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SHORT FORM ORDER

COPY

INDEX No. 11-38148

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/4/12
ADJ. DATES 2/10/12
Mot. Seq. # 001 - MD
PC Conf: 5/4/12
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WORLD WIDE SPECIALTY PROGRAMS, INC.,

Plaintiff,

-against-

LEXINGTON INSURANCE COMPANY, CHARTIS, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NEW HAMPSHIRE INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ALL RISKS, LTD. and BRADLEY & PARKER, INC.,

Defendants

LAZER, APTHEKER, ROSELLA
Attys. For Plaintiff
225 Old Country Rd.
Melville, NY 11747

MEYER, SUOZZI, ENGLISH & KLEIN
Attys. For Def Bradley & Parker
PO Box 9194
Garden City, NY 11530

CAHILL, GORDON & REINDEL, LLP
Attys. For Def Chartis
89 Pine St.
New York, NY 10005

COLLAZO, FLORENTINO & KEIL, LLP
Attys. For Def All Risks Ltd.
747 Third Ave.
New York, NY 10017

Upon the following papers numbered 1 to 28 read on this motion for preliminary injunctive relief ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4-6 ; Replying Affidavits and supporting papers 7 ; Sur-Reply Affidavits and supporting papers 8-9; 10-11 ; Affidavits 12 (Hennessey); 13 (Yasan); 14 (Krugman); 26 (Marcotte) ; Other 15; 16 (memoranda); 17-18 (memorandum) 19-20 (memorandum); 21-22 (memorandum); 23 -24(memorandum); 25-26 (transcript); 28 (summons & complaint) ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#001) by the plaintiff for preliminary injunctive relief is considered under CPLR Article 63 and is denied; and it is further

ORDERED that a preliminary conference is scheduled for **May 4, 2012** at 9:30 am in Part 45 at the courthouse located at 1 Court Street - Annex, Riverhead, New York, 11901.

This action arises out of a series of events which led to the termination of a long standing business relationship between the plaintiff and defendant Chartis Inc., and certain of its subsidiaries and/or member companies which underwrite "program" insurance policies that afford coverage to particular types of businesses. The plaintiff seeks the recovery of money damages from all of the defendants under tort theories and money damages from defendants, Chartis Inc. and Lexington Insurance Company, for breach of a Program Administration Agreement.

The plaintiff was named program administrator under the terms of the Program Administration Agreement (hereinafter "PAA") it last entered into with defendant, National Union Fire Insurance Company of Pittsburgh, Pa. and the other insurance companies listed in the caption, all of whom are members of the Chartis group of insurers. These defendants write the Staffing Services Program that is the subject of the plaintiff's PAA Defendant Chartis, Inc. (hereinafter "Chartis") is the parent company of those defendants, but Chartis has no contractual relationship with the plaintiff. Neither does defendant, Lexington Insurance Company [hereinafter "Lexington"], as it is a member insurance company of Chartis US, Inc, but not a signatory to the PAA. Instead, Lexington manages and/or oversees most of the Staffing Services Program business for the Chartis group. As program administrator for Chartis' temporary staffing insurance program, the plaintiff advertised, sold, renewed and otherwise managed, directly and/or with the aid of third-party brokers and agents, the staffing program policies underwritten by Chartis group members.

Under the terms of ¶ 24 of the PAA, either the "Company" (the insurer signatories thereto) or the plaintiff, as "Program Administrator" had the right to terminate the PAA provided that notice of not less than 90 days issued to the other side in accordance with the notice provisions set forth in ¶ 25. In November of 2011, the plaintiff terminated the PAA, effective as of May 11, 2012. On November 28, 2011, the Chartis group of insurance companies entered into a PAA with defendant All Risks Ltd., to fill the void left by the plaintiff's impending departure. It also notified the plaintiff that it was terminating the PAA with the plaintiff on the earlier date of February 26, 2012

By the complaint filed in this action, the plaintiff charges defendants Chartis and Lexington with breaching those portions of the PAA which provide that upon termination of the PAA and the plaintiff's payment of sums due the insurer companies, the plaintiff remains the owner of the "expirations on business" (see ¶ 24(h). Expirations are known in the insurance industry as information regarding insurance policy types; names of insureds; coverage amounts; premiums; risk to loss ratios and policy expiration dates. Expirations are thus a valuable part of the policy renewal processes, by which insurers, administrators and third-party brokers maintain their clientele. The plaintiff claims that the expirations arising from its PAA with the Chartis defendants are trade secrets. The plaintiff further claims that all of the defendants are liable to the plaintiff in tort due to their misappropriation of the coveted expirations and the defendants' engagement in other unfair business practices, unfair competition and interference with plaintiff's contracts and contractual relations with existing clients.

By the instant motion (#001), the plaintiff seeks preliminary injunctive relief restraining and enjoining the defendants from the following: 1) utilizing and/or disseminating the plaintiff's trade secrets including its "expirations"; 2) collecting profits, commissions or other revenue from insured/policy holders solicited and procured by the defendants' use of plaintiff's "expirations"; 3) renewing policies so obtained; 4) corresponding with insured/policy holders so obtained and serviced

by the plaintiff. The plaintiff also seeks a mandatory injunction compelling the defendants to specifically perform the Program Administration Agreement between plaintiff and defendant Lexington Insurance Company and the other defendant insurance companies listed in the caption that write the program insurance at issue herein. For the reasons stated below, the plaintiff's motion for such preliminary injunctive relief is denied.

It is well established that to prevail on a motion for a preliminary injunction, the movant must demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see* ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 862, 552 NYS2d 918 [1990; ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.***, 65 AD3d 1051, 886 NYS2d 41 [2d Dept 2009]; ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, 778 NYS2d 516 [2d Dept 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court (*see* ***Tatum v Newell Funding, LLC,*** 63 AD3d 911, 880 NYS2d 542 [2d Dept 2009]; ***Bergen-Fine v Oil Heat Inst., Inc.***, 280 AD2d 504, 720 NYS2d 378 [2d Dept 2001]). Because this provisional remedy is considered to be a drastic one (*see* ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]), a clear legal right to relief which is plain from undisputed facts must thus be established (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.***, 65 AD3d 1051, *supra*; ***Gagnon Bus Co., Inc. v Vallo Transp., Ltd.***, 13 AD3d 334, 786 NYS2d 107 [2d Dept 2004]; ***Blueberries Gourmet v Avis Realty***, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]). The burden of showing such an undisputed right rests with the movant (*see* ***Omaakaze Sushi Rest., Inc. v Ngan Kam Lee***, 57 AD3d 497, 868 NYS2d 726 [2d Dept 2008]; ***Doe v Poe***, 189 AD2d 132, 595 NYS2d 503 [2d Dept 1993]).

Factors militating against the granting of preliminary injunctive relief include: 1) that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***306 Rutledge, LLC v City of New York,*** 90 AD3d 1026, 935 NYS2d 619 [2d Dept 2011]; ***DiFabio v Omnipoint Communications, Inc.***, 66 AD3d 635, 636–637, 887 NYS2d 168 [2d Dept 2009]; ***Mar v Liquid Mgt. Partners, LLC,*** 62 AD3d 762, 880 NYS2d 647 [2d Dept 2009]); 2) that the granting of the requested injunctive relief would confer upon the plaintiff the ultimate relief requested in the action (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*** 65 AD3d 1051, *supra*; ***SHS Baisley, LLC v Res Land, Inc.***, 18 AD3d 727, 795 NYS2d 690 [2d Dept 2005]); or 3) that an alteration rather than a preservation of the *status quo* of the parties or the res at issue would result from a granting of the injunction (*see* ***Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.***, 50 AD3d 1072, 857 NYS2d 648 [2d Dept 2008]; ***Matter of 35 New York City Police Officers v City of New York,*** 34 AD3392, 826 NYS2d 22 [1st Dept 2006]). Moreover, a preliminary injunction will not issue in cases wherein the irreparable harm claimed is remote or speculative or where it is economic in nature (*see* ***Rowland v Dushin,*** 82 AD3d 738, 917 NYS2d 702 [2d Dept 2011]; ***Family-Friendly Media, Inc. v Recorder Television Network,*** 74AD3d 738, 903NYS2d 80 [2d Dept 2010]; ***Quick v Quick***, 69 AD3d 827, 892 NYS2d 769 [2d Dept 2010]; ***EdCia Corp. v McCormack***, 44 AD3d 991, 845 NYS2d 104 [2d Dept 2007]). Finally, mandatory injunctive relief is not available absent "extraordinary circumstances" as such relief generally confers upon the movant the ultimate relief to which he or she would be entitled if successful on the merits of the case or disturbs the status quo (*see* ***Board of Mgrs. of Wharfside Condominium v Nehrich***, 73 AD3d 822, 900 NYS2d 747 [2d Dept 2010]; ***SHS Baisley, LLC v. Res Land, Inc.***, 18 AD2d 727, 728, 795 NYS2d 690 [2d Dept 2005]; ***St. Paul Fire & Mar. Ins. Co. v York Claims Serv.***, 308 AD2d 347, 349, 765 NYS2d 573 [1st Dept 2003]).

Here, the moving papers failed to establish the plaintiff's entitlement to the injunctive relief demanded. The plaintiff's demand for mandatory injunctive relief in the form of an order compelling one or more of the defendants to specifically perform the PAA is unfounded in as much as such relief is not supported by a pleaded claim therefor (*see* ***BSI, LLC v Toscano***, 70 AD3d 741, 896 NYS2d 102 [2d Dept 2010]; ***Seebaugh v Borruso***, 220 AD3d 573, 632 NYS2d 800 [2d Dept 1995]). Nor is it supported by the existence of "extraordinary circumstances" which would warrant the granting of such mandatory injunctive relief, provisionally.

The plaintiff's claims for prohibitive preliminary injunctive relief are also unavailing. The plaintiff's breach of contract claim is asserted against Chartis and Lexington, neither of whom are signatories to the PAA. A likelihood of success on the merits of such claim is thus lacking. In any event, a stand alone breach of contract claim, being one at law for the recovery of money damages, will not support preliminary injunctive relief due to the adequacy of such money damages (*see* ***Mar v Liquid Mgt. Partners, LLC***, 62 AD3d 762, *surpa*).

Also apparent from the record is the absence of any showing of a likelihood of success on the merits of the plaintiff's tort claims against the defendants. No actionable conduct constituting the defendants' misappropriation of any confidential and proprietary information or trade secrets of the plaintiff nor acts of unfair competition or of interference with contracts on the part of the defendants are apparent from undisputed facts. While preliminary injunctive relief is an available remedy to halt the misappropriation and wrongful utilization of confidential information to contact and solicit customers ascertained from an book of expirations belonging to the plaintiff, an independent agent, (*see* ***Clarion Associates, Inc. v D.J. Colby Co., Inc.***, 276 AD2d 461, 714 NYS2d 99 [2d Dept 2000]), the record here is devoid of clear proof of the defendants' engagement in such conduct.

It is well settled law that absent a covenant not to compete, an employee is free to compete with his or her former employer unless trade secrets are involved or fraudulent methods employed, and that remembered information as to specific needs and business habits of particular customers is not confidential (*see* ***Reed, Roberts Assoc. v Strauman***, 40 NY2d 303, 386 NYS2d 677 [1976]; ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, 778 NYS2d 516 [2d Dept 2004]). Knowledge of the intricacies of a business operation does not necessarily constitute a trade secret and absent any wrongdoing, it cannot be said that a former employee "should be prohibited from utilizing his knowledge and talents in this area" (*id.* at 40 NY2d p.309). Trade secret protection will not attach to customer lists or other proprietary information where such customers and information are readily ascertainable from sources outside the former employer's business unless the employee has engaged in an act such as stealing or memorizing his employer's customer lists (*see* ***Walter Karl, Inc. v Wood***, 137 AD2d 22, 528 NYS2d 94 [2d Dept 1988]).

The plaintiff's tort claims against the defendant All Risks rest principally upon the migration of three of its of former underwriters to All Risks, and their apparent interface with third-party broker/agents seeking to secure new business for themselves through All Risks. Each of these three underwriters have averred that they were never asked to take trade secrets, confidential or proprietary information with them upon leaving the plaintiff. These new hires further aver that they have not been asked to divulge any confidential, proprietary or trade secret information of the plaintiff on or after their departure from the plaintiff nor have they used or disclosed such information to All Risk employees or others during their tenure with All Risks. While All Risks admits that it issued "e-mail

blasts" advertising its new business with Chartis to thousands of insurance industry contacts, the record is devoid any evidence that All Risks targeted specific insureds through the use of expirations or other confidential information. Instead, the record includes evidence that the recipient e-mail insurance industry contacts were compiled by All Risks from publically available sources and its purchase of lists of independent agents from third-party vendors. All Risks has also established that the expirations belong, in the absence of a contractual provision to the contrary, to the independent retail brokers (*see* ***Matter of Corning***, 108 AD2d 96, 488 NYS2d 477 [3d Dept 1975). While there is a contract between the Chartis' insurers and the plaintiff, namely the PAA, which provides that the expirations belong to the plaintiff, upon its termination and plaintiff's payment of amounts owing to the insurers, there is no contract between the plaintiff and All Risks or the independent retail agents who act as liaison between it as program administrator and the insureds. Since the absence of any such contract renders the efficacy of the plaintiff's claims of ownership of the expiration, *viz a viz* All Risks and the independent agents, doubtful, the record lacks a sufficient showing of the plaintiff's likelihood of success on its claims against defendant All Risks sounding in good will impairment, unfair competition or misappropriation of trade secrets or confidential or proprietary information.

To support its tort claims against Chartis, the plaintiff relies heavily upon the disclosure of expiration type information in an e-mail exchange between a Lexington executive to the three new hires at All Risk, which issued to facilitate their new business relationship following the termination of the plaintiff's PAA . The record reflects, however that the information so imparted was garnered from in-house sources available to Lexington and that the disclosure, which was limited to fewer than twenty insureds, was inadvertent and immediately remedied by retraction. Moreover, the expirations became the property of the plaintiff *viz a viz* the PAA signatory insurers under the terms of the PAA only if the agreement is terminated and World Wide has paid all amount owing the insurers (*see* PAA ¶ 24(h)). Since the conduct about which the plaintiff complains predated the termination date of the PAA under either the plaintiff's May 26, 2012 termination date or the Chartis's earlier termination date of February 26, 2012, questions exist regarding whether the plaintiff may succeed on its claim of immediate ownership of the expirations under the terms of the PAA. These circumstances cast considerable doubt upon the plaintiff's claims that Chartis' conduct constitutes a wrongful utilization of confidential or proprietary information or trade secrets or an actionable impairment of the plaintiff's good will or unfair competition.

The plaintiff also failed to establish a likelihood of success on the merits of its claims against defendant Bradley & Parker, Inc. by virtue of the acts of its agent/representative, Jonathan Carroll, who last worked for the plaintiff in July of 2004. There is ample evidence in the record tending to negate the plaintiff's claim that Carroll's contacts with clients of the plaintiff following the plaintiff's termination of its PAA with the Chartis insurers included the improper solicitation of the plaintiff's client base, about which, Carroll was aware only by reason of his misappropriation of plaintiff's expirations or by virtue of the improper disclosure or other dissemination of such expirations by the defendants' agents or employees. The record is replete with clear refutations by Carroll and others of the facts underlying the plaintiff's tort claims. The plaintiff thus failed to meet its burden of showing, from undisputed facts, a likelihood of success on the merits of any of its claims sounding in unfair competition, good will impairment and misappropriation of trade secrets or proprietary information against defendant, Bradley & Parker, Inc.

The plaintiff's final tort claim against all defendants sounds in tortious interference with contract. It rests upon allegations that the plaintiff's insureds have been advised of the termination of the plaintiff's relationship with Chartis and that some insureds, after solicitation by the defendants, are renewing program policies with Chartis insurers through All Risks and it independent agents instead of insuring with the plaintiff's new program underwritten by Zurich. As the defendants aptly point out, however, the plaintiff has no contract with its insureds. Its only contract is the PAA which it terminated after the plaintiff secured a new PAA with Zurich. These circumstances, coupled with the absence of any pleaded claim that the purported wrongful conduct constitutes an interference with prospective business relations, renders the claim as pleaded, dubious at best, and it militates against a finding of a likelihood of success on the merits (*see* ***Smith v Meridian Tech., Inc.***, 86 AD3d 557, 559–560, 927 NYS2d 141 [2d Dept 2011]).

Nor do the plaintiff's new allegations of Chartis' alleged wrongdoing, asserted for the first time in plaintiff's reply papers, establish the plaintiff's entitlement to the preliminary injunction demanded. These new claims are premised upon allegations that Chartis members intentionally issued defective non-renewal notices to the plaintiff's insureds so that the policies of such insureds would necessarily be renewed by the Chartis group by virtue of state insurance law requirements. However, these claims are highly speculative as they rest upon vague and unsubstantiated allegations of intentional wrongdoing which have been flatly refuted by the evidentiary sur-reply submissions of the Chartis defendants. Since the plaintiff's new claims rest upon facts which either do not exist or are not actionable under any of the tort theories advanced by the plaintiff in its complaint, including interference with existing contracts, said claims do not provide sufficient support for the plaintiff's demands for preliminary injunctive relief.

The plaintiff thus failed to meet the likelihood of success element of a claim for preliminary injunctive relief (*see* ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, *supra*). Such a failure renders a discussion of the remaining elements imposed upon a litigant seeking preliminary injunctive relief, academic.

In view of the foregoing, the instant motion (#001) by the plaintiff for preliminary injunctive relief is denied. Counsel are reminded that their appearances at the preliminary conference scheduled above are required.

DATED: 3/13/12

THOMAS F. WHELAN, JSC