

<b>NYC Med. Practice PC v Kalsow</b>
2020 NY Slip Op 32784(U)
August 24, 2020
Supreme Court, Kings County
Docket Number: 512047/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8  
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NYC MEDICAL PRACTICE PC d/b/a GOALS  
AESTHETICS AND PLASTIC SURGERY,  
Petitioner, Decision and order  
  
- against - Index No. 512047/20

SERGEI KALSOW ET AL,  
Respondent, August 25, 2020  
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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to enjoin the defendant from utilizing certain websites in violation of a non-solicitation agreement. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On August 28, 2018 the plaintiff and defendant entered into an agreement whereby the defendant would perform as a surgeon at the plaintiff's facility. The agreement provides that for two years after the termination of the agreement the defendant may not solicit or attempt to solicit any business from any of the plaintiff's customers or potential customers. The plaintiff alleges that defendant created a website which when accessed or searched for creates the appearance that he still works for the plaintiff thus violating the non-solicitation agreement. The plaintiff seeks an injunction preventing the defendant from continuing the operation of the website or search protocols which lead to such solicitation.

Conclusions of Law

In relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v.

Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016])). In this case the basis for the injunction is the fact the defendant has violated the non-solicitation agreement. In Bessemer Trust Company N.A. v. Branin, 16 NY3d 549, 925 NYS2d 371 [2011] the court held that implied solicitation in this context means 'actively' soliciting business. In USI Insurance Services LLC v. Miner, 801 F.Supp2d 175 [S.D.N.Y. 2011] the court reasoned the same standard applies to express non-solicitation agreements. Thus, advertising to the general public is not solicitation and likewise competition is proper provided there is no active solicitation.

There is no evidence supporting the allegation the defendant actually solicited any of the plaintiff's customers or potential customers. Rather, the plaintiff argues the defendant established a website, dr.kalsow.com and that the defendant is soliciting clients utilizing that website. Clearly, the domain name of that website which only comprises the name of the defendant cannot be considered solicitation. The plaintiff asserts that a Google search of Dr. Kalsow will likewise leave the impression that Kalsow still works for the plaintiff, thereby improperly soliciting clients from them. However, Dr. Kalsow maintains his own website which upon review reveals that it does not mention the plaintiff at all. Further, a search of r. Kalsow does not yield any connection between the two. Thus, there can really be no question that no such improper solicitation is taking place. Therefore, the


plaintiff cannot establish a likelihood of success on the merits.

Consequently, the motion seeking a preliminary injunction is denied.

So ordered.

ENTER:

DATED: August 24, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC