

Tri State Commercial Realty Servs. LLC v Akibeh

2025 NY Slip Op 33686(U)

September 16, 2025

Supreme Court, Kings County

Docket Number: Index No. 524839/2025

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the day of September 2025.

SEP 16 2025

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

**DECISION
and
ORDER**

-----X
TRI STATE COMMERCIAL REALTY SERVICES LLC,

Plaintiff,

-against-

Index No.: 524839/2025

AVI AKIBEH, MOSHE AKIBEH, and ELY AKIBEH,

Mot. Seq. No.: 1

Defendants.
-----X

The following papers were read on this motion pursuant to CPLR 2219(a), in addition to exhibits admitted and testimony received in evidence at a preliminary injunction hearing:

<u>Papers</u>	NYSCEF DOC. #
Notice of Motion/Affidavits/Affirmations/Exhibits.....	12, 3-8
Answering Affirmation//Exhibit.....	19-24
Reply Affirmation.....	
Other.....	

MONTELIONE, RICHARD J., J.

This action was commenced on July 24, 2025, by filing the summons and complaint which alleges that defendants, former employees of plaintiff Tri State Commercial Realty Services LLC (Tri State) breached the non-solicitation, non-competition, and confidentiality provisions of an employment contract between the parties when they separated from employment on July 21, 2025. The affidavit of service of the summons and complaint was filed on August 3, 2025, and the last day to serve an answer was August 25, 2025. Defendants filed their answer on September 2, 2025 (NYSCEF #38), eight days late, which was rejected by the plaintiff (NYSCEF #39).

By Order to Show Cause issued on July 24, 2025 (NYSCEF #12), plaintiff moved pursuant to CPLR 6301 and obtained a Temporary Restraining Order 1) enjoining defendants from (i) speaking to or soliciting plaintiff's existing or prospective clients for a period of 12

Tri State Commercial Realty Services LLC v. Avi Akibeh, Moshe Akibeh, and Ely Akibeh,
Index No. 524839/2025

months, (ii) speaking with, or soliciting, plaintiff's current and former employees for a period of 12 months, (iii) using plaintiff's confidential and proprietary information for the benefit of defendants, (iv) disclosing plaintiff's confidential and proprietary information to third parties, (v) making false representations concerning plaintiff to its' present and prospective clients, and (vi) breaching defendants' contractual obligations regarding non-solicitation, non-compete, confidentiality, and post-employment obligations. The defendants opposed the motion and claim that the contract involving defendant Avi Akibeh expired on December 31, 2022, that he was not an employee because he was never paid a salary, benefits, or withholdings promised under the agreement. Defendant Avi Akibeh's contract provides non-compete for 12 months with a five-mile radius (encompassing all of Brooklyn), and defendant Moshe Akibeh's contract provides for a non-compete for 18 months with a 10-mile radius (encompassing approximately all of New York City). Defendants claim that the plaintiff has failed to identify any information that would qualify as "confidential and proprietary," and in any event it obtained an independent forensic IT firm which searched for and removed any Tri State data. The court held a hearing as to whether to issue a Preliminary Injunction on September 4, 2025.

After receiving testimony from Shlomi Bagdadi, Chief Executive Officer and owner of plaintiff Tri State Commercial Realty Services LLC (Tri State), on behalf of the plaintiff, and from Avi Akibeh, former Executive Vice-President of Tri State, and after consideration of the exhibits entered into evidence, and arguments of counsel, the court shall issue a limited preliminary injunction.

It appears that although the contract between the parties may use the words "employment," "salary," and "manager," this agreement was not an employment contract because at least one of the defendants was never paid a salary and defendants were provided with 1099s and not W-2s. Schedule A to the contract also uses the words "work for hire." The court notes that although at least one contract was expired at the time defendants separated from plaintiff's business on July 21, 2025, some of the restrictive covenants as noted below are enforceable as the parties continued to have a working relationship after the expiration of the contract and either party could terminate the contract thereafter upon proper notice to the other. *See Kushner v Carter Ledyard & Milburn LLP*, 220 AD3d 534, 535 [1st Dept 2023], *lv to appeal denied*, 42 NY3d 901 [Ct. of Ap. 2024]:

The common-law presumption "recognizes an inference that parties intend to renew an employment agreement for an additional year where the employee continues to work after expiration of an employment contract" (*Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 177 [2008]).

The court finds that the real estate broker services provided by the plaintiff are significantly if not primarily initiated by reaching out to potential customers by information obtained from multiple and publicly available sources or from professional research companies. The court finds this is common to all such firms that offer these services. The uniqueness of the plaintiff's business is allegedly within its methods of determining/splitting commissions and

Tri State Commercial Realty Services LLC v. Avi Akibeh, Moshe Akibeh, and Ely Akibeh,
Index No. 524839/2025

using financial information from its own commercial lease deals. Such financial details involving commercial leases, with such information being known and maintained only by the plaintiff and not available to the general public or other similar businesses, is claimed to be crucial in closing a deal because plaintiff's customers will know what the actual market rate is within an area where plaintiff has this information. This data base provides a business advantage.

The standard to apply regarding whether to issue a preliminary injunction is found in *Power-Flo Tech., Inc. v Crisp*, 231 AD3d 1070, 1071 [2d Dept 2024]:

‘[t]o establish the right to a preliminary injunction, the plaintiff must prove by clear and convincing evidence (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the grant of the injunction, and (3) a balance of the equities in the plaintiff's favor’ (*Keneally, Lynch & Bak, LLP v. Salvi*, 190 A.D.3d 961, 963, 141 N.Y.S.3d 69; see *Cushing v. Sanford Equities Corp.*, 223 A.D.3d 870, 871, 204 N.Y.S.3d 524).

‘Although the purpose of a preliminary injunction is to preserve the status quo pending a trial, the remedy is considered a drastic one, which should be used sparingly’ (*Soundview Cinemas, Inc. v. AC I Soundview, LLC*, 149 A.D.3d 1121, 1123, 53 N.Y.S.3d 157; see *Seagate Mini Mall, Inc. v. Seagate Assn., Inc.*, 201 A.D.3d 759, 761, 156 N.Y.S.3d 911).

Legal Analysis

Enforceable Terms of the Agreement

The court finds that plaintiff is likely to prevail in enforcing the terms of the contract regarding misappropriation of trade secrets and proprietary information regarding internal records having to do with financial information found in leasing agreements which are maintained solely by the plaintiff. The fact that defendant Avi Akibeh's contract was expired does not affect the terms of the agreement dealing with injunctive relief as to these provisions. See *Kushner v Carter Ledyard & Milburn LLP*, supra. The court finds any misappropriation of such material will cause irreputable harm and a balance of the equities favors the plaintiff.

Therefore, any and all hard copies and electronic files taken by the defendants, including but not limited to, the plaintiff's internal policies and procedures, accounting systems, business forms, lease data base information obtained exclusively by plaintiff and not available to the general public or other similar businesses, to the extent they are in hard copy, must be returned forthwith, and to the extent they are kept in electronic form, must be destroyed and an affidavit submitted no later than 30 days from the date of this order indicating that all such files have been returned or destroyed. Any software owned or licensed to the plaintiff, if any, must be returned forthwith.

Tri State Commercial Realty Services LLC v. Avi Akibeh, Moshe Akibeh, and Ely Akibeh,
Index No. 524839/2025

The court further finds that it is likely that the plaintiff will prevail in enforcing the provision of the agreement involving non-solicitation of plaintiff's employees (or contractors) but the restricted period is not reasonable and the court will limit the restrictive period to six (6) months.

Unenforceable or Partially Enforceable Terms of the Agreement

The plaintiff never provided or indicated that a confidential client list existed or that such a list would constitute a trade secret and therefore the defendants will not be prohibited from servicing current customers and/or obtaining new customers provided that the servicing and solicitation of clients is from publicly or professionally obtained information (other than from plaintiff) and that any relationship is not dependent on any proprietary information provided by the plaintiff. *See Nat. Organics, Inc. v Kirkendall*, 52 AD3d 488, 489, 860 NYS2d 142, 143, 27 IER Cases 1870, 2008 NY Slip Op 05058, 2008 WL 2291928 [2d Dept 2008], "(a) restraint is reasonable only 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" (*id.* at 388–389, 690 N.Y.S.2d 854, 712 N.E.2d 1220). A noncompete agreement must also be reasonably limited temporally and geographically (*id.*; *Elite Promotional Mktg., Inc. v. Stumacher*, 8 A.D.3d 525, 526, 779 N.Y.S.2d 528)." The court also finds there is no irreparable harm to plaintiff by the defendants obtaining new clients because current clients of plaintiff were solicited from publicly or professionally available sources. *See IVI Envtl., Inc. v McGovern*, 269 AD2d 497, 498 [2d Dept 2000], "(t)here is no evidence that the defendants used or threatened to use any protected trade lists or confidential customer lists. In fact, the record shows that the names of the plaintiff's past, present, or prospective clients are readily ascertainable from outside sources (*see, Reed, Roberts Assoc. v. Strauman, supra*; *Price Paper & Twine Co. v. Miller*, 182 A.D.2d 748, 582 N.Y.S.2d 746; *Buffalo Imprints v. Scinta, supra*... the plaintiff failed to show that irreparable injury would result absent the granting of preliminary injunctive relief").

The court further finds that the non-competition provisions regarding prohibiting the defendants from engaging in brokerage work is unreasonable and unlikely to be found enforceable because the services are not "unique, special or extraordinary" but, ultimately, common brokerage services. *See H & R Recruiters, Inc. v Kirkpatrick*, 243 AD2d 680, 681 [2d Dept 1997], "...if the employee's services are truly special, unique or extraordinary, and not merely of high value to his or her employer, injunctive relief may be available although trade secrets are not involved (*Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499, 398 N.Y.S.2d 1004, 369 N.E.2d 4). *See also Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392, 278 NE2d 636, 639 [Ct. of Ap. 1972], "(g)enerally, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the employee from soliciting his employer's customers (*Boosing v. Dorman*, 148 App.Div. 824, 827, 133 N.Y.S. 910, 911, *affd.* 210 N.Y. 529, 103 N.E. 1121; [additional citations omitted]).

Lastly, as a practical matter, issuing a preliminary injunction restraining defendant from servicing any customers which may have been initiated while defendants had a working

Tri State Commercial Realty Services LLC v. Avi Akibeh, Moshe Akibeh, and Ely Akibeh,
Index No. 524839/2025

relationship with the plaintiff will not result in any demonstrable benefit to the plaintiff and there exists an adequate remedy at law. *See Data Sys. Computer Ctr., Inc. v Tempesta*, 171 AD2d 724 [2d Dept 1991]:

We note that while the defendant salesmen would be adversely affected economically by the issuance of an injunction, the plaintiffs would derive no benefit from it, since there is no showing that the injunction would persuade their lost accounts to return to them (*cf., Composite Panel Fabricators v. Webb*, 118 A.D.2d 615, 499 N.Y.S.2d 765). Finally, to the extent that plaintiffs allege harm which could be attributable to the defendants' actions, it appears that there exists an adequate remedy at law.

Based on the foregoing, it is

ORDERED that given the short delay in answering, a potentially meritorious defense, and the pending application for injunctive relief and opposition to this relief, this court compels the plaintiff to accept the defendant's answer which is deemed served on the day of its filing (CPLR 3012[d]; *Mufalli v Ford Motor Co.*, 105 AD2d 642 [1st Dept 1984]); and it is further

ORDERED that plaintiff's motion for injunctive relief is GRANTED to the following extent (MS#1):

1. Defendants are enjoined from (i) soliciting plaintiff's current employees for a period of 6 months and former employees for a period of 6 months since their separation from plaintiff's business, (ii) to the extent defendants are in possession, using plaintiff's assets including but not limited to plaintiff's business credit cards and/or confidential and proprietary information, (iii) to the extent defendants are in possession, disclosing plaintiff's confidential and proprietary information to third parties, (iv) making false representations concerning plaintiff to its' present and prospective clients;
2. that any and all hard copies, and electronic files taken by the defendants, if any, including but not limited to, the plaintiff's internal policies and procedures, accounting systems, business forms, proprietary client database, landlord and tenant contact lists, and deal pipeline information, to the extent they are in hard copy, must be returned forthwith to plaintiff's counsel's office, and to the extent they are kept in electronic form, must be destroyed and an affidavit submitted no later than 30 days from the date of this order indicating that all such files have been either returned or destroyed;

and it is further

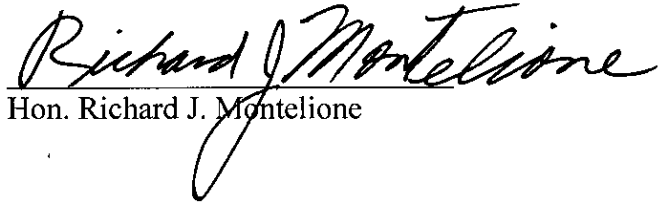
ORDERED that defendants may engage in their profession provided A) all customer sources must be publicly available or available from professional sources and B) defendants may not utilize any of the assets of the plaintiffs; and it is further

Tri State Commercial Realty Services LLC v. Avi Akibeh, Moshe Akibeh, and Ely Akibeh,
Index No. 524839/2025

ORDERED that any relief not specifically granted in DENIED; and it is further

ORDERED that the respective parties may retrieve their exhibits from the Part 99 Clerk within thirty (30) days of the date of this decision and order or the exhibits will be destroyed.

This constitutes the decision and order of the Court.


Hon. Richard J. Montelione

KINGS COUNTY CLERK
FILED
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