D&A Woodlands Enter., Inc. v Sinatra
2019 NY Slip Op 31533(U)
April 4, 2019
Supreme Court, Queens County
Docket Number: 718242/2018
Judge: Cheree A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No. 718242/2018
D&A WOODLANDS ENTERPRISE, INC.

Motion
Date: February 6, 2019

Plaintiff,

Motion Cal. No.:9

-against-

Motion Sequence No.: 1

GARY SINATRA,

Defendant.

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The following efile papers numbered 15-21, 24-45 submitted and considered on this motion by plaintiff D&A Woodlands Enterprise, Inc. seeking an Order pursuant to CPLR §6301 enjoining defendant from competing with D&A Woodlands Enterprise, Inc. in the powertool and equipment repair business, directly or indirectly, as agreed to in the July 31, 2017 contract of sale entered into by defendant Gary Sinatra and the plaintiff; and the cross-motion of defendant Gary Sinatra seeking an Order pursuant to CPLR 3211(a)(1) and (7) dismissing plaintiff's verified complaint or for summary judgment pursuant to CPLR 3212; or in the alternative for rescission of the non-compete provision of the subject contract between the parties or otherwise for a declaration of this Court declaring that the provision is unenforceable as illegal, oppressive, overbroad, or otherwise against New York State public policy; or severing so much of the non-compete Provision as is unenforceable and reforming the contract.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	EF 15-21
Cross-Motion-Affidavits-Exhibits.....	EF 24-44
Reply Affirmation-Affidavits-Exhibits.....	EF 45

This action arises from a contract executed by the parties. Plaintiff D&A Woodlands Enterprise, Inc. (hereinafter "Woodlands") and defendant Gary Sinatra (hereinafter "Sinatra") entered into a contract on or about July 31, 2017 wherein Sinatra sold his business to Woodlands. According to plaintiff, following the sale of the business to Woodlands in July 31, 2017, which included the restrictive non-compete agreement and the sale of the good will of the business, and

despite representing to Woodlands that the reason he wanted to sell the business was to retire, Sinatra continues to contact his former clients and continues to repair power tools, thereby directly competing with plaintiff and causing real damage to plaintiff's business. Woodlands seeks injunctive relief in order to mitigate and prevent further injury to its business. In support of the motion, Woodlands submitted the affidavit of its principal Daniel Gammino (hereinafter "Gammino").

Woodlands seeks an Order pursuant to CPLR §6301 enjoining defendant from competing with D&A Woodlands Enterprise, Inc. in the power tool and equipment repair business, directly or indirectly, as agreed to in the July 31, 2017 contract of sale. Sinatra cross-moved seeking an Order pursuant to CPLR 3211(a)(1) and (7) dismissing plaintiff's verified complaint or for summary judgment pursuant to CPLR 3212; or in the alternative for rescission of the non-compete provision of the subject contract between the parties or otherwise for a Declaration of this Court declaring that the provision is unenforceable as illegal, oppressive, over broad, or otherwise against New York State public policy; or severing so much of the Non-Compete Provision as is unenforceable and reforming the contract.

Sinatra was the owner of a business which engaged in the repair of power tools and equipment. The business had been in operation since 1998. On or about June 2016 Sinatra began soliciting purchasers to buy the power tool and equipment repair business so that he could retire. Woodlands approached Sinatra to discuss purchasing the business. On or about July 31, 2017 Woodlands and Sinatra entered into a Contract of Sale of Business and Rider, paying valuable consideration to Sinatra for the purpose of the business. The parties were both represented by counsel. At paragraph 30(f) of the agreement, pursuant to the terms of the business, the sale included, among other things, the "good will" of the business and the customer contacts of the business, and Sinatra's work for Woodlands for a one year period following the closing in order to effectuate the exchange of "Good Will being purchased in the agreement." Paragraph 30(b) of the agreement provided that "[i]t is expressly understood that the work performed by Seller [Defendant] shall be subject to and bound by the direction of Purchaser [Plaintiff]."

The Contract also contained a non-compete clause which stated the following at Paragraph 26:

> "Non-compete clause- It is expressly understood that this Agreement is premised upon Seller's desire to retire power tool and equipment repair business and cease working, except as set forth herein. Seller agrees that provided that Purchaser is in compliance with the terms of this Agreement, Seller shall not compete with Purchaser, directly or indirectly, by engaging in the power tool and equipment repair business as an owner, partner, member, associate, employee, consultant or in any other manner anywhere in Long Island (Nassau and Suffolk County), the Five Boroughs of New York City or Westchester County after the date of closing for a period of four (4) years.

Woodlands contends that during the one year period following the closing of the sale of the business, rather than working towards transferring the "Good Will" of the purchased business to Woodlands, Sinatra actively worked to keep the "Good Will" for himself personally. Despite the sale and agreeing not to compete with Woodlands, Sinatra continues to repair power tools and equipment and to sell those repaired power tools and equipment for his own benefit in violation of the parties agreement. Sinatra continues to solicit work with the customer base he sold to Woodlands in direct competition with Woodlands. Woodlands also claims that they were fraudulently induced into the agreement since Sinatra has not retired or stopped working in the power tool and equipment repair business.

Cross-Motion of Sinatra

Sinatra cross-moved seeking an Order pursuant to CPLR 3211(a)(1) and (7) dismissing plaintiff's verified complaint or for summary judgment pursuant to CPLR 3212; or in the alternative for rescission of the non-compete provision of the subject contract between the parties or otherwise for a declaration of this Court declaring that the provision is unenforceable as illegal, oppressive, overbroad, or otherwise against New York State public policy; or severing so much of the non-compete provision as is unenforceable and reforming the Contract.

As set forth in his annexed sworn affidavit dated December 28, 2018, Sinatra is a resident of Queens County. He owned a small tool and equipment repair business for many years known as Juniper Equipment Services, Inc. Tool and equipment repair is the only skill that Mr. Sinatra has by which he earns his living. In early 2016 intending to retire due to a physical injury, he sought potential buyers for his business. He stated that on July 31, 2017 he entered into a form contract drafted by plaintiff's attorney whereby he sold his business to plaintiff with Daniel Gammino as the principal of the plaintiff's business for the sum of $55,000.00, also selling the "good will" of the business, its "customer contacts," an its rights under any contract for telephone service. Plaintiff agreed to pay and did pay $40,000.00 at the signing of the contract and to make three future payments totaling $15,000.00. Contemporaneously with the execution of the form Contract the parties executed a Rider which contained a "non-compete" clause. Defendant 's interpretation was that it represented a complete prohibition on employment and it was conditioned on plaintiff being in compliance with all terms of the agreement. However, defendant maintained that plaintiff breached the agreement. The Rider contained a Labor Agreement where Sinatra was to work for plaintiff for a period of one year, for a minimum of twenty hours a week. Plaintiff agreed to divide net profits from the business equally during his period of employment. He began working for plaintiff on August 8, 2017, and the store had no heat, air conditioning or lights. The store could not process credit card payments. He never received any breakdown of profits and expenses in the business although he asked for same in August and September 2017. In essence, Sinatra maintained that plaintiff has violated the agreement based upon plaintiff's inaccurate accounting and the failure of him working for the minimum twenty hours a week as of October 30, 2017; his firing prior to the one year period of employment agreed upon in the Labor agreement; being told in December 2017 when the first of the three $5000.00 payments was due under the agreement that he in fact breached

the agreement (which was later resolved); plaintiff being evicted from the storefront and working at Mr. Gammino's home instead; Gammino's mismanagement of the business; that he did not receive any profits in December 2017 and February and March 2018; being accused of actively soliciting plaintiff's clients and breaching the contract; and, plaintiff prematurely terminating his employment on March 30, 2018. He claimed at no time did he actively solicit any of his former clients for contract work or a position. All of the aforementioned demonstrated his material breach of the agreement. Two affidavits of his prior clients were annexed to the cross-motion.

In response, plaintiff contended that Sinatra attempted to rewrite history and that he now claims hardship by not being able to obtain employment in the power tool repair business, when it was never his intention to continue working in the power tool and equipment business, but always his intention to retire, which is expressly stated in the Contract of Sale. Plaintiff would not have purchased the business from the defendant, since he represented to plaintiff that he intended to retire and cease working. Plaintiff claims that defendant has continued to operate the same business under a different name in direct competition with plaintiff. It is undisputed that defendant entered into the contract to sell the business and transfer the "good will" of the business to plaintiff, and that defendant agreed to include a non-compete clause into the contract which addressed the geographic area that his business conducted its business.

Discussion

CPLR §6301 provides the grounds for obtaining a preliminary injunction and temporary restraining Order:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in and action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

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CPLR §6313(a) provides the following:

> If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice. Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time.

The law is well settled that to prevail on an application for a preliminary injunction, the moving party must demonstrate (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors the movant (*see Chase Home Finance v Cartelli,* 140 AD3d 911 [2d Dept 2016]). The determination of whether to issue a preliminary injunction is left to the discretion of the Court (*see Doe v Axelrod,* 73 NY2d 748 [1988]. Thus, it is up to the Court to preserve, if necessary, the status quo until the merits of the case is determined (*Hoppman v Riverview Equities*, 16 AD2d 631 [1st Dept 1962]). Addressing the first prong, Woodlands has demonstrated that it will likely succeed on the merits of this action. Moving next to the second prong, Woodlands has demonstrated that without the preliminary injunction it will suffer irreparable injury to his reputation and business. Finally, under the third prong, Woodlands has shown that a balancing of the equities favors the Court granting the preliminary injunction in its favor. *(See Mohawk Maintenance Co. v Kessler*, 52 NY2d 276 [1981]; *Purchasing Assocs., Inc. v Weitz*, 13 NY2d 267 [1963]). The evidence of defendant's breach was of sufficient strength to warrant a finding that plaintiff was likely to succeed on the merits of its case, despite the triable issues raised by defendant in the cross-motion (*see Manhattan Real Estate Equities Group LLC v Pine Equity, NY, Inc.*, 16 AD3d 292 [1st Dept 2005]; *see also Mobstub, Inc.* v www.staytrendy.com, 153 AD3d 809 [2d Dept 2017]; *BDC Mgmt. Servs., LLC v Singer*, 144 AD3d 597 [1st Dept 2016]; *Lund v Agmata Washington Enter., Inc.*, 190 AD2d 577 [1st Dept 1993]

Under New York law, the Courts will fully enforce a restrictive covenant that is part of a contract for the sale of a business and its accompanying good will, however the express covenants restricting competition must be reasonable in scope (*see Mohawk Maintenance Co. v Kessler*, 52 NY2d 276 (1981).

In the case *Mohawk Maintenance Co. v Kessler*, 52 NY2d 276 (1981) the Court of Appeals held that a seller of a business has a legal duty to refrain indefinitely from acting to impair the "good will" transferred in connection with the sale of a business, stating the following:

> A purchaser who acquires the "good will" of a business pays good and valuable consideration for the seller's implied promise to do everything within his power to transfer the loyalties of his customers to the new proprietor. At the very least, the purchaser obtains the exclusive right, as between himself and the seller, to exploit the established loyalties of the firm's customers for the benefit of his newly acquired business. The

> expectation in the purchaser that arises as a result of the transaction is clearly a vested property right of indefinite duration (*see* 14 Williston, Contracts [3d ed], § 1640, at pp 118-119, n 6.) It would make no more sense to hold that the seller may attempt to defeat this right by soliciting his former customers after the passage of a "reasonable" period of time than it would to hold that the seller of a business may re-enter and attempt to retake the premises and tangible assets of the firm after a "reasonable" time has expired.

In the case *BDO Seidman v Hirshberg*, 93 NY2d 382 [1999] the reasonableness standard for the enforceability of noncompete agreements was stated "[a] restraint is only reasonable if it: (1) is no greater than is required for the protection of the legitimate interest of the employer; (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." An employer has a legitimate interest "in preventing a former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment" (*Id*). (*See also Natural Organics, Inc. v Kirkendall*, 52 AD3d 488 [2d Dept 2008]). The seller of good will has an implied covenant or duty to refrain from contacting former customers and soliciting their business (*see Bessemer Trust Co.. N.A. v Branin*, 16 NY3d 549 [2011]; *see also Hyde Park Products Corp. v Maximilian Lerner Corp.*, 65 NY2d 316 [1985]; *Von Bremen v MacMonnies et al.*, 200 NY 41 [1910]). "When the good will of a business is sold, irrespective of any term in the contract, the seller is prevented by an implied covenant from depreciating the value of the goodwill by approaching his former customers and attempting to regain the patronage" (*see CSI Group, LLP v Harper*, 153 AD3d 1314 [2d Dept 2017]).

In the matter *Purchasing Assocs., Inc. v Weitz*, 13 NY2d 267 [1963], the Court of Appeals held that a covenant in an employment contract that an employee would not compete with an employer in the data processing business within 300-mile radius of New York City for two years after the termination of employment was not enforceable in the absence of proof that the restrictive covenant was entered into as incident to the sale of business involving the transfer of good will, or that the employee's services were in any way unique.

The defendant's reliance upon cases which he cited, *Oak Orchard Community Health Ctr. v Blasco*, 8 Misc3d. 927, 2005 NY Slip Op 25221 (Supreme County, Monroe County 2005) and *HD Smith Wholesale Drug Co. v Mittlemark*, 33 Misc.3d 1227(A), 2011 NY Slip Op 52129(U) (Supreme Court, New York County 2011) is misplaced. The cases involved a non-compete clause executed through the sale of the "good will" and customer contacts of the business, however the cases did not involve a non-compete clause from a defendant who specifically represented his intention to retire and cease working in the field. Defendant also relied upon the case *Cliff v R.R.S. Inc.*, 207 AD2d 17 (3d Dept. 1994). This case does not deal with a restrictive covenant in a contract based upon the sale of goodwill leading to an implied covenant which is not limited in duration, an express covenant not to compete arising from the sale of a business or a restrictive covenant based upon an employment agreement. The case also relied upon *Alexander & Alexander Servs.. Inc. v Maloof*, 105 AD2d 1066 (4th Dept 1984), since over five years had elapsed since the sale of the business and one

of the covenants in the agreement between the parties had already lapsed. "As a general rule, rescission of contract is permitted for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but... only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract" (*See RR Chester. LLC v Arlington Bldg. Corp.*, 22 AD3d 652 [2d Dept 2005] *citing Callanan v Powers et al*, 199 NY268 [1910] [internal citation omitted].) Here the covenant not to compete was ancillary to the buy and sell agreement and not to employment contract (*see Krafi Agency, Inc. v Delmonico*, 110 AD2d 177 [4th Dept 1985]; *see also Slomin's Inc. v Gray*, 176 AD2d 934 [2d Dept 1991]).

Thus, if the Court were to grant the preliminary injunction, it would be merely enforcing the plain and unambiguous language as set forth in the parties Contract of Sale.

Defendant's cross-motion to dismiss CPLR 3211(a)(1) and (7)

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Teitler v Pollack & Sons*, 288 AD2d 302 [2d 2001]; *see also Held v Kaufman*, 91 NY2d 425 [1998]; *Hoeg Corp. v Peebles Corp*, 153 AD3d 607 [2d Dept 2017]). "To qualify as documentary evidence, the evidence 'must be unambiguous and of undisputed authenticity' " (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable,' qualify as documentary evidence in proper cases..." (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017]). Dismissal is warranted under CPLR 3211 (a) (7) if the facts alleged in the complaint do not fit within any cognizable legal theory (*see generally Hecht v Andover Assocs. Mgmt. Corp., etal.*, 114 AD3d 638 [2d Dept 2014]; *G.L. v Markowitz*, 101AD3d 821 [2d Dept 2012]; *Salvatore v Bd. of Educ. of Mineloa Union Free School Dist.*, 89 AD3d 1078 [2d Dept 2011];*Treeline I OCR, LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748 [2d Dept 2011]). "If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail" (*Cooper v 620 Prop. Assocs*, 242 AD2d 359 [1997]). "On a motion to dismiss pursuant to CPLR 3211(a)(7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the [plaintiff] must be accorded the benefit of every favorable inference" (*Leon v Martinez*, 84 NY2d 83 [1994]; *see also Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]). "A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense as a matter of law...[i]n order for evidence to qualify as documentary it must be unambiguous, authentic and undeniable." (*See Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010] [internal citations omitted].) "Under CPLR 3211 a trial court may use affidavits in its consideration of a pleading" (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]). Letters are not considered documentary evidence (*see Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]; *see also Anderson v Armentano*, 139 AD3d 769 [2d Dept 2016]). On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be

afforded a liberal construction, the facts therein must be accepted as true, and the [plaintiff] must be accorded the benefit of every favorable inference" (*Leon v Martinez*, 84 NY2d 83 [1994]; *see also Goshen v Mut. Life Ins. Co.*, 98 NY2d 314 [2002]; *Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]). In consideration of a motion under CPLR 3211(a)(7) "the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Sokol v Leader*, 74 AD3d 1180 [2010]).

Here, the Court finds no basis to grant the motion to dismiss, therefore the defendant's cross-motion must be denied in its entirety.

This Court finds that plaintiff D&A Woodlands Enterprise Inc. has demonstrated its entitlement to injunctive relief under all three aforementioned prongs and that the equities balance in its favor of maintaining the status quo until this matter is resolved. Pursuant to CPLR 6312 (b) the Court may fix an undertaking in an amount that will compensate the plaintiff for damages incurred by reason of the injunction in the event that it is determined that the defendant was not entitled to the injunction. The fixing of the amount of an undertaking is a matter resting within the discretion of the Court (*Clover Street Assocs v Nilsson*, 244 AD2d 312 [2d Dept 1997]). Therefore, it is

ORDERED, that the plaintiff's motion seeking for a preliminary injunction is granted; and it is further

ORDERED, that defendant is prohibited from competing with D&A Woodlands Enterprise, Inc. in the power tool and equipment repair business, directly or indirectly, as agreed to in the July 31, 2017 contract of sale; and it is further

ORDERED, that the plaintiff shall post a bond in an amount to be determined upon the serving and filing of a motion by plaintiff to fix the bond amount pursuant to CPLR 6312 (b) within fifteen (15) days of notice of entry of this decision. Defendant may submit his position on the amount of the bond in the form of opposition or a cross motion. Alternatively, the parties may stipulate to the waiver of a bond or as to the amount and nature of the bond. The undertaking shall be in the form of surety, deposited with the Queens County Clerk or in a joint interest bearing escrow account, and it is further

ORDERED, that defendant's cross-motion is denied in its entirety; and it is further

ORDERED, that the movant shall serve a copy of this Order within 20 days of the date of this Order.

This constitutes the decision and Order of the Court.

Dated: April 4, 2019

Hon. Chereé A. Buggs, JSC