

<b>A to Z Supplies, LLC v Orshitizer</b>
2018 NY Slip Op 32399(U)
August 20, 2018
Supreme Court, Queens County
Docket Number: 706029/2018
Judge: Leonard Livote
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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: Honorable Leonard Livote IAS TERM, PART 33
Acting Supreme Court Justice

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A to Z Supplies, LLC, Index No:706029/2018

Plaintiff,

-- against -- Motion Date: 06/19/18

Michael Orshitzer, Abraham Fischer,
And Qualmax Supplies, Inc.

Defendants. Seq No: 1

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The following papers numbered 1 to 9 read on this motion by
plaintiff, A to Z Supplies, LLC, for a preliminary injunction
enforcing a restrictive covenant in employment agreements.

Table with 2 columns: Document Description and PAPERS NUMBERED. Includes entries for Notice of Motion, Answering Affirmations, Reply Affirmations, and Other.

Upon the foregoing papers it is ordered that the motion is
denied as more fully set forth below.

I. The Allegations of the Complaint

On or about February 1, 2006 and September 1, 2008,
defendant Michael Orshitzer and defendant Abraham Fischer
respectively (collectively the defendant employees) entered into
Contract Sales Services Master Agreements with Miat, Inc. whereby
the defendant employees agreed to provide services to the
company. The contracts required the defendants to find new
customers for Miat, stay in contact with existing customers,
oversee their orders, and sell them new products. Miat gave the
defendant employees access to confidential information, trade
secrets, and marketing information. Pursuant to paragraph 10 of

their agreements, the defendant employees promised not to disclose the confidential information and trade secrets of Miat to anyone for three years after the termination of their agreements.

In or around November, 2017, Miat entered into unsuccessful negotiations for the sale of its customer list to defendant Qualmax, Inc., a supplier of products to nursing homes. On February 18, 2018, Miat and plaintiff AZ entered into a general bill of sale agreement (GBS) whereby the latter purchased the list of all of the former's customers and their contact information. Miat also purchased the restrictive covenants agreed to by defendant Orshitzer and defendant Fischer. Plaintiff AZ became the successor of Miat on or about February 18, 2018, and the restrictive covenants agreed to by the defendant employees were made binding upon the successors of Miat.

The defendant employees have contacted companies on Miat's customer list on behalf of defendant Qualmax. On or about February 27, 2018, plaintiff AZ notified the defendants that they were violating the restrictive covenants, but they did not cease their behavior.

## II. The Allegations Made By The Defendant Employees

The defendant employees worked for Miat, a company engaged in the sale of various products, including medical, kitchen, and housekeeping products, mainly to nursing homes for approximately ten years. They signed employment agreements which had converted from fixed term to month by month agreements. The employment agreements contained restrictive covenants that were operative during the term of the contracts and for a period of three years after their termination. The employment agreements also contained the following clause: "16. Assignment, The contract may not be assigned by either party in whole or in part without the prior written consent of the other party hereto except as specifically provided herein. The Contract may nonetheless be assigned by Miat, in its sole discretion, to any subsidiary or affiliate of Miat or to any successor of Miat either by merger or acquisition or substantially all of the assets of the business of Miat as a going concern." The restrictive covenant did not have a survivor clause which made it operative if Miat simply went out of business.

In early 2017, Joseph Wosner, the owner of Miat, tried to sell the business and its building together, but he eventually decided to sell the building separately. He did sell the building separately, and he then proceeded to liquidate the inventory.

Miat's attorney, Lawrence Rabin, Esq. and Barry Butensky, an employee of Miat, initially tried to help Wosner in the sale of the business, but Rabin and Butensky subsequently decided to organize their own company without informing Wosner. Rabin and Butensky organized plaintiff AZ, a Connecticut company. Wosner could not sell the business, and in December 2017, Miat stopped making sales. Wosner did not at the time inform Miat's customers and vendors that Miat had sold or assigned its business to anyone, and Wosner now takes the position that Miat survives as an active company. Although the defendant employees at first informed Butensky that they might work for him, they decided not to do so after he opened AZ in Connecticut, far from their homes. The defendant employees decided to work for defendant Qualmax, which was a well-established supplier of medical, janitorial, and housekeeping products to nursing homes. By December 2017, Butensky and Wosner knew that the defendant employees intended to work for defendant Qualmax, and in February 2018 they entered into the GBS.

Paragraph 1 of the GBS entered into by AZ and Miat provided: "[s]eller sells the goods (Goods) described here to buyer: The list of all customers of seller together with the contact information of the customers and the do not compete agreements with seller's former salespeople. Customers only, not suppliers." Paragraph 6 of the GBS provided: "[a]dditional terms of sale for Goods are as follows: Buyer agrees that Seller's principal, Joseph Wosner, has the right to contact people on the list for any business purposes provided Joseph Wosner is the sole owner of such business."

There is nothing confidential about Miat's customer list. The list is comprised of nothing more than a list of publicly known nursing facilities, and Butensky, a former employee of Miat, knew all about the customers before he established plaintiff AZ.

### III. Discussion

A party moving for a preliminary injunction has the burden of establishing by clear and convincing evidence (1) a likelihood of ultimate success on the merits; (2) irreparable injury if provisional relief is withheld; and (3) a weight of the equities in his favor. (*See, Doe v Axelrod*, 73 NY2d 748; *Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212). "To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts. Where the facts are in sharp dispute, a preliminary injunction

will not be granted." (*Related Properties, Inc. v. Town Bd. of Town/Vill. of Harrison*, 22 AD3d 587, 590 [citations omitted]; *Omakaze Sushi Rest., Inc. v. Ngan Kam Lee*, 57 AD3d 497. *Vega v. Golden*, 51 AD2d 540). Thus, in *Buchanan Capital Markets, LLC v. DeLucca* (144 AD3d 508, 508-09), a case where the plaintiff sought an injunction enforcing covenants not to compete in employment agreements between its predecessor and the defendants, the Appellate Division, First Department, held that "[t]he motion court did not improvidently exercise its discretion in denying the injunctive relief sought since the conflicting affidavits raise[d] sharp issues of fact" (Internal citations and quotation marks omitted).

In the case at bar, there is, at best for the plaintiff, a sharp issue of fact concerning whether Miat could assign the restrictive covenant to the plaintiff because the new company was a "successor of Miat \*\*\* by \*\*\* acquisition or substantially all of the assets of the business of Miat as a going concern." On the one hand, the plaintiff asserts that Miat's assets substantially consisted of its customer list, a confidential document intentionally withheld from its competitors, and its trademark "Rensow," both sold to the plaintiff. On the other hand, the defendants allege that signs of a successor such as "the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business" and "continuity of management, personnel, physical location, assets and general business operation" (*In re New York City Asbestos Litig.*, 15 AD3d 254, 256) are not present in this case.

There is also an issue of fact concerning whether the GBS was actually a sale of assets or just a scheme to prevent the defendant employees from working for a competitor. While the GBS purports to convey a confidential customer list from Miat to AZ, paragraph 6 of the GBS gives Wosner "the right to contact people of the list for any business purpose." Wosner is in effect allowed to open up a business in direct competition with AZ and to contact customers on the list purportedly sold to AZ.

There is also an issue of fact pertaining to whether Miat's customer list was a trade secret. On the one hand, the defendants allege that Miat sold ordinary medical, kitchen, and housekeeping supplies to nursing homes whose identity could be ascertained by opening the phone book. Customers bought products from more than one supplier, with price being the determinative factor. On the other hand, the plaintiff alleges that the customer list contains client's names, contact names, cell phone numbers, email addresses, discount rates, payment methods, and tax schedules and that much of this information, compiled over many years and not

available to the public. is useful in setting prices. "[A] trade secret must first of all be secret: whether it is, is generally a question of fact \*\*\*." (*Ashland Management Inc. v. Janien*, 82 NY2d 395, 407). "The question of whether or not a customer list is a trade secret is generally a question of fact \*\*\*" (*A.F.A. Tours, Inc. v. Whitchurch*, 937 F2d 82, 89). In the case at bar, there is an issue of fact pertaining to whether Miat's customer list is entitled to trade secret protection which precludes the issuance of a preliminary injunction (*See, Beach v. Touradji Capital Mgmt., LP, supra; Shannon Stables Holding Co. v. Bacon*, 135 AD2d 804).

Accordingly, the motion for a preliminary injunction is denied.

Dated: 8/20/18



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Leonard Livote, A.J.S.C.

**FILED**  
**AUG 28 2018**  
**COUNTY CLERK**  
**QUEENS COUNTY**