Shimon v Paper Enters., Inc.
2017 NY Slip Op 30101(U)
January 12, 2017
Supreme Court, Kings County
Docket Number: 506923/2015
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of January, 2017.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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BARRY SHIMON,

Plaintiff,

- against -

PAPER ENTERPRISES, INC.,

Defendant.

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PAPER ENTERPRISES, INC.,

Third-Party Plaintiff,

- against -

WORLDWIDE SALES & DISTRIBUTING, INC.,

Third-Party Defendant.

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DECISION AND ORDER

Index # 506923/2015

Mot. Seq. 1, 2

The following papers numbered 1 to 7 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 4
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	5 - 7

Upon the foregoing papers, the motion by Plaintiff BARRY SHIMON ("Shimon") for a preliminary injunction is DENIED (motion sequence 1). Defendant's cross-motion for a preliminary injunction is GRANTED to the extent that Shimon, either directly or indirectly, individually or through any person or entity, is prohibited from soliciting or attempting to pursue, market or solicit the business of any of PAPER ENTERPRISES, INC.'s customers or prospective customers until August 27, 2017 (motion sequence 2).

Background

On or around August 28, 2012, Shimon, on behalf of his company, WORLDWIDE SALES & DISTRIBUTING, INC. ("WSD"), the Third-Party Defendant herein, entered into three separate agreements with Defendant/Third-Party Plaintiff, PAPER ENTERPRISES, INC. ("PEI") whereby PEI, in essence, purchased WSD. The three agreements are: (1) the Asset Purchase Agreement by which PEI purchased certain WSD assets and assumed certain liabilities; (2) the Employment Agreement by which PEI agreed to employ Shimon as manager of PEI's newly formed "Retail Division" for a term of five years; and (3) the Warehousing and Services Agreement by which WSD agreed to allow PEI to store, warehouse, assemble and repackage its merchandise at WSD's warehouse in Edison, New Jersey.

According to PEI, PEI is a full-service distributor and supplier of paper products, janitorial supplies, equipment and other general merchandise, which are purchased from domestic and foreign suppliers and then resold to wholesalers and retailers in New York, New Jersey, Connecticut, Pennsylvania, Delaware and Maryland (hereinafter referred to as the "Territory"). WSD was engaged in the same business as PEI but also specialized in repackaging products into smaller units for resale.

Paragraph 6.6 of the Asset Purchase Agreement contained a non-compete clause stating, in relevant part, that Shimon agrees that "for a period of five (5) years from and after the Closing Date...he will not engage in any business similar to or which competes with the Business anywhere in the states of New York, New Jersey, Pennsylvania, Connecticut, Maryland and Delaware, directly or indirectly...."

According to PEI, Shimon left PEI's employ after two years and has since formed a new company in New York called "Great $ Deal Inc." (hereinafter referred to as "Great Deal") which competes with PEI in violation of the aforementioned non-compete clause. In support, PEI proffers the affidavits of Chris Seebak, an independent sales representative, and Ishmael Alvarado, PEI's retail division manager, stating that they saw Great Deal's products on their customers' shelves, including re-packs which were Shimon's specialty when he owned WSD. Mr. Alvarado further states that he visited the location listed on the Great Deal products' labels, which is located in Linden, New Jersey, and that the workers there showed him Shimon's office. Further, that he observed many bulk-delivered products identical to those sold by PEI. In addition, PEI proffers the affidavit of Murray Pottruck, PEI's Chief Financial Officer, who states that sales from PEI customers, some of whom came to PEI when Shimon sold his business to PEI and some of whom have been recently acquired, have declined an average of 40 percent.

Shimon does not dispute that he is associated with Great Deal, nor does he dispute that he entered into the subject agreements. Rather, Shimon, as the initial movant, seeks a preliminary

injunction prohibiting PEI "from taking any action that would prevent, inhibit and/or otherwise impede Mr. Shimon's ability to obtain employment and/or engage in commerce in order to support himself and his family." It is Shimon's position that PEI has breached the relevant agreements thereby relieving him of further performance thereunder. In addition, Shimon argues that the Asset Purchase Agreement is unenforceable due to lack of consideration because he, as an individual, was not a party to the Asset Purchase Agreement. Further, that the non-compete clause is unenforceable due to overbreadth. Shimon relies primarily on the fact that the Employment Agreement contained only a two-year restrictive covenant to bolster his argument that the five-year restrictive covenant in the Asset Purchase Agreement is unreasonable.

Discussion

It is well established that covenants not to compete, which relate to the sale of a business and its accompanying good will, are accorded full enforcement when they are reasonable in scope and duration and are not unduly burdensome (*see Mohawk Maintenance Co. v Kessler*, 52 NY2d 276, 283-284 [1981]). "The covenant not to compete is designed to work in conjunction with the implied covenant of the seller to refrain from soliciting his former customers" and whether such a covenant is reasonable depends on the circumstances of each case (*Town Line Repairs, Inc. v Anderson*, 90 AD2d 517, 517 [2d Dept 1982]). "As a general rule, however, covenants not to compete pursuant to the sale of a business are not treated as strictly as those whose sole purpose is to limit employment" (*Id.* at 517-518). Moreover, "New York courts have found three to five year restrictions to be reasonable in the context of the sale of a business" (*Hakakian v Think Bronze, LLC*, 2010 N.Y. Misc. LEXIS 6513; 2010 NY Slip Op 33597(U), *7 [Nassau Cty 2010][*citing FTI Consulting Inc. v Price Waterhouse Coopers, LLP*, 8 AD3d 145 [1st Dept. 2004]]).

"To prevail on a motion for a preliminary injunction, the moving party must establish: (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the moving party's position" (*Reuschenberg v Town of Huntington*, 16 AD3d 568, 569 [2d Dept 2005]). Where a movant is seeking injunctive relief in a suit to enforce a restrictive covenant that was given ancillary to the sale of a business, courts have held that the movant need not demonstrate actual loss of customers since irreparable harm is presumed to have occurred upon the demonstration of a likelihood of success on the merits (*see Manhattan Real Estate Equities Group, LLC v Pine Equity*, 16 AD3d 292, 292 [1st Dept 2005]; *Frank May Assocs. v Boughton*, 281 AD2d 673, 674 [3d Dept 2001]).

Here, given the undisputed facts, the Court finds that PEI has established entitlement to the injunctive relief that it seeks. First, Shimon's contention that he is not bound by the Asset Purchase Agreement is without legal support and is otherwise without merit. Secondly, Shimon fails to

provide support for his argument that the geographic scope or duration of the subject restrictive covenant is overly broad. He fails to dispute that PEI's business extends into the six-state Territory. Accordingly, there is no basis to deem the subject restrictive covenant unenforceable. Conversely, Shimon's application for injunctive relief must fail.

Any issues regarding discovery shall be addressed at the upcoming compliance conference scheduled for February 1, 2017.

Based on the foregoing, it is hereby

ORDERED that Plaintiff Shimon's motion is denied; and it is further

ORDERED that Defendant/Third-Party Plaintiff PEI's cross-motion for a preliminary injunction is granted to the extent that Shimon, either directly or indirectly, individually or through any person or entity, is prohibited from soliciting or attempting to pursue, market or solicit the business of any of PEI's customers or prospective customers until August 27, 2017, and that this injunction may be modified by the Court at any time pending resolution of this case.

This constitutes the Decision and Order of this Court.

E N T E R,

Sylvia G. Ash, J.S.C.