

JSB Partners, LLC v Colabella
2012 NY Slip Op 30443(U)
February 22, 2012
Sup Ct, NY County
Docket Number: 600524/10
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

JSB PARTNERS, LLC

INDEX NO. :600524/10

MOTION SEQ. NO. 004

Plaintiff,

MOTION DATE:

- v -

COLABELLA, ET AL.

MOTION CAL. NO.:

Defendant.

The following papers, numbered 1 to _____ were read on this motion to amend and for a preliminary injunction.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits _____	_____
Answering Affidavits -- Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

FILED

Dated:

FEB 28 2012

NEW YORK COUNTY CLERK'S OFFICE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 11

-----X
JSB PARTNERS LLC,

Plaintiff,

Index No. 600524/10

-against-

ANDREA COLABELLA, STEVEN SHAPIRO
and CARDEA GROUP INC.,

Defendants.

-----X
Joan A. Madden, J.:

FILED

FEB 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Andrea Colabella ("Colabella") and Steven Shapiro ("Shapiro") (together "the movants") move for injunctive relief pursuant to New York Civil Rights Law ("NYCRL") §§ 50 and 51 and General Business Law ("GBL") § 133, and for leave to serve a Second Amended Answer and Counterclaim and to add certain counterclaim defendants. Plaintiff JSB Partners LLC ("JSB") opposes the motion only with respect to certain aspects of JSB's request for injunctive relief.

JSB is an executive recruiting firm in Manhattan. Colabella is a recruiter who was employed by JSB from January 7, 2008 until November 9, 2009. Shapiro was employed by JSB as a recruiter from February 7, 2006 until November 9, 2009. Defendant Cardea Group Inc. ("Cardea") is a New York corporation founded by Colabella and Shapiro to provide professional staffing.

In this action, JSB alleges that Colabella and Shapiro breached their respective employment agreements by converting

JSB's confidential information for their own use in order to contact and solicit JSB's clients during their employment and for 18 months after their employment with JSB ended. The complaint seeks compensatory and punitive damages and injunctive relief. Defendants answered the complaint and asserted various counterclaims, including a counterclaim seeking the recovery of unpaid commissions pursuant to Labor Law § 190.

By interim order dated September 22, 2011, this court granted, without opposition, that part of the motion seeking leave to file a Second Amended Answer and Counterclaim and to add certain counterclaim defendants.

As to the movants' request for injunctive relief, it seeks to enjoin JSB from using the email accounts assigned to Colabella and Shapiro, who resigned from JSB on November 9, 2009. Defendants maintain that such use violates GBL § 133 and NYCRL §§ 50 and 51. In support of their request, the movants submit evidence that after Colabella resigned, JSB sent emails from Colabella's email account on January 11, 2010, March 11, 2010, and March 26, 2010. JSB did not send any emails from Shapiro's email account.

JSB counters that the movants have not shown any irreparable harm warranting a grant of injunctive relief, and that the movants have known about the emails since filing the complaint over a year ago. JSB also notes that it has not sent an email

[* 4]

from Colabella's email account since March 26, 2010, and that no emails were sent from Shapiro's account, and that it has agreed not to send any emails from either account in the future. However, JSB maintains that it has a right to continue to use the email accounts for legitimate business purposes.

On the September 22, 2011 return date of the motion, the parties entered into a stipulation in which JSB agreed that it would "respond to any outside inquiries by clients and candidates seeking services from either defendant by advising such persons that Ms. Colabella and Mr. Shapiro are no longer employed by [JSB]" ("the Stipulation"). The parties also agreed to submit letter briefs to the court addressing "the continued use [by JSB] of work email addresses previously assigned to either defendant (Colabella or Shapiro)."

In their letter brief, the movants argue that under NYCRL §§ 50 and 51 and GBL § 133, JSB is prohibited from conducting business by falsely implying a connection between JSB and Colabella and Shapiro, its former employees, and that maintaining the email accounts which are associated with Colabella and Shapiro violates these statutes. The movants also assert that JSB did not notify them that it would keep the email accounts active and monitor them indefinitely, and point to a provision in the Employee Handbook permitting employees to use JSB's computer systems for personal use.

JSB responds that the email accounts belong to it and were used in furtherance of JSB's business purposes during the movants' employment with it, and that the accounts have historical and archival value to JSB. In particular, JSB asserts that the identity of job applicants who dealt with Colabella or Shapiro during their employment with JSB is confidential information belonging to JSB and that if a job applicant contacts these accounts, such contact is a business opportunity belonging to JSB.

A preliminary injunction is a drastic remedy, and thus should not be granted unless the movant demonstrates "a clear right" to such relief. City of New York v 330 Continental, LLC, 60 AD3d 226, 234 (1st Dept 2009); Peterson v Corbin, 275 AD2d 35 [2d Dept], lv dismissed, 95 NY2d 919 (2000). Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor. CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 (2005); Aetna Ins. Co. v Capasso, 75 NY2d 860 [1990]). If any one of these three requirements is not satisfied, the motion must be denied. Faberge Intern., Inc. v Di Pino, 109 AD2d 235 (1st Dept 1985). Moreover, "[p]roof establishing these [requirements] must be by affidavit and other competent proof with evidentiary detail." Scott v. Mei,

219 AD2d 181, 182 (1st Dept 1996).

Here, the movants has not made a sufficient showing to warrant granting them a preliminary injunction based on the alleged violation of GBL § 133 or §§ 50 and 51 through JSB's continuing use of their email accounts. Section 133 of the GBL¹ "protects trade names from unlawful infringement by prohibiting the use of someone else's name, style or symbol as part of one's own name with an intent to deceive the public." U-Neek, Inc. v. Wal-Mart Stores, Inc., 147 F Supp 158, 176 (SD NY 2001) (internal citations and quotations omitted). To be entitled to relief under the statute, it must be shown that the use of the trade name is intentional and likely to cause confusion, mistake or deception. Frank's Rest., Inc. v. Lauramar Enterprises, Inc., 273 AD2d 349 (2d Dept 2000). The movants have not demonstrated that the JSB's use of their email accounts constitutes a violation of GBL § 133, and in particular that JSB used the movants' names as part of JSB's name, or that any such use was intended to mislead the public.

With respect to the claims under NYCRL, section 51 provides,

¹GBL section 133 provides, in part, that "[n]o person, firm or corporation shall, with the intent to deceive or mislead the public, assume, adopt or use as, or as part of, a corporate, assumed or trade name, for advertising purposes or for purposes of trade, or any other purpose any name designation or style or symbol or simulation thereof, which may deceive or mislead the public..."

[* 7] .
in part, that:

Any person whose name, portrait or picture is used within this state for advertising purposes or for purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use...

To state a cause of action under NYCRL § 50² and/or 51, a plaintiff must allege (i) the use of his or her name, portrait, or picture, (ii) for the purposes of advertising or trade, (iii) without his or her consent. Welch v Mr. Christmas Inc., 57 NY2d 143, 147 (1982); Molina v. Phoenix Sound Inc., 297 AD2d 595 (1st Dept 2002).

Even assuming *arguendo* that the three emails sent by JSB from Colabella's account provide violated sections 50 and 51 of NYCRL, the movants cannot show injunctive relief is warranted as JSB has agreed not to send any more emails from the movants' accounts and to advise any clients or candidates sending emails to the accounts that the movants are no longer employed by JSB. Furthermore, the movants cannot show irreparable harm, as any lost business opportunities resulting from the three emails can

²Section 50 provides that "[a] person, firm, corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained written consent of such person...is guilty of a misdemeanor."

* 8] ,
be remedied with money damages. Sterling Fifth Associates v. Carpentille Corp., Inc., 5 AD3d 328 (1st Dept 2004).

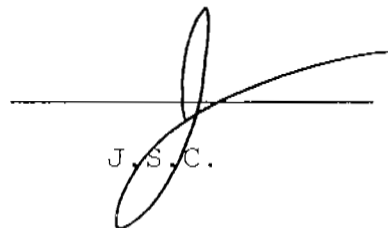
Moreover, as JSB has agreed to notify all clients and candidates using the email accounts that the movants are no longer employed by JSB, JSB's limited use of the email accounts would not appear to violate the NYCRL, or to result in any irreparable harm to the movants.

Finally, in view of JSB's position that there are legitimate business purposes for maintaining the email accounts and JSB's agreement to restrict its use of such accounts, the equities balance in favor of denying injunctive relief.

In view of the above, it is

ORDERED that, except to the extent that JSB has agreed not to send any further emails from the email accounts of the movants and to advise any clients or candidates sending emails to the accounts that the movants are no longer employed by JSB, the motion for a preliminary injunction enjoining JSB's use of the email accounts is denied.

DATED: February 22 2012


J.S.C.

FILED

FEB 28 2012

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