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SHORT FORM ORDER

INDEX No. 16781-12

COPY

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 6/15/12
ADJ. DATES 6/29/12
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - MD (moot)
Preliminary Conf: 10/5/12
CDISP Y____ N x

CASUAL WATER BRIDGEHAMPTON, LLC, Plaintiff, -against- CASUAL WATER LTD., GREGORY P. KIRWAN and MICHAEL HARTMAN, Defendants.	PHILLIPS LYTELL LLP Attys. For Plaintiff 437 Madison Ave. New York, NY 10022 AUSTIN M. MANGHAN, III, ESQ. Atty. For Defendants 21 West Second St. Riverhead, NY 11901

Upon the following papers numbered 1 to 12 read on this motion for preliminary injunctive relief and cross motion to vacate order; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-6; Answering Affidavits and supporting papers 7; Replying Affidavits and supporting papers 8-9; Other 10 (defendants' memorandum); 11 (plaintiff's memorandum); 12 (reply memorandum); (~~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 restraining the defendants from competing with the plaintiff's pool servicing business in the areas identified by zip codes in the moving papers and from aiding and abetting the acquisition of new accounts by any other pool servicing companies who conduct business in the areas identified by said zip codes, is considered under CPLR 6311 and is granted subject to the conditions imposed below; and it is further

ORDERED that the motion (#002) by the defendants to vacate the temporary restraining order dated June 1, 2012, enjoining the defendants from competing with the plaintiff's pool servicing business in the areas identified by zip codes in the moving papers and from adding and abetting the acquisition of new accounts by any other pool servicing companies who conduct business in the areas identified by said zip codes is considered under Article 64 of the CPLR and is denied as moot in view of the agreement reached by the parties on June 15, 2012; and it is further

ORDERED that a preliminary conference is scheduled for **October 5, 2012**, at 9:30 a.m., in Part 45, at the courthouse located at 1 Court Street - Annex, Riverhead, New York. Counsel are directed to appear at said conference ready to proceed accordingly.

In February and May of 2008, the plaintiff purchased from defendant, Casual Water, LTD, (hereinafter "LTD") the pool service and maintenance portions of the LTD defendant's pool construction, service and maintenance business. The former purchase encompassed 90 existing accounts of Acquired Subscribers and future Subscribers located in certain geographical areas defined by zip code 11932. The latter purchase encompassed 60 existing accounts of Acquired Subscribers and future Subscribers located in certain geographical areas defined by zip code. Also purchased by the plaintiff was the good will attributable to the pool servicing and maintenance business established by the LTD defendant and certain inventory and equipment. The sales were memorialized in two separate written agreements (collectively the "Sale Agreements") which were executed by, among others, the plaintiff, its principal, the LTD defendant and two of its principals, both of whom have been joined herein as party defendants.

The terms of the Sale Agreements obligated the plaintiff, as purchaser, to use its best efforts in securing customer satisfaction by performing its contractual obligations to service and maintain pools and spas in accordance with the highest standards of professional behavior and ethics so as to protect and enhance the Casual Water name and logo, but only with respect to the 150 Acquired Subscribers whose accounts and contracts were subject to transfer to the plaintiff at the closing of the purchase agreements (*see* ¶ 6 of the "Sale Agreements"). In addition, the plaintiff, as purchaser, agreed to support all warranties related to sellers' installed pools. The terms of ¶ 7 in the Sales Agreements also obligated the plaintiff, as purchaser, "to refer all construction related business in the aforementioned zip codes to the seller".

In ¶ 7 of the Sale Agreement dated February 6, 2008 , the LTD defendant agreed "not to at any time to solicit or service any of the Acquired Subscribers sold to the purchaser under this agreement". The LTD defendant further agreed "to refer all new Subscribers in zip codes 11932 to purchaser. Seller will not support or refer subscribers to any other servicing organizations in zip code 11932".

Similar language set forth in ¶ 7 of the Sale Agreement dated May 21, 2008, stated that the LTD defendant agreed "not to at any time solicit or service any of the Acquired Subscribers sold to Purchaser pursuant to this agreement." The LTD defendant further agreed "to refer all new Subscribers in zip codes 11901, 11931,..... 11971, 11978 to Purchaser. Seller will not support or refer Subscribers to any other servicing organizations in zip codes 11901, 11931,.....11971, 11978".

The Sale Agreements further provided that both the purchaser and the seller "would execute Non-compete Agreements in the forms annexed hereto in schedule B". The Sales Agreement in ¶13 declared that "this agreement may not be terminated by either party absent a material breach".

Two Non-Compete Agreements of the type that were referred to in ¶ 7 of the purchase agreements dated February 6, 2008 (the "Bridgehampton Non-Compete Agreement") and May 21, 2008 (the "West Non-Compete Agreement") were indeed executed by all signatories of each respective purchase agreement. In ¶ 1 of the Bridgehampton Non-Compete Agreement, the defendants agreed as follows:

> Seller, Kirwin and Hartman hereby represent, warrant and agree that they shall not:
>
> i. Compete, directly or indirectly in any manner with Purchaser or engage in the business of

> swimming pool or spa servicing or maintenance, within the zip code 11932.
>
> ii. Aid, assist or support any other swimming pool or spa servicing or maintenance organization except for purchaser in zip code 11932.

By similar language set forth in ¶ 1 of the West Non-Compete Agreement, the defendants agreed as follow: Seller, Kirwin and Hartman hereby represent, warrant and agree that they shall not:

> i. Compete, directly or indirectly in any manner with Purchaser or engage in the business of swimming pool or spa servicing or maintenance, within the zip codes 11901, 11931, 11931, 11935, 11939,.....11977 and 11978.
>
> ii. Aid, assist or support any other swimming pool or spa servicing or maintenance organization except for purchaser in the aforementioned zip codes.

In ¶ 1 of the Non-Compete Agreements, the individual defendants further agreed to as follows:

> Each of the principals signing this agreement individually agree not to compete in the pool/spa construction and servicing business in Suffolk County New York for a period of three years after leaving the employment of either the Seller or the Purchaser.

The Non-Compete Agreements also provided that in the event of a "breach", the non-breaching party would be entitled to injunctive relief restraining the breaching party. It also contained an acknowledgment that injunctive relief would not be precluded by the availability of other remedies, such as money damages, as such damages were deemed insufficient.

In its complaint, the plaintiff alleges that in or around December 2011, the defendant approached the plaintiff about renegotiating the parties' Sale and Non-Compete Agreement (*see* ¶ 26 of the complaint). In or around April 2012, the plaintiff informed defendant Kirwan, that it was not interested in renegotiating the parties' Sale and Non-Compete Agreements on the terms that LTD had proposed. Shortly thereafter, the plaintiff alleges that the defendants informed the plaintiff that they had no intention of continuing to honor the Sale and Non-Compete Agreements and intended to service and maintain pools and spas within the Sold Territory (*see* ¶ 28 of the complaint). On or about May 7, 2012, the defendants purportedly sent a formal letter to the plaintiff and a related company, Causal Water East LLC, informing the plaintiff that they were intending to cancel the Sale and Non-Compete Agreements without providing any specificity (*see* ¶ 29 of the complaint). The plaintiff further alleges that since LTD ended the agreements, the defendants are intentionally steering customers away from the plaintiff (*see* ¶ 31 of the complaint). Additionally, the plaintiff alleges that the defendants failed to forward customers' messages to the plaintiff and have attempted to recruit the plaintiff's employees. Furthermore, the plaintiff alleges that LTD has a continual working relationship with Shinnecock Pools, another servicing company within the Sold Territory (*see* ¶ 24 of the complaint).

By the instant motion, the plaintiff seeks preliminary injunctive relief of the same nature and character as that demanded by it on a permanent basis in the single cause of action set forth in its complaint. The plaintiff relies heavily on its claims that the defendants violated the Non-Compete Agreement by soliciting customers and employees, failing to handle messages properly, and supporting a competing pool service business in the area covered by the sale agreements and agreed that in the Non-Compete Agreement that such a violation would entitle the plaintiff to a preliminary injunction notwithstanding that money damages may also be an available remedy to the plaintiff. The defendants oppose the motion and rely upon the fact allegedly underlying the counterclaims asserted in their answer wherein the defendants seek money damages from the plaintiff due to its purported breach of its obligations to provide top quality service to its customers and restraint from conducting pool construction within the Sold Territories.

For the reasons stated, the instant motion is granted, conditionally, to the extent set forth below.

It is axiomatic that to be entitled to a preliminary injunction, a movant must establish (1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in the movant's favor (*see* ***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]), as the remedy is considered to be a drastic one (*see* ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]). Consequently, a clear legal right to relief, which is plain from undisputed facts, must 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]).

Although generally disfavored by the courts, covenants not to compete will be enforced if reasonably limited as to time, geographic area, and scope, but only where shown to be necessary to protect the employer's interests, not harmful to the public, and not unduly burdensome (*see* ***BDO Seidman v Hirshberg***, 93 NY2d 382, 690 NYS2d 854 [1999]; ***Ricca v Ouzounian***, 51 AD3d 997, 859 NYS.2d 238 [2d Dept 2008]). Even if overly broad, covenants not to compete may be enforced in part by the courts in order to serve the interests of the parties under the circumstances of a particular case (*see* ***BDO Seidman v Hirshberg***, 93 NY2d 382, *supra* at 397). Where, however, the relationship of the parties is that of seller and purchaser of all or part of the good will of a going business, the courts will enforce an incidental covenant not to compete by the seller (*see* ***Purchasing Assoc. Inc. v Weitz***, 13 NY2d 267, 246 NYS2d 600 [1963]). This common law covenant is implied in law and is not subject to a test of reasonableness and is of indefinite duration (*see* ***Mohawk Maintenance Co., Inc. v Kessler,*** 52 NY2d 276, 437 NYS2d 646 [1981]).

As recently stated by the Court of Appeals, a seller of goodwill has an "implied covenant" or a "duty to refrain from soliciting former customers, which arises upon the sale of the 'good will' of an established business" (***Bessemer Trust Co. v Branin***, 16 NY3d 549, 556, 925 NYS2d 371 (2011); quoting ***Mohawk Maintenance Co. v Kessler***, 52 NY2d 276, *supra*). This implied covenant is permanent and not subject to divestiture after a reasonable amount of time has passed (*id.*). The duty not to solicit former clients arising from the sale of goodwill is distinct from the

duty not to compete in the industry which may only arise out of an express agreement (*see* ***Mohawk Maintenance Co. v Kessler***, 52 NY2d at 285, *supra*). A seller's "implied covenant" not to solicit his former customers is "a permanent one that is not subject to divestiture upon the passage of a reasonable period of time" (*id.* at 285). Upon the sale of "good will," a "purchaser acquires the right to expect that the firm's established customers will continue to patronize the business" (*id.*, citing ***People ex rel. Johnson Co. v Roberts***, 159 NY 70, 80–84, 53 NE 685 [1899]). This is so because the essence of these types of transactions is, in effect, an attempt to transfer the loyalties of the business' customers from the seller, who cultivated and created them, to the new proprietor (*see* ***Bessemer Trust Co. v Branin***, 16 NY3d 549, *supra*).

The parties to a sale of a business agreement may, however, chose to negotiate and expressly define the reach of the limitation imposed upon the seller with respect to its solicitation of its former customers and other forms of competition with the purchaser and where the parties do so, the more general implied covenant is lost (*see* ***MGM Ct. Reporting Serv., Inc. v Greenberg***, 74 NY2d 691, 543 NYS2d 376 [1989]). Nevertheless, where a plaintiff seeks preliminary injunctive relief in a suit to enforce a restrictive covenant that was given ancillary to the sale of the good will of a business, some courts have held that the plaintiff need not demonstrate actual loss of customers since irreparable harm is presumed to have occurred upon the plaintiff's demonstration of a likelihood of success on the merits (*see* ***Manhattan Real Estate Equities Group, LLC v Pine Equity***, 16 AD3d 292, 791 NYS2d 418 [1st Dept 2005]; ***Frank May Assoc. Inc. v Boughton***, 281 AD2d 673, 721 NYS2d 154 [3d Dept 2001]). Where the parties expressly agree in writing that either may obtain injunctive relief for a breach of the covenant and that irreparable harm is agreed to due to the insufficiency of money damages, a showing of irreparable harm is not required (*see* ***New York Real Estate Inst., Inc. v Edelman***, 42 AD3d 321, 839 NYS2d 488 [1st Dept 2007]).

Upon application of the foregoing legal maxims to the facts adduced on the instant motion, the court finds that the plaintiff has established its entitlement to the preliminary injunctive relief requested. The moving papers further established that a balance of the equities tips in favor of the plaintiff as purchaser of the good will of the pool/spa service and maintenance business in the specified geographical areas under the terms of the transactional agreements at issue herein. The defendants' claims that the Non-Compete Agreements are unenforceable because of its decision to terminate the Sale Agreements due to alleged breaches by plaintiff are unavailing since no proof of any breaches, let alone of a material breach, was advanced by the defendants in their opposing papers. The defendants failed to set-forth sufficient proof to support their allegation that "marble dusting" subcontracted out by the plaintiff to another company is considered pool construction. The Sales and Non-Compete Agreements fail to define the relevant term "pool construction." The conflicting submissions in regards to this issue necessitate the need for further discovery.

Under these circumstances, this motion (#001) by the plaintiff is granted, conditionally, to the following extent: that the defendants are hereby preliminarily enjoined and restrained, pursuant to CPLR 6311, from: (a) competing, either directly or indirectly, in any manner with Casual Water Bridgehampton LLC or engaging in the business of swimming pool or spa servicing or maintenance within the zip codes 11932, 11901, 11931, 11935, 11939, 11942, 11944, 11946, 11947, 11948, 11952, 11956, 11957, 11958, 11959, 11960, 11964, 11965, 11968, 11969, 11970, 11971, 11977, 11978,; or (b) aiding, assisting or supporting any other swimming pool or spa servicing or maintenance organizatio n, except for Casual Water Bridgehampton LLC, in zip codes 11932,

11901, 11931, 11935, 11939, 11942, 11944, 11946, 11947, 11948, 11952, 11956, 11957, 11958, 11959, 11960, 11964, 11965, 11968, 11969, 11970, 11971, 11977, 11978.

The preliminary injunction granted herein is conditioned upon the plaintiff's posting of an undertaking in the amount of $10,000.00 in the form required by CPLR 2512, within 45 days of the date of this order and the plaintiff's service a copy of this order, together with proof of the posting of such undertaking, upon the defendants' counsel. In the event that the plaintiff fails to timely post the undertaking required by the terms of this order, the preliminary injunction herein granted shall terminate on the 45th day following the date of this order.

This constitutes the decision and order of this Court.

DATED: 7/31/12

THOMAS F. WHELAN, J.S.C.