Trrigr LLC v Kerriz Inc.
2020 NY Slip Op 31047(U)
April 24, 2020
Supreme Court, New York County
Docket Number: 650567/2017
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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TRRIGR LLC,

Plaintiff,

- v -

KERRIZ INC., KERRIANN SCOTT

Defendant.

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INDEX NO. 650567/2017

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the defendants' motion to preclude and for summary judgment is denied.

RELEVANT FACTUAL BACKGROUND

The full facts of this matter are stated in prior decisions this court on motions to (i) dismiss (mtn. seq. no. 001) and (ii) for summary judgment in this action (mtn. seq. no. 002) (NYSCEF Doc. Nos. 15, 48). Briefly, the dispute arises out of the sale of a dry cleaning business (the **Business**) by Trrigr LLC (**Trrigr**) to Kerriz Inc. (**Kerriz**). Trrigr previously operated the Business as Kae Lee Cleaners, but decided to change its focus to supplying an integrated platform for customers to place dry-cleaning orders through a mobile application (the **Trrigr App**), which connects dry cleaners with customers to provide dry cleaning services to said customers.

Reference is made to a certain Asset Purchase Agreement (the **APA**) dated February 1, 2016 by and between Kerriz as buyer and Trrigr as seller pursuant to which Kerriz purchased "all of seller's rights, title, and interest in, rights and business, and to all assets of seller's accounts" for the Business for $67,000 (NYSCEF Doc. No. 70). The "seller's accounts" included its customers, totally approximately 1,555 customers in the point of sale system (**POS**), at least 381 of whom were already doing business with Trrigr through the App. The APA contained the following non-solicitation clause (the **Non-Solicitation Provision**):

> 26. NON-SOLICITATION
>
> Buyer agrees that for two (2) years after the date of this Agreement (such period is referred to as the "Restricted Period"), buyer shall not solicit or attempt to solicit the business of any customers or customers of the Seller with respect to Services that the Seller performs for such customers or customers. Buyer agrees that it will not directly or indirectly persuade or attempt to persuade any person or entity which is or was a customer or client of Seller to cease doing business with Seller or reduce the amount of business it does with Seller. The Provisions of this Section shall survive the termination of this Agreement. Buyer agrees that any breach of this Section would cause irreparable harm to Seller and that money damages would not provide an adequate remedy to Buyer.

(*id.*).

The APA also included a liquidated damages provision (the **Liquidated Damages Provision**), which provides for liquidated damages in the event of a "material breach" of the Non-Solicitation Provision of "$10,000 for each breach and/or customer or client" (*id.*, § 28).

Triggr alleges that shortly after the parties executed the APA, Kerriz began soliciting Trrigr customers by mass text message and email, including the 381 customers who were doing business on the App, and encouraging them to place orders directly through Kerriz's website, which was powered by Trrigr's competitor, Delivery.com, rather than through the App. In this

action, Trrigr seeks "no less that $40,000 and up to $3,810,000" pursuant to the APA's Liquidated Damages Provision.

Previously, before discovery was completed, Trriggr had moved for summary judgment on its claims for (i) breach of contract and (ii) tortious interference with business relations. The court (Schecter, J.) granted Trrigr summary judgment on the tortious interference with business relations cause of action, but denied the motion with respect to the cause of action for breach of contract, finding that, "questions of fact relating to the meaning and scope of the non-solicitation provision preclude summary judgment"[1] (NYSCEF Doc. No. 48 at 7). The court explained that it is "unclear what type of solicitation the parties intended to prohibit" and, as a result, Trrigr has not established that "the breaches it alleges necessarily fall within the scope of the [Non-Solicitation] provision" (*id.* at 6). By way of example, the court pointed to the fact that Kerriz allegedly solicited customers by texting them to "stop by or call" and mention the text to get $10 off an order; the court found it "unclear" that such conduct constitutes a breach of the Non-Solicitation Provision. In addition, the court held that even if Kerriz may have breached the Non-Solicitation Provision, Trrigr failed to demonstrated that the Liquidated Damages Provision is enforceable:

> Specifically, it has not shown that the amount fixed by the parties is not a penalty "plainly or grossly disproportionate to the probably loss" (*see BDO Seidman v Hirschberg*, 93 NY2d 382, 396 [1999]. The clause contemplates at least $10,000 award even if none of Trrigr's customers actually ceased or reduced doing business with Trrigr. The court is not convinced, moreover, that damages would be hard to ascertain here when dealing with a limited universe of 381 App customers. The customers could easily figure out which of those 381 customers, if any, placed orders in response to Kerriz'[s] solicitations and Trrigr could be awarded damages in the amount that it would have profited from those orders

[1] Other causes of action were previously dismissed, along with the individual defendant, Ms. Scott (NYSCEF Doc. No. 15).

> had they been placed through the App. To the extent that some of the 381 customers may have stopped using the App altogether based on Kerriz'[s] solicitation (a fact that remains unproven), Trrigr's damages could be based on the continuing business those particular customers have done from the date of the alleged breach until the two-year period ended.

(*id.* at 6-7).

In now moving for summary judgment, Kerriz argues that even if it contacted the 381 customers who had also used the Trrigr App, it had the right to do so pursuant to the APA because it purchased the right to do whatever Trriggr, itself, was doing prior to the transfer of the Business, including the right to contact and market to its own customers. In addition, Kerriz argues that, "the non-solicitation clause is vague, overbroad and ambiguous because it contradicts" the terms of the APA "regarding the use and enjoyment of the assets and business being transferred," which Kerriz paid $67,000 to use and enjoy (NYSCEF Doc. No. 108 at 6).

DISCUSSION

It is well settled that on a motion for summary judgment, the court may decide only matters of law. Where a defendant has moved for summary judgment and a plaintiff opposes the same, the court must accept the pleadings as true and the decision must be made on the "version of facts most favorable" to the plaintiff (*McLaughlin v Thaima Realty Corp.*, 161 AD2d 383). The proponent of a summary judgment motion has the initial burden of tendering proof in admissible form sufficient to establish his entitlement to summary judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden then shifts to the opposing party to demonstrate the existence of a genuine issue of material fact only when the movant meets its initial burden. A movant cannot meet his initial burden by simply pointing to gaps in the other

side's evidence (*George Larkin Trucking Co. v Lisbon Tire Mart, Inc.* [185 AD2d 614, 615 [4th Dept 1992]).

Though the facts of this action are relatively straightforward, this action is unusual in that the Non-Solicitation Provision here is intended to prevent the ***buyer*** from contacting the seller's customers and, thus, from competing with the ***seller***. Typically, it is the other way around, i.e., it is the buyer of the business who wishes to prevent the seller as the former owner from competing with the buyer. Generally, covenants not to compete that are incident to the sale of a business are liberally enforced "on the premise that the buyer of a business should be permitted to restrict his seller's freedom of trade so as to prevent the latter from recapturing and utilizing, by his competition, the good will of the very business which he transferred for value" (*Purchasing Assocs., Inc. v Weitz*, 13 NY 2d 267, 271 [1963]). This rationale does not necessarily apply here, however, where the ***buyer***, Kerris, agreed that it "shall not solicit or attempt to solicit the business of any customers or customers of the Seller with respect to Services that the Seller performs for such customers or customers" and further agreed that, "it will not directly or indirectly persuade or attempt to persuade any person or entity which is or was a customer or client of Seller to cease doing business with Seller or reduce the amount of business it does with Seller."

Extrinsic evidence of parties' intent with respect to a contractual provision may only be considered if the contract is ambiguous, which is an issue of law in the first instance (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). A contract is deemed "unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in

the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*id.*, [internal quotation omitted]).

Here, as set forth above, it is Kerriz that argues that the Non-Solicitation clause is too "ambiguous" (NYSCEF Doc. No. 108 at 6). The court agrees, as "[g]iven the ambiguity" in what was prohibited by the Non-Solicitation provision, and whether it was intended to apply to text messages to existing customers, there are "issues of fact as to the specific conduct [Kerriz] was prohibited from engaging in and whether [its] conduct was impermissibly competitive or *de minimus"* (*SSM Consulting LLC v CTI Teksource LLC* [112 AD3d 437,428 [1st Dept 2013]). Given that Trrigr also vigorously opposes the motion for summary judgment, the motion is, therefore, denied.

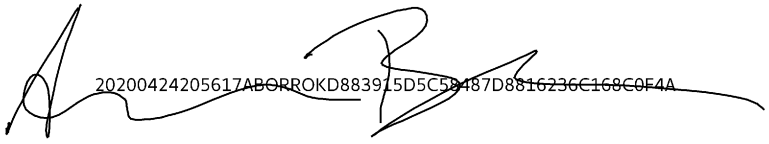
Turning to the motion to preclude, Kerris also seeks to preclude Trrigr from introducing any new evidence concerning Kerriz's contact with 381 customers allegedly contacted by Kerris in violation of the Non-Solicitation Provision. It is unclear what specifically Kerris seeks to preclude that has not already been produced by Trrigr. Trrigr attaches its customer list, which its counsel affirms was provided to Kerris's counsel, together with the texts and emails sent by Kerris to customers, in opposition (see NYSCEF Doc. Nos. 84, ¶ 11; 94; 88-92). Kerris does not address this aspect of its motion in its reply or otherwise respond to what Trriggr produced in any fashion (*see* NYSCEF Doc. No. 108). Note of issue was filed in this action on August 13, 2019. Discovery is now closed. The motion to preclude is denied with respect to anything already produced by Trrigr.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is denied, and it is is further

ORDERED that the motion to preclude is denied; and it is further

ORDERED that the Clerk of Trial Support is directed to place this matter on the Part 40 Trial Calendar for the earliest possible trial date.



4/24/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE