

**Oseff v Scotti**

2014 NY Slip Op 33654(U)

June 23, 2014

Supreme Court, New York County

Docket Number: 005821/08

Judge: Stephen A. Bucaria

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**ORIGINAL**

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
LANCE OSEFF, JENNIFER OSEFF, BALCO  
SECURITY SERVICES, INC. and SECURITY  
CENTRAL ALARM SERVICES, INC.,

Plaintiffs,

-against-

FRANK SCOTTI, BALCO ALARM SERVICES  
CORP., RALPH AIELLO and ELECTRONIC  
SECURITY SYSTEMS OF NEW YORK,

Defendants.

\_\_\_\_\_  
BALCO ALARM SERVICES CORP.,

Plaintiff,

-against-

BALCO SECURITY SERVICES, INC. a/k/a  
SECURITY CENTRAL ALARM SERVICES, INC.,  
LANCE OSEFF and JENNIFER OSEFF,

Defendants.

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 005821/08

MOTION DATE: June 17, 2014  
Motion Sequence # 009

INDEX No. 8884/10

\_\_\_\_\_  
The following papers read on these motions:

Notice of Motion..... X  
 Affirmation in Support..... X  
 Affirmation in Opposition..... X  
 Reply Affirmation..... X

Motion by plaintiffs Lance Oseff, Jennifer Oseff, Balco Security Services, Inc., and Security Central Alarm Services, Inc. for partial summary judgment is **granted** to the extent indicated below.

This is an action for breach of contract. Defendant Balco Alarm Services Corp. was in the business of providing central station alarm security services. On January 2, 2007, plaintiff Balco Security Services, Inc. entered into a contract to purchase the assets of Balco Alarm for \$650,000. The assets consisted of Balco Alarm’s customer list; customer files, including location; service contracts; Balco Alarm’s phone numbers; and a central station alarm receiver with associated computer equipment. The purchasing company, Balco Security, was formed by plaintiffs Lance and Jennifer Oseff. Lance Oseff had been a long term employee of Balco Alarm, which is owned by defendant Frank Scotti.

The purchase price included a promissory note for \$310,000. The note provided for interest at a rate of 9 % and was to be paid in 60 monthly installments, commencing January 1, 2012. The contract provided that \$649,000 of the purchase price was allocated to good will. The agreement provided that, for a period of five years following the closing, seller would not “solicit, perform installations, service, provide central station monitoring, or otherwise contact customers” purportedly listed on an attached schedule. The contract permitted Balco Alarm Services to make one mailing, within one year of the closing, soliciting its former customers as to “entertainment, communication, and automation systems,” but not as to “central station based alarm services” and to “sell goods and provide services to [customers listed on the schedule] other than central station monitoring.

In 2008, the Oseffs and Balco Security commenced an action against Scotti, Balco Alarm Services, and defendant Ralph Aiello (Index No. 5821/08). Plaintiffs allege that defendant Scotti formed another company, defendant Electronic Security Systems of New York, for the purpose circumventing the restrictive covenant. In the first cause of action in the amended complaint, plaintiffs asserted a claim for fraud, claiming that defendants Scotti and Balco Alarm Services misrepresented the number of Balco Alarm’s active customers. In the second cause of action, plaintiffs alleged that defendants Scotti and Aiello tortiously interfered with Balco Security’s prospective economic relations with its customers. In the third cause of action, plaintiffs alleged that defendants tortiously interfered with Balco

Security's contracts with its customers. The fourth cause of action was for conspiracy. The fifth cause of action is for breach of the restrictive covenant in the asset purchase agreement. The sixth cause of action was for defamation. The seventh cause of action was for a permanent injunction restraining defendants from defamation, tortious interference, and violation of the restrictive covenant. The eighth cause of action was for attorney's fees.

On May 6, 2010, the seller, Balco Alarm Services, commenced an action to enforce the \$310,000 promissory note (Index No. 8884/10). By order dated September 16, 2010, the seller's action on the promissory note was joined with the purchaser's breach of contract action. By order dated September 10, 2013, the court granted defendant Balco Alarm Services' motion for summary judgment dismissing plaintiffs' first cause of action (fraud), second cause of action (tortious interference with prospective economic relations), third cause of action (tortious interference with contract), fourth cause of action (conspiracy), sixth cause of action (defamation), and eighth cause of action (attorney fees). However, the court denied defendant Balco Alarm Services' motion for summary judgment to the extent that plaintiff asserted a claim for breach of the implied covenant to refrain from soliciting former customers (See Bessemer Trust Co. v Branin, 16 NY3d 549, 556 [2011]).

Plaintiffs Lance and Jennifer Oseff, Balco Security Services, and Security Central Alarm Services move for partial summary judgment with respect to their second and fifth causes of action to the extent of a judicial determination that defendants violated the covenant not to compete contained in the January 2, 2007 agreement. Plaintiffs allege that defendants violated the restrictive covenant by reprogramming the customers' equipment so that the alarm was reported to defendants' central station rather than that of the plaintiffs. Plaintiffs have established a prima facie violation of the restrictive covenant, and the burden shifts to defendants to show a triable issue as to whether the covenant was violated.

In opposition, defendant Scotti claims that Balco Alarm could, without violating the restrictive covenant, provide security services other than central station monitoring, such as "installing or servicing equipment for alarm systems that activated a local siren or bell...or generated an alarm system to the subscriber's cell phone or directly to the police or fire department (Aff of Frank Scotti at ¶ 5)." Scotti further claims that it would not violate the restrictive covenant for Balco Alarm to provide central station monitoring to former customers at "other locations" or at the listed locations after the five-year period elapsed.

A seller has an implied covenant or duty to refrain from soliciting former customers, which arises upon the sale of the good will of an established business (Bessemer Trust Co. v Branin, 16 NY3d 549, 556 [2011]). A seller's implied covenant not to solicit its former customers is a permanent one that is not subject to divestiture upon the passage of a reasonable period of time (Id at 557). The purchaser has the right to expect that the firm's established customers will continue to patronize the business (Id). The essence of this type of transaction is an attempt to transfer the loyalties of the business' customers from the seller, who cultivated and created them, to the new proprietor (Id). Nevertheless, the buyer assumes

certain risks, such as that the customers of the acquired business, as a consequence of the change in ownership, may choose to take their patronage elsewhere (Id). Thus, the buyer assumes the risk that there will be a certain amount of attrition of customers over time. The seller is free to compete and accept the trade of former customers, provided it does not actively solicit such trade. The purchaser is also free to negotiate an express covenant, reasonably restricting the seller's right to compete in a particular geographical area or field of endeavor (Id).

Balco Security negotiated an express covenant, restricting Balco Alarm's right to compete in the field of central station monitoring, with respect to former customers, at the customer locations serviced by Balco Alarm, before the assets were sold. The covenant is reasonable in terms of both geographical area and field of endeavor. Reprogramming the customer's security system, installed at a location serviced by Balco Alarm before the assets were sold, would, for five years after the sale of assets, constitute a violation of the covenant. Plaintiff's motion for summary judgment as to its second and fifth causes of action is granted to this extent.

Security systems which communicate directly with the police or fire department, or which are limited to activating a local alarm without reporting to a central station, are in competition with systems which provide central station monitoring. Thus, upon selling its central station monitoring equipment to Balco Security, Balco Alarm impliedly covenanted to refrain from soliciting former customers as to central station monitoring, systems directly communicating with public safety authorities, and local alarm systems. This implied covenant is of indefinite duration and is not limited to the five year period. By negotiating an express restrictive covenant, Balco Security did not waive the implied covenant arising from Balco Alarm's sale of its assets. Plaintiff's motion for summary judgment as to its second and fifth causes action is further **granted** to this extent.

So ordered.

Dated JUN 23 2014

*Stephen A. Berane*  
J.S.C.

**ENTERED**  
JUN 23 2014  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE