

J & R Heating v Green Heat Energy Corp.

2014 NY Slip Op 32388(U)

August 29, 2014

Supreme Court, Suffolk County

Docket Number: 064035/2014

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/13/14
SUBMIT DATE: 8/15/14
Mot. Seq. # 001 - MD
CDISP: NO
Prelim. Conference: 10/17/14

-----X
J & R HEATING d/b/a HART PETROLEUM :
 :
 Plaintiff. :
 :
 -against- :
 :
 GREEN HEAT ENERGY CORP., RALPH FICO, :
 LEWIS CAHILL and PORT ENERGY GROUP, INC., :
 :
 Defendants. :
 :
 -----X

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Upon the following papers numbered 1 to ____ read on this motion by the plaintiff for a preliminary injunction
____; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of
Cross Motion and supporting papers _____; Answering papers 5; Reply papers 6; Other
8-11 (other); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for preliminary injunctive relief restraining
all defendants from servicing or soliciting former customers of defendant, Port Energy Group Inc.,
from using the name Port Energy or its customer list and from operating defendant Green Heat Energy
Group or other home heating oil company in competition with the plaintiff is considered under CPLR
6311 and is denied; and it is further

ORDERED that a preliminary conference shall be held herein on Friday **October 17, 2014** at 9:30 a.m. in the courtroom of the undersigned located in the Supreme Court Annex Building of the Courthouse at One Court Street, Riverhead, New York 11901.

This action in which the plaintiff seeks injunctive relief and money damages arises out of its purchase of assets from competing home heating oil companies under the terms of two Purchase and Sale Agreements executed on August 30, 2013. In the first of such agreements, the plaintiff agreed to purchase substantially all of the business assets of defendant, Port Energy Group, Inc. [hereinafter Port Energy], under the terms of a Purchase and Sale Agreement executed by Port Energy through its president, Christian, L. Cahill, and defendant, Lewis Cahill, as guarantor of the obligations of the corporate seller, Port Energy and by the plaintiff by its president Raymond Hart. The Agreement contained restrictive covenants which prohibited the seller, Port Energy and its guarantor, defendant Lewis Cahill, from selling or distributing and from soliciting to accepting orders for the sale and distribution of #2 home heating oil, gas for heating purposes and for heating equipment or the installation or the maintenance thereof for ten years within the “territory” which term is not defined. Defendant Port Energy and its guarantor further agree not to solicit, communicate or interfere within the undefined “territory” with customers of the plaintiff or to assist any person in doing so for a period of 10 years. These defendants further agreed not to disclose any information included in the Customer information purchased by the plaintiff or use the name Port Energy or similar name except in government filings.

The plaintiff also entered into a separate Purchase and Sale Agreement with defendant, Green Heat Energy Corp. [hereinafter “Green Heat”], on August 30 2013. This contract was limited to the sale by Green Heat of two trucks for the sum of \$45,000.00. Defendant, Lewis Cahill, executed this agreement as president of Green Heat while the plaintiff’s president, Raymond Hart, executed on behalf of the plaintiff. No restrictive covenant of any kind was contained in this agreement. Green Heat, an oil company in Bay Shore, New York, was allegedly formed by defendant Cahill as a secondary source of income and was operated by defendant Fico. Following the closing of both asset sales and purchases, defendants Lewis Cahill and Ralph Fico were hired by the plaintiff. Both were let go following a dispute over allegedly disruptive conduct on the part of Lewis Cahill which could not be resolved.

In the complaint served and filed herein, the plaintiff charges all defendants with violating the terms of the restrictive covenants set forth in the Purchase and Sale Agreement between the plaintiff and defendant Port Energy which bound it and its guarantor, defendant Lewis Cahill. The first two causes of action set forth in the complaint seeks such relief against all defendants. In the Third and Fourth causes of action, the plaintiff seeks injunctive relief and money damages from defendants, Fico and Green Heat, by reason of their purported misappropriation of the customer list of Port Energy so as to service and solicit its business away from plaintiff Hart Petroleum and thereby compete with it unfairly.

By the instant motion, the plaintiff seeks broad and expansive injunctive relief against all defendants as outlined above. The motion is opposed only by defendants Fico and Green Heat, who appeared herein by service of a joint answer prepared by their counsel. However, the motion and the pleaded plaintiff's claims against defendant Lewis Cahill have been resolved by the filing of a "Stipulation of Partial Settlement" and proposed "Consent Judgment", the terms of which, contemplate a severance and continuation of all claims against all other defendants (*see* Document #20 posted by plaintiff on August 4, 2014 in the court's E-file data base). For the reasons stated below, the motion is denied.

By statutory fiat, "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (CPLR 6301). Appellate case authorities have long pronounced that to prevail on a motion for preliminary injunctive relief, the movant must clearly demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 800 NYS2d 48 [2008]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862, 552 NYS2d 918 [1990]; *Greystone Staffing, Inc. v Warner*, 106 AD3d 954, 2013 WL 2228792 [2d Dept 2013]; *Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051, 886 NYS2d 41 [2d Dept 2009]; *Pearlgreen Corp. v Yau Chi Chu*, 8 AD3d 460, 778 NYS2d 516 [2d Dept 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court, as the remedy is considered to be a drastic one (*see Doe v Axelrod*, 73 NY2d 748, 536 NYS2d 44 [1988]; *Tatum v Newell Funding, LLC*, 63 AD3d 911, 880 NYS2d 542 [2d Dept 2009]; *Bergen-Fine v Oil Heat Inst., Inc.*, 280 AD2d 504, 720 NYS2d 378 [2d Dept 2001]). Consequently, a clear legal right to relief, which is plain from facts presented that are generally undisputed, must be established (*see Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051, *supra*; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, 786 NYS2d 107 [2d Dept 2004]; *Blueberries Gourmet v Avis Realty*, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]).

A preliminary injunction is thus not a proper remedy where it appears that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762, 880 NYS2d 647 [2d Dept 2009]; *Dana Distrib., Inc. v Crown Imports, LLC*, 48 AD3d 613, *supra*). Nor is it appropriately issued where the irreparable harm claimed is remote or speculative or where it is economic in nature (*see County of Suffolk v Givens*, 106 AD3d 943, 967 NYS2d 387 [2d Dept 2013]; *Rowland v Dushin*, 82 AD3d 738, 917 NYS2d 702 [2d Dept 2011]; *Family-Friendly Media, Inc. v Recorder Tel. Network*, 74AD3d738, 903 NYS2d 80 [2d Dept 2010]).

Preliminary injunctive may be available to halt irreparable injury to a business arising from conduct on the part of a person who is bound by an enforceable restrictive covenant and who violates the terms thereof (*see Washington Deluxe Bus, Inc. v Sharmash Bus Corp.*, 47 AD3d 806, 850 NYS2d 516 [2d Dept 2008]). Here, only defendants Lewis Cahill and Port Energy were bound by the restrictive covenants set forth in the Purchase and Sale Agreement of August 30, 2013, by which the plaintiff purchased substantially all of the assets of Port Energy. While there are allegations of conduct on the part of defendant Lewis Cahill regarding his breach of the terms of these restrictive covenants, there are none posited against defendant, Port Energy. Since all claims for relief against defendant Cahill were resolved by him and the plaintiff in the Stipulation of Partial Settlement filed herein by the plaintiff as outlined above, the instant motion likewise resolved and in effect, withdrawn from consideration by the court. Accordingly, the motion is denied as academic with respect to defendant Cahill. It is denied with respect to defendant Port Energy due to the absence of any allegations of conduct which might be considered violative of the provisions of the restrictive covenant.

To the extent that the motion targets defendants, Fico and Green Heat, for purported violations of the restrictive covenant set forth in the Purchase and Sale Agreement between the plaintiff and Cahill and Port Energy, it is denied, as defendants Fico and Green Heat were not signatories to such agreement nor otherwise bound by the terms of said restrictive covenant (*see Washington Deluxe Bus, Inc. v Sharmash Bus Corp.*, 47 AD3d 806, *supra*). Since there is no viable claim for permanent injunctive relief against defendants Fico and Green Heat and no demonstrable threat to the subject matter of the action which would render any judgment ineffectual having been shown, the remedy of a preliminary injunction is not available to the plaintiff (*see* CPLR 6301; *BSI, LLC v Toscano*, 70 AD3d 741, 896 NYS2d 102 [2d Dept 2010]; *Seebaugh v Borruso*, 220 AD3d 573, 632 NYS2d 800 [2d Dept 1995]).

The motion is further denied with respect to defendants, Fico and Green Heat, to the extent that is premised on the plaintiff's claims for permanent injunctive relief prohibiting such defendants from engaging in acts of unfair competition that are advanced in the Third cause of action in the complaint. "A cause of action based on unfair competition may be predicated upon trademark infringement or dilution in violation of General Business Law §§ 360–k and 360–l, or upon the alleged bad faith misappropriation of a commercial advantage belonging to another 'by exploitation of proprietary information or trade secrets'" (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 866 NYS2d 677 [2d Dept 2008]; *quoting Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.*, 20 AD3d 439, 440, 799 NYS2d 24 [2d Dept 2005]; *see Mitzvah Inc. v Power*, 106 AD3d 485, 966 NYS2d 3 [1st Dept 2013]; *Laro Maintenance Corp. v Culkin*, 267 AD2d 431, 700 NYS2d 490 [2d Dept 1999]). The key to stating a non-statutory, common law claim of unfair competition is that the defendant charged with actionable conduct displayed some element of bad faith in misappropriating the plaintiff's labor, skill, expenditures, proprietary information or trade secrets (*see Parekh v Cain*, 96 AD3d 812, 948 NYS2d 72 [2d Dept 2012]; *see also Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 938 NYS2d 17 [1st Dept 2012; *bad-faith misappropriation of a commercial advantage necessary to state a claim for unfair competition*]).

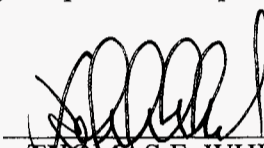
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Here, the plaintiff claims that Fico and Green Heat wrongfully used Port Energy's customers lists that were purchased by the plaintiff to solicit those customers in an effort to divert their business to Green Heat and that these customer lists and other information constitute trade secrets. In support of this claim, the plaintiff relies upon one, unsigned, undated solicitation letter written on Green Heat letterhead and defendant Fico's name, as president, which targets a purported Port Energy's client and upon the allegations advanced in affidavits of the plaintiff's president and its technology servicer submitted in support of the instant motion.

The court however, finds that these submissions failed to establish, by clear and convincing evidence, a likelihood of success on the merits of the plaintiff's claims for unfair competition against defendants Fico and Green Heat due to their engagement in a bad faith misappropriation of plaintiff's labor, skill, expenditures, proprietary information or trade secrets. The record is devoid of any demonstration that the customer lists at issue warrant trade secret protection (*see Reed, Roberts Assoc., Inc. v Straman*, 40 NY2d 303, 386 NYS2d 677 [1976]; *see also Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 407, 604 NYS2d 912 [1993]; Restatement of Torts § 757, comment [b]; *Delta Filter Corp. v Morin*, 108 AD2d 991, 485 NYS2d 143 [3d Dept 1985]), or that they came into the hands of these defendants by their bad faith employment of wrongful means (*see Parekh v Cain*, 96 AD3d 812, *supra*).

In view of the foregoing, the instant motion (#001) by the plaintiff for preliminary injunctive relief is denied.

Dated: August 29, 2014



THOMAS F. WHELAN, J.S.C.