

R&G Brenner Income Tax Consultants v Gilmartin
2019 NY Slip Op 32124(U)
May 24, 2019
Supreme Court, Nassau County
Docket Number: 016901/11
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

R&G BRENNER INCOME TAX
CONSULTANTS,

Plaintiff,

INDEX No. 016901/11

MOTION DATE: April 18, 2012
Motion Sequence # 002

-against-

RICHARD GILMARTIN,

Defendant.

The following papers read on this motion:

- Notice of Motion..... X
- Affidavit in Support..... X
- Affidavit in Opposition..... X
- Affirmation in Further Support & Reply.... X

Motion by plaintiff R & G Brenner Income Tax Consultants for an order holding defendant in contempt for violation of the preliminary injunction is **denied**.

This is an action against a tax accountant to enforce a covenant not-to-compete. Plaintiff R & G Brenner Income Tax Consultants is engaged in the business of preparing tax returns, financial planning, and other services. R & G Brenner's principal office is in Valley Stream, and it maintains approximately 30 other offices in the New York City area.

Defendant Richard Gilmartin worked for R & G Brenner as a tax return preparer from January 2006 through November 9, 2011. Gilmartin is a CPA, and his practice included

representing Brenner clients at IRS audits. Brenner requires its tax preparers to sign an annual "General Employee Tax Preparation Agreement," setting forth their terms and conditions of employment. In addition to the tax preparation agreement, Brenner requires its employees to sign a "confidentiality non-solicit and non-compete agreement," promising not to "solicit, contact, [or] meet with" any Brenner client for a period of two years after the termination of his employment. Gilmartin resigned from R & G Brenner on November 9, 2011.

This action was commenced on December 2, 2011. R & G Brenner alleges that prior to his departure Gilmartin downloaded confidential, proprietary information from Brenner's computer system, including presumably contact information for Brenner clients. Plaintiff seeks a declaratory judgment that Gilmartin breached the restrictive covenant in the general tax preparation agreement and also a permanent injunction restraining Gilmartin from further breaches and "otherwise competing" with Brenner.

On February 21, 2012, the court issued a preliminary injunction enjoining defendant Gilmartin from soliciting any former R & G Brenner client who did not have an IRS audit pending. Additionally, defendant was restrained from keeping or maintaining any R & G Brenner business records, except to the extent necessary to defend pending IRS audits with respect to former R & G Brenner clients.

By notice of motion dated March 22, 2012, plaintiff moves to hold defendant in contempt of court for violating the preliminary injunction. Plaintiff alleges that defendant violated the injunction by soliciting nine former clients who do not have IRS audits pending. In opposition, defendant asserts that the preliminary injunction does not prohibit him from contact with clients loyal to him, as long as there is no solicitation.

Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate (*McCain v Dinkins*, 84 NY2d 216, 226 [1994]). Civil contempt must be proven by clear and convincing evidence and requires a showing that the rights of a party have been prejudiced (*Town Bd v R.K.B. Realty*, 936 NYS 2d 228 [2d Dept 2012]). The benefits of the preliminary injunction issued by the court is that plaintiff should not lose accounting fees as a result of defendant's solicitation of plaintiff's clients.

Plaintiff alleges that defendant solicited Julie Schwartzman-Morris by calling her on her cell phone on March 17, 2012 and making disparaging remarks about R & G Brenner. However, it appears that defendant was not successful in obtaining Ms. Schwartzman-Morris as a client. Thus, while a solicitation occurred, defendant's contact with Schwartzman-Morris does not warrant a contempt finding.

Plaintiff alleges that Jisook Lee called R & G Brenner and asked to make an appointment. However, after being advised that Gilmartin was no longer with the firm, Lee stated that she thought she was calling Gilmartin's new office and hung up the phone. Contrary to plaintiff's argument, the phone call from Jisook Lee is not clear and convincing evidence of solicitation. Plaintiff's request for a contempt finding based upon solicitation of Julie Schwartzman-Morris and Jisook Lee is denied.

Plaintiff alleges that defendant sent an email to Steven Singh on March 16, 2012, inquiring whether he wished to schedule a meeting. Clearly, a solicitation of Singh occurred in violation of the court's order. However, plaintiff has not established that defendant was successful in obtaining Singh as a client. Accordingly, plaintiff's request for a contempt finding based upon solicitation of Steven Singh is denied, with leave to renew upon the trial of the action and with leave to assert a claim for disgorgement of any fees earned by defendant from that client.

Plaintiff alleges that Gilmartin violated the preliminary injunction by soliciting Sandra Stone Nolan, James Desanti, and Gregory Larsen. The court concludes that there is insufficient evidence as to solicitation of Desanti and Larsen. Although there appears to have been a solicitation of Nolan, she contacted plaintiff to obtain a copy of her tax return for a refinancing. Thus, plaintiff has not established that defendant obtained Nolan as a client. Plaintiff's request for a contempt finding based upon solicitation of Sandra Stone Nolan is denied, with leave to renew upon the trial of the action and with leave to assert a claim for disgorgement of any fees earned by defendant from that client.

Plaintiff has established that Leslie Morgan, a client of plaintiff since 2004, used defendant to prepare her tax return. However, plaintiff has not established that defendant solicited Leslie Morgan. Plaintiff's request for a contempt finding based on solicitation of Leslie Morgan is denied, with leave to renew upon the trial of the action and with leave to assert a claim for disgorgement of any fees earned by defendant from that client.

Plaintiff has not established that defendant solicited Jin Oh. Rather, it appears based on the email from Oh that he was a loyal client of defendant. Plaintiff's request for a contempt finding based upon defendant's solicitation of Jin Oh is denied.

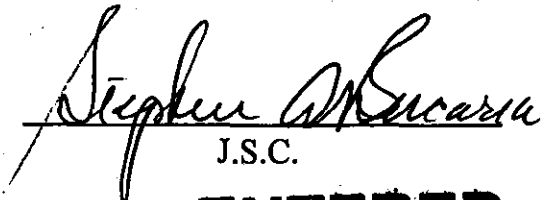
Plaintiff has established that defendant solicited Amira Dickinson in violation of the court's order. However, it is clear that Dickinson was dissatisfied with defendant's tax work and he did not perform any further work for the client. Plaintiff's request for a contempt finding based upon defendant's solicitation of Amira Dickinson is denied.

Plaintiff has not established that defendant solicited Steven Stano. Rather, it appears based on the email from Stano that he was a loyal client of defendant. Plaintiff's request for a contempt finding based upon defendant's solicitation of Steven Stano is denied.

Plaintiff has established that Arthur Bernal, a client of plaintiff since 2003, used defendant to prepare his tax return. However, plaintiff has not established that defendant solicited Bernal. Plaintiff's request for a contempt finding based on solicitation of Arthur Bernal is denied, with leave to renew upon the trial of the action and with leave to assert a claim for disgorgement of any fees earned by defendant from that client.

So ordered.

Dated MAY 24 2012


J.S.C.

ENTERED
MAY 29 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE