

Oseff v Scotti

2014 NY Slip Op 33655(U)

November 26, 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: Nov. 3, 2014
Motion Sequence # 010

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 defendant Balco Alarm Services Corp. for leave to reargue plaintiffs' motion for partial summary judgment, with respect to the second and fifth causes of action, is **granted**. Upon reargument, plaintiff's motion for partial summary judgment with respect to the second cause of action is **denied**. Plaintiff's motion for partial summary judgment with respect to the fifth cause of action 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 and was owned by defendant Frank Scotti. Plaintiff Lance Oseff was a long term employee of the company. Oseff, and his wife, plaintiff Jennifer Oseff, formed plaintiff Balco Security Services, Inc. for the purpose of purchasing Balco Alarm Services' business.

On January 2, 2007, 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 locations; service contracts; Balco Alarm's phone numbers; and a central station alarm receiver with associated computer equipment.

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 alleged that defendant Scotti formed another company, defendant Electronic Security Systems of New York, for the purpose circumventing the restrictive covenant. It appears that Balco Security ceased payment on note on or before commencing the action.

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 plaintiffs 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 subsequently moved for partial summary judgment with respect to their second cause of action (tortious interference with prospective economic relations) and fifth cause of action (breach of the restrictive covenant). Plaintiffs alleged 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. In opposition, defendant Scotti claimed 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." Scotti further claimed that, without violating the restrictive covenant, Balco Alarm could provide central station monitoring to former customers at "other locations," or at the listed locations after the restrictive covenant lapsed on January 2, 2012.

By order dated June 23, 2014, the court granted plaintiff's motion for partial summary judgment, with respect to the second and fifth causes of action, to the extent of declaring that, for five years after the sale, Balco Alarm could not reprogram a customer's security system, installed at a location which Balco Alarm had serviced before the assets were sold. The court further determined that 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 was not limited to the five year period but was of indefinite duration.

Defendant Balco Alarm Services Corp. moves for leave to reargue plaintiff's motion for partial summary judgment with respect to the second and fifth causes of action. Defendant argues that summary judgment dismissing plaintiffs' second cause of action was previously granted in the court's order of September 10, 2013. With respect to the fifth cause of action, defendant argues that it did not violate the restrictive covenant.

In the court's order of September 10, 2013, defendant's motion for summary judgment dismissing plaintiffs' claim for tortious interference with prospective economic relations was granted. Accordingly, upon reargument, plaintiffs' motion for partial summary judgment with respect to its second cause of action is **denied**, and plaintiffs' cause of action for prospective tortious interference is **dismissed**.

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). Nevertheless, the purchaser 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). 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). Any such covenant must be reasonable in scope (*Mohawk Maintenance Co. v Kessler*, 52 NY2d 274, 284 [1981]). In determining reasonableness, the court must consider the nature of the "relevant industry," including applicable technology (*Bessemer Trust Co. v Branin*, 16 NY3d at 557).

With respect to the fifth cause of action, plaintiffs' motion for partial summary judgment is **granted** to the extent of declaring that from January 2, 2007 to January 2, 2012, defendant Balco Alarm Services Corp. was prohibited from providing central station monitoring for customers listed on the schedule attached to the January 2, 2007 agreement. However, Balco Alarm was free to install or monitor security systems communicating directly with police, fire, or public safety, or installing local alarm systems, and to provide entertainment, communication, and automation systems to its former customers. Balco Alarm was also free to solicit its former customers concerning security systems communicating directly with police, fire, or public safety, or local alarm systems, and to solicit its former customers concerning entertainment, communication, and automation systems. The right to solicit included the right to send one mailing to its former customers, soliciting them as to the latter services, within one year of the asset purchase agreement.

So ordered.

Dated NOV 26 2014

ENTERED

DEC 01 2014

MARSHALL COUNTY

Stephen A. Quarcia
J.S.C.