavit and claims that there is no reasonable explanation for Brown's request for the data dump. Further, he contends that he "has been informed by insurance brokers and assureds that they have been 'cold called' by Safe Harbor coincidentally 30 days before the expiration of WQIS policies and offered unsolicited insurance quotes significantly lower than WQIS'." He closes by stating that Safe Harbor has been underbidding WQIS in the marketplace for WQIS renewals by 20%, 40% and sometimes 60%.

C. *Affidavits in Sur-Reply*

Brown avers that he requested the data dump from Imor as part of his duties as Executive Vice President and Chief Underwriting Officer of WQIS. He avers that annually, in or around September, WQIS applied to Towers Watson & Co. (Towers Watson) for reinsurance. Towers Watson required information on all vessels insured. As a result, each year, Brown avers, he requested the extraction of the required data from the OMNI system, which was then culled and organized in order to give Towers Watson the data needed for insurance purposes. When a portable device was used, as in recent years, Brown stated that he delivered the device to Thomas Dean, Senior Vice President at Towers Watson. Brown contends that Hobbie attended the meetings and witnessed the delivery on several occasions. Brown further avers that he requested a limited data dump from Imor, provided it to Towers Watson and is not in possession of it.

Thomas E. Dean, submitted an affidavit in which he avers that: he is a Senior Vice President of Towers Watson; worked with WQIS to obtain reinsurance annually; the annual process required information on the vessels insured by WQIS; WQIS provided the information through the "Data Dump"; this past year, on September 10, 2012, Towers Watson provided Brown and Gerone with an encrypted USB drive containing the 2011 Data Dump so that the 2012 Data Dump could be uploaded to it; and on September 27, 2012, at an in-person meeting at WQIS' offices, Towers Watson was provided with the portable media storage device containing the 2011 and 2012 Data Dump.

II. Discussion

To succeed on a motion for a preliminary injunction, the movant must demonstrate a likelihood of ultimate success on the merits, that irreparable injury would result in the absence of injunctive relief, and that a balancing of the equities to effect substantial justice and to preserve

the status quo warrants the grant of this extraordinary relief. CPLR 6301; *Key Drug Co. v Luna Park Realty Assoc.*, 221 AD2d 598, 599 (2d Dept 1995); *Pilgreen v 91 Fifth Ave. Corp.*, 91 AD2d 565, 567 (1st Dept 1982) *app dismissed*, 58 NY2d 1113 (1983). Additionally, movant “must demonstrate a clear right to relief which is plain from the undisputed facts,” to establish its likelihood of success (*Blueberries Gourmet Inc. v Aris Realty Corp.*, 255 AD2d 348, 349–50 (2d Dept 1998). Where questions of fact exist which would substantially subvert the movant’s likelihood of ultimate success, an injunction should not be granted. *Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co.*, 53 AD3d 612, 613 (2d Dept 2008).

Here, plaintiffs contend that defendants have misappropriated their trade secrets. Specifically, they claim that a preliminary injunction is necessary because defendants are using WQIS’s customers’ policy renewal dates and premiums to unfairly compete against WQIS. However, the affidavits submitted do not establish this allegation. Instead, the undisputed affidavit of Thomas Dean, an objective third-party, supports defendants’ claims that they have not appropriated any trade secrets belonging to WQIS. At best, hearsay statements repeated in Ryszetyk’s affidavit raise an inference of misappropriation. However, the court cannot grant the extreme remedy of a preliminary injunction based on such hearsay.

That said, there is no doubt that defendants are competing against WQIS, Brown’s, Gerone’s and Quinn’s former employer. But, such competition and the fact that they may have created their business while in the employ of WQIS is not improper. *See Don Buchwald & Assocs. v Marber-Rich*, 11 AD3d 277, 278 (1st Dept 2004) (employee may create competing business prior to leaving employ without breaching fiduciary duty so long as he does not use employer’s resources). Nor is contact with customers of WQIS inappropriate if, as defendants

contend, they are using publicly available information to do so. A customer list will not be treated as a confidential, sensitive, and proprietary trade secret where the information contained in the list is readily ascertainable from nonconfidential sources. *Ronald W. Freeman, P.C. v Li Zhu*, 209 AD2d 213, 214 (1st Dept 1994).

Generally, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the employee from soliciting his employer's customers Conversely, where the customers are not known in the trade or are discoverable only by extraordinary efforts courts have not hesitated to protect customer lists and files as trade secrets.

Leo Silfen, Inc. v Cream, 29 NY2d 387, 392-393 (1972). Thus, a contact list based on knowledge of the industry or compiled from information publicly available does not qualify as a trade secret. *Fada Intl. Corp. v Cheung*, 57 AD3d 406, 406 (1st Dept 2008), *lv denied* 12 NY3d 706 (2009).

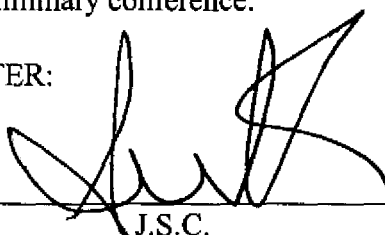
Having failed to establish a clear likelihood of success, the application for a preliminary injunction is denied. *See Doe v Axelrod*, 73 NY2d 748, 750 (1988) (where no likelihood of success on merits, preliminary injunction should be denied). Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED that the parties are to appear in Part 54, 60 Centre St., rm. 228, New York, N.Y., on January 23, 2014, at 9:30 a.m., for a preliminary conference.

DATE: January 3, 2013

ENTER:



J.S.C.