

<b>Noble Desktop NYC, LLC v American Graphics Inst., LLC</b>
2021 NY Slip Op 30377(U)
February 5, 2021
Supreme Court, New York County
Docket Number: 656677/2020
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

NOBLE DESKTOP NYC, LLC, Plaintiff, INDEX NO. 656677/2020, MOTION DATE 02/01/2021, MOTION SEQ. NO. 001

- v -

AMERICAN GRAPHICS INSTITUTE, LLC, CHRISTOPHER SMITH, ABC COMPANIES, and JOHN DOES,

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for INJUNCTION

ORDER

Upon the foregoing documents,

It appearing to this Court that a cause of action exists in favor of the plaintiff and against the defendant American Graphics Institute, LLC, and that the plaintiff is entitled to a preliminary injunction on the ground that such 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, and the plaintiff has demanded and would be entitled to a judgment restraining such 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, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in the sum of \$ TO BE DETERMINED at an EVIDENTIARY HEARING and conditioned upon plaintiff posting, with the County Clerk of this Court, such undertaking that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendant all damages and costs, which may be sustained by reason of this injunction; and it is further

ORDERED that defendant American Graphics Institute, LLC, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of such defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

Running any classes or providing any services that qualify as a "New York Business" to clients in the "New York Territory" or to individuals resident in the "New York Territory" as those terms are defined in the May 1, 2020 Purchase Agreement, herein, and

Running any advertisements on its website that markets classes or services described above;

and it is further

ORDERED that on March 5, 2021, the parties shall appear for an evidentiary hearing via Microsoft Teams, at which testimony

will be taken, and documents admitted for a determination of the issue of the reasonable amount of undertaking that plaintiff shall post as a condition of the preliminary injunction, upon submission by any counsel of the standard form request for conference at [59nyef@nycourts.gov](mailto:59nyef@nycourts.gov) no more than five days and no less than two days before such hearing date; and it is further

ORDERED that counsel are directed to submit to [59nyef@nycourts.gov](mailto:59nyef@nycourts.gov) and file with NYSCEF a preliminary conference order or a counter preliminary conference order on March 19, 2021.

#### DECISION

To the extent that plaintiff seeks a preliminary injunction that restrains defendants from violating the Purchase Agreement, such relief is unavailable as it would effectively grant plaintiff the ultimate relief. See Moltisanti v East River Housing Corp, 149 AD3d 530, 531 (1<sup>st</sup> Dept. 2017).

With respect to the electronic message dated January 25, 2021 from plaintiff to defendant concerning defendant's alleged wrongful solicitation of an independent contractor, the court notes that such evidence did not exist at the time of the filing of the herein show cause order, and is introduced for the first time in reply. In any event, plaintiff submits, in reply, the copy of its contract with such contractor dated June 16, 2020. Such contract contradicts plaintiff's contention that, in

contravention of 4.5 of the Purchase Agreement, captioned "Non-Solicitation", defendant induced such contractor to terminate his employment or contracting relationship with plaintiff. Nor does plaintiff contradict the evidence in the record that defendant's employment of or business relationship with such contractor predated the Purchase Agreement and continued thereafter. Therefore, with respect to its claim that defendant breached the "non solicitation" clause of the Purchase Agreement by inducing such contractor to terminate his contract with the plaintiff or to enter into a contract with defendant, plaintiff has not demonstrated a likelihood of success on the merits.

However, this court finds that, pending the resolution of this action, plaintiff has demonstrated entitlement to a preliminary injunction that enjoins defendant American Graphics Institute, LLC, from any further breach of the covenant not to "directly or indirectly, engage in any business that is substantially similar to or directly competitive with the [plaintiff's] current or future business (including New York Business) in the New York Territory", as defendant promised under 4.5 of the Purchase Agreement.

As the covenant met the standard of reasonableness, plaintiff established a likelihood of success on the merits. Further, as the claim is based on the sale of a business and accompanying good will, irreparable injuries were established without the necessity of showing actual loss of customers. Defendants also failed to prove laches by a showing of unreasonable and

inexcusable delay by plaintiff resulting in prejudice to defendant[] creating an equitable estoppel.\*\*\*There is no showing that defendant changed its position as a result of any delay.

Hay Group, Inc v Nadel, 170 AD2d 398, 399-400 (1<sup>st</sup> Dept 1991)

(citations omitted).

CPLR 6312(b) requires that the plaintiff give an undertaking in an amount to be fixed by the court (see Confidential Brokerage Services, Inc. v Confidential Planning Corp, 85 AD3d 1268, 1270 [3d Dept 2011]), which "must be 'rationally related to defendant['s] potential damages should the preliminary injunction later prove to have been unwarranted'" (Suttongate Holdings Limited v Laconm Management NV, 159 AD3d 514, 515 [1<sup>st</sup> Dept 2018]). As neither party has offered any evidence with respect to that issue, an evidentiary hearing is warranted.

2/5/2021  
DATE

Debra A. James  
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE