Weiner v Artura
2015 NY Slip Op 30102(U)
January 20, 2015
Supreme Court, Suffolk County
Docket Number: 014744-2014
Judge: Emily Pines

[* 1]

SHORT FORM ORDER INDEX NUMBER: 014744-2014

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 09-30-2014
Motion Submit Date: 09-13-2014
Motion Sequence No.: 002 MOTD
003 MOTD

[ ] Final
[x] Non Final

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ROBERT R. WEINER,

Plaintiff,

- against -

RICHARD F. ARTURA and MICHAEL COX,

Defendants.

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Attorney for Plaintiff
Robert R. Weiner
Counsellor-At-Law
49 Redan Drive
Smithtown, New York 11787

Attorney for Defendants
Richard F. Artura, Esq.
165 South Wellwood Ave.
Lindenhurst, New York 11757

ORDERED that the motion (002) and cross motion (003) are consolidated for the purpose of this determination; and it is further

ORDERED that the plaintiff's motion (002) seeking summary judgment dismissing the counterclaims; dissolution of the partnership; the appointment of a receiver to, *inter alia*, distribute the surplus partnership fees equally between the parties; an injunction; an order directing the defendants to deliver to the plaintiff any telephone messages; and to provide callers with the plaintiff's cell phone number is granted to the extent provided herein; and it is further

ORDERED that the defendants' cross motion (003) seeking summary judgment dismissing the complaint and on the counterclaims, and for an injunction enjoining the plaintiff from soliciting current or former clients of the law office is granted to the extent provided herein; and it is further

ORDERED that the parties are directed to appear in Part 46 for a hearing on April 20, 2015 and April 21, 2015 at 9:30 a.m.

In this action, the gravamen of the plaintiff's complaint is that the defendants are depriving him of his share of the law firm's fees from June 1, 2014. The record reveals that the parties executed an Acquisition and Merger Agreement ("the Agreement") on December 12, 2007, at which time the defendants executed a promissory note to purchase the goodwill from the plaintiff and non-party James F. Quinn for the sum of $975,000, to be divided equally between the plaintiff and Mr. Quinn. The Agreement provided for the merger of the defendants' law practices with the existing law firm called "Phillips, Weiner & Quinn." The Agreement provided, inter alia, that the merged firm would receive all of the existing law firm's clients, defendant Artura's clients and defendant Cox's clients, and would take over the lease of the building located at 165 S. Wellwood Avenue, Lindenhurst, New York. The Agreement also provided for each of the partners to receive a twenty-five percent interest in the profits and losses. Until the plaintiff and Quinn received full payment for their good will, they would each have a forty-nine percent equity interest in the merged firm and Artura and Cox would each have a one percent equity interest in the merged firm. The merged firm would also pay all expenses, including salaries, office supplies, utilities, telephone, and equipment

lease. Certain assets were excluded from the merger, including Weiner and Quinn's rights to the name "Phillips & Weiner[1]" and "Phillips, Weiner & Quinn."

The partners shared equally in the surplus from the expenses and received a weekly draw, however, there was an expectation that, at some point, Mr. Quinn would leave the firm. Upon Mr. Quinn's exit in January, 2009, he surrendered his equity, and the firm continued as "Phillips, Weiner, Artura & Cox." The record reveals that the plaintiff continued to work in the firm on a part-time basis. On June 11, 2014, the defendants paid to the plaintiff the remaining balance of the promissory note owed to him. Shortly thereafter, the defendants began to negotiate with the plaintiff regarding his role in the law firm on an of-counsel basis, however, no agreement was reached. This action was commenced on July 29, 2014.

The complaint alleges that in or about June 2014 the defendants took exclusive possession of the partnership, appropriated the law firm's profits in excess of their shares, and failed to pay the plaintiff his share of profits in the partnership. The plaintiff alleges that he has not received his share of profits obtained from certain matters which settled prior to June 2014. The complaint seeks the appointment of a receiver to collect all law firm fees, pay all business expenses and distribute the surplus to each party; a dissolution of the partnership; an accounting; an injunction against the defendants enjoining them from entering into any new transactions or receiving any money in the name of the partnership; and other injunctive relief restraining the defendants from continuing to use his name in the letterhead, building sign, and other media.

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[1] Phillips is the name of the plaintiff's partner who died in 1993.

The defendants asserted general denials in their answer and three counterclaims. The first counterclaim seeks damages from August 11, 2014 for soliciting clients of the firm in contravention of the terms of the Agreement. The second counterclaim seeks a judgment declaring that the plaintiff has sold his interest in the partnership. The third counterclaim seeks an order of ejectment against the plaintiff, who allegedly continues to enter the law firm and work on client files.

The plaintiff now moves by order to show cause for summary judgment dismissing the counterclaims, and other injunctive relief as stated above, and from interfering with U.S. mail deliveries to the plaintiff, directing the defendants to deliver to the plaintiff telephone messages or emails which were addressed to him, and directing defendants to inform callers who wish to speak with the plaintiff that he is no longer at the firm and to provide the callers with his cell phone number.

The defendants cross-move for summary judgment on their counterclaims and to dismiss the complaint; and for an injunction enjoining the plaintiff from soliciting current or former clients of the law firm.

In support of his motion, the plaintiff submits, *inter alia*, his personal affidavit, copies of the pleadings, a copy of the Agreement, copies of the promissory notes, correspondence between the parties, and a picture of the law firm's office sign. The plaintiff avers in his affidavit that although the Agreement excluded from the merger all rights to the name "Phillips & Weiner," and "Phillips,

Weiner & Quinn," in or about June 2014, without plaintiff's knowledge or permission, the defendants borrowed money without the plaintiff's knowledge or permission using the name "Phillips & Weiner" to obtain a loan to pay the promissory note owed to the plaintiff. The plaintiff also states that it has been the practice fo the merged law firm that as income was received and expenses were paid, surplus payments in addition to the weekly draw would be made to the three of them equally. After June 11, 2014, the surplus payments stopped, and the defendants terminated the plaintiff's cell phone service which the law firm previously paid. Moreover, the plaintiff states that mail addressed to him is being withheld, that the defendants disabled his office computer and removed his business cards from the office. In a letter dated August 6, 2014, defendant Artura informed the plaintiff that he should cease any work on firm files. The plaintiff responded with a letter dated August 11, 2014 demanding that the defendants cease using the name "Phillips & Weiner." A letter dated August 18, 2014 from defendant Artura informed the plaintiff that if he entered the firm office that it would be considered a trespass. The plaintiff also states, in particular, that his share of fees are due to him in the matter "Suffolk County Police Officers by the Estate of David McConnell," as well as his share of a one-third contingency from the Law Office of Civordi & Obiol, and his share of fees in the matter "Estate of Grzegorz Oksa and Kamilia Oksa," and seeks remuneration.

In opposition and in support of their cross motion, the defendants submit, *inter alia*, the personal affidavits of defendant Artura and defendant Cox, and a copy of the promissory note which reveals that the plaintiff was fully paid on June 11, 2014 for his share of goodwill in the former law firm of Phillips, Weiner & Quinn. Defendant Artura avers in his affidavit that upon agreeing to

merge law practices with the plaintiff and Mr. Quinn, he and Mr. Cox would jointly and severally pay the purchase price of $950,000 to the plaintiff and Mr. Quinn for their goodwill of the law firm "Phillips. Weiner & Quinn." It was agreed that pending completion of the purchase, that the parties would merge their practices. Mr. Artura states that the Agreement was only entered into upon the basis that the parties would work together until Quinn left to become a judge and then Weiner, Artura & Cox would continue to work together until such time as Cox and Artura paid the balance of the plaintiff's note or the plaintiff retired. When Mr. Quinn left the firm in January 2009, the plaintiff expressed his desire to initially work part time and to retire shortly thereafter.

Artura states that when another lawyer joined the firm in February 2012, the relationship between the parties became tense and strained due to the fact that the plaintiff was taking a full share of the earnings while working part time hours. He states that the plaintiff repeatedly told him, if you want me out just pay off my note. In April 2012, Artura states that he made an application for a loan through the law firm to satisfy the plaintiff's note, however, he cancelled it shortly thereafter when the plaintiff learned of it. In June 2014, Artura & Cox applied for a new loan and used this amount to pay off the plaintiff's note. Upon paying the plaintiff the balance of the note, Artura states that the goodwill had been purchased for the firm "Phillips, Weiner & Quinn" and that the plaintiff no longer had an equity interest in the firm. In Artura's opinion, the plaintiff is not entitled to share in profits or obligated to share in losses inasmuch as the plaintiff was bought out by the terms of his own agreement. Artura and Cox attempted to reach an agreement regarding the plaintiff's employment in the firm without success. The plaintiff then went to the post office and changed the firm's address to his new office address, thereby receiving mail regarding some of his clients, but also mail regarding clients he never represented. Artura further states that the plaintiff has appeared

at the firm's office without permission and solicited the firm's clients. Defendant Cox's affidavit supports Artura's account of the facts.

By order dated September 8, 2014 (Pines, J.), this court directed the following temporary relief on the plaintiff's order to show cause:

> 1. Ordered, that the motion for summary judgment and cross motion as well as the motion for preliminary injunctive relief will be handled together both returnable on September 30, 2014.
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> 2. Ordered that Robert Weiner and Michael Cox shall meet on a minimum of a weekly basis to discuss clients who have asked for Mr. Weiner and whose cases he handled at the defendant law firm.
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> 3. Ordered that the defendants remove Robert Weiner's profile from the law firm web site as soon as possible.
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> 4. Ordered that Robert Weiner shall be permitted to create his own website using his own name with his own telephone number and address as legal counsel.
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> All temporary relief ordered herein is without prejudice to the claims

and counterclaims with the parties hereto.

During the pendency of the motions, the parties have agreed to meet, pursuant to the above order, and discuss the clients which have sought to speak with the plaintiff, and the removal of the plaintiff's name from the firm's stationery, website and office signs.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts. *Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397 [2003]). To grant a preliminary injunction the law requires the moving parties to demonstrate: "(1) the likelihood of ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) a balancing of equities." *Albini v Solork Associates*, 37 AD2d 835, 326 NYS2d 150 [1971]). The first requirement compels a party seeking a preliminary injunction to establish a "clear right" to the relief. *7A Weinstein-Korn-Miller, NY Civ Prac, par 6301.18.*

To recover under a breach of contract theory, the plaintiff has the burden of proving: (1) formation of a contract between the plaintiff and defendant, (2) performance by the plaintiff, (3) the defendant's failure to perform, and (4) resulting damage. *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055, 872 NYS2d 725 (3d Dept 2009). Furthermore a written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms.

Willsey v Gjuraj, 65 AD3d 1228, N.Y.S.2d 528 (2d Dept 2009).

Turning to the branch of the plaintiff's motion for summary judgment dismissing the first counterclaim seeking damages for the plaintiff's alleged breach of contract by soliciting the firm's clients, the plaintiff has failed to demonstrate his prima facie entitlement to judgment as a matter of law. The plaintiff, as the seller of goodwill of the firm, has a legal duty to refrain from acting to impair the "good will" transferred to the purchaser in exchange for part of the purchase price. *Mohawk Maintenance Co. v Kessler*, 52 NY2d 276, 437 NYS2d 646 (1981); *Von Bremen v MacMonnies*, 200 NY 41, 200 NY (NYS) 41 (1910); *Planet Mfg. Corp. v Goldstein*, 54 AD2d 896, 387 NYS2d 889 (1976); *Hyde Park Products Corporation v Maximilian Lerner Corporation*, 65 NY2d 316, 491 NYS2d 302 (1985); *Bessemer Trust Co. N.A. v Branin*, 16 NY3d 549, 925 NYS2d 371 (2011). Deliberate solicitation of a seller's former customers breaches the duty against impairment of the goodwill transferred as part of the sale of the business, *Hyde Park Prods. Corp. v Maximilian Lerner Corp.*, *supra* at 321, which entitles the buyer to injunctive relief. *Mohawk Maintenance Co. v Kessler*, *supra*; *Von Bremen v MacMonnies*, *supra*; *Planet Mfg. Corp. v Goldstein*, *supra*. The purchaser is free to negotiate an express covenant, reasonably restricting the seller's right to compete in a particular geographical area or field of endeavor. "However, in the absence of an express covenant against competition, a seller of 'good will' who lawfully competes with a purchaser may advertise to the public and not specifically aimed at the seller's former customers is permissible under New York law." *Bessemer Trust Company v Branin*, *supra* at 558; *Von Bremen v MacMonnies*, *supra* at 47-49.

Here, there is no dispute that the Agreement is silent with regard to a covenant not to compete. Therefore, the plaintiff is free to advertise to the public that he has opened a new law practice but may not contact his former clients directly. Since the defendants have alleged that the plaintiff has contacted his former clients and the plaintiff has denied such activity, issues of credibility exist regarding whether the plaintiff solicited his former clients from June, 2014 to the present time, whether his former clients were trying to reach him, or whether the plaintiff's activity caused damages to the merged law firm, which cannot be determined on a motion for summary judgment. *Combs v Freeport*, 139 AD2d 688, 527 NYS2d 443 [2d Dept 1988]; *Zulferino v State Farm Auto. Ins. Co.*,123 AD2d 432, 506 NYS2d 736 [2d Dept 1986]). Therefore, the branch of the plaintiff's motion for summary judgment dismissing the first counterclaim and the branch of the defendants' cross motion for summary judgment on the first counterclaim are denied.

Turning to the branch of the plaintiff's motion for summary judgment dismissing the second counterclaim seeking a declaratory judgment that the plaintiff has sold his interest in the partnership, the plaintiff has failed to demonstrate with sufficient admissible evidence his prima facie entitlement to judgment as a matter of law. The record reveals that the plaintiff was paid in full for his share of goodwill in the law practice. The court agrees with the defendants that, consequently, his equity interest in the merged law firm was depleted. The court finds that inasmuch as the defendants performed on the Agreement to purchase the goodwill from the plaintiff, the plaintiff was obliged by the terms of the Agreement to surrender his equity interest in the law firm. This court declares that the plaintiff has sold his interest in the partnership. Therefore, the branch of the plaintiff's motion seeking to dismiss the second counterclaim is denied, and the branch of the defendants' cross

motion seeking summary judgment on the second counterclaim is granted.

Turning to the branch of the plaintiff's motion for summary judgment dismissing the third counterclaim which seeks an order of ejectment against the plaintiff, the court finds that the plaintiff has failed to submit any admissible evidence which would demonstrate his entitlement to judgment as a matter of law to dismiss the counterclaim. As to what qualifies for ejectment, Warren's Weed, New York Real Property states that ejectment is an action at law to restore possession of real property to the party rightfully entitled to it. Where a party having a right of possession in real property is excluded from it, an action to recover real property enables enforcement of a right of entry against the defendant who is wrongfully denying possession. *2 Warren's Weed, Ejectment, § 1.01, at Eject-3, Eject-4 [4th ed].* Here, the plaintiff has failed to discuss the dismissal of this counterclaim, and therefore, that branch of the motion seeking dismissal is denied. The court finds that the defendants have also failed to submit admissible evidence in their cross motion that they were excluded from the law firm's offices which would entitle them to an ejectment action as a matter of law. Therefore, the branch of the defendants' cross motion for summary judgment on the third counterclaim is denied.

The plaintiff's request for injunctive relief restraining the defendants from using his name in the merged law firm's business is granted upon consent of the parties. At a conference with the court on January 20, 2015, the parties agreed that the name "Phillips" can be utilized by both law firms. The defendants have agreed to remove the plaintiff's name from the building sign, advertisements, stationery, business cards, internet website and other media on or before March 1,

2015.

The parties have stipulated to try the remaining issues regarding the plaintiff's allegation in the complaint that he is entitled to his share of surplus fees for cases which were settled prior to his termination date and the defendants' allegation in the first counterclaim that they are entitled to damages for the plaintiff's interference with the merged law firm's business and alleged solicitation of the merged law firm's clients. The parties have agreed to conduct limited discovery on these two issues. All other requested relief is denied.

The parties are reminded that the temporary order dated September 8, 2014 is still in effect. The parties are directed to continue to meet and confer in good faith. The plaintiff is directed to notify the defendant Artura by telephone prior to appearing at the merged law firm's offices.

The parties are directed to appear at a hearing on April 20, 2015 and April 21, 2015 at 9:30 a.m.

Dated: January 20, 2015
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.