

**M.H. Mandelbaum Orthotic & Prosthetic Servs., Inc.
v Werner**

2013 NY Slip Op 33237(U)

December 13, 2013

Supreme Court, Suffolk County

Docket Number: 25256-09

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

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NO.: 25256-09

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 9-11-13; 9-27-13
SUBMITTED: 10-17-13
MOTION NO.: 008-MOT D
009-MOT D

M.H. MANDELBAUM ORTHOTIC &
PROSTHETIC SERVICES, INC. and MARTIN
H. MANDELBAUM,

Plaintiffs,

GARFUNKEL WILD, P.C.
Attorneys for Plaintiffs
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Great Neck, New York 11021

-against-

MARC WERNER,

Defendant.

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Upon the following papers numbered 1-73 read on this motion and cross-motion for summary judgment ; Notice of Motion and supporting papers 1-33 ; Notice of Cross Motion and supporting papers 34-65 ; Answering Affidavits and supporting papers 66-72 ; Replying Affidavits and supporting papers 73 ; it is,

ORDERED that the branch of the motion by the plaintiffs which is for partial summary judgment is granted as to the referral-source solicitation and non-competition claims in the first cause of action on the issue of liability only; and it is further

ORDERED that branch of the motion by the plaintiffs which is for partial summary judgment is otherwise denied; and it is further

ORDERED that the cross motion by the defendant for partial summary judgment is granted to the extent of dismissing the third cause of action and the plaintiffs' claim for attorney's fees; and it is further

ORDERED that the cross motion by the defendant for partial summary judgment is otherwise denied; and it is further

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ORDERED that the branch of the motion by the plaintiffs which is for a preliminary injunction is granted; and it is further

ORDERED that, pending the final resolution and determination of the above-entitled action, the defendant is enjoined and restrained from (1) providing prosthetic or orthotic services to any patient who received such services from the defendant while he was employed by M.H. Mandelbaum Orthotic & Prosthetic Services, Inc., from March 20, 2008, through March 20, 2009, and (2) accepting referrals from any entity that was a referral source of M.H. Mandelbaum Orthotic & Prosthetic Services, Inc., from March 20, 2007, through March 20, 2009. Such injunction to become effective on the earlier of (i) the date the undertaking referred to below is posted or (ii) a date specified by the court; and it is further

ORDERED that the plaintiffs post an undertaking pursuant to CPLR 6312 (b); and it is further

ORDERED that, if the parties cannot stipulate to an appropriate amount, they shall submit papers to the court regarding the amount of the undertaking no later than January 10, 2014. The papers to be submitted shall provide the court with a calculation of the projected revenue affected by the scope of the injunction for the year 2014 and shall discuss the proposed amount of the undertaking in light of such revenue.

The facts of this case are found in the prior order of the court dated May 30, 2012, and the prior decision after hearing under Index No. 22222-10, which is also dated May 30, 2012. They will not be repeated here. The plaintiffs move for partial summary judgment on issue of liability with respect to the first cause of action for breach of contract, the third cause of action for tortious interference with business relations, and the fifth cause of action for a permanent injunction. Alternatively, the plaintiffs seek preliminary injunctive relief. The defendant cross moves for partial summary judgment dismissing the first, third, and fifth causes of action, as well as the fourth cause of action for conversion. The defendant also seeks summary judgment on his counterclaim for defamation.

The First Cause of Action

The first cause of action alleges that the defendant violated the restrictive covenants in the parties' shareholder agreement (1) by soliciting an employee of the corporate plaintiff, (2) by soliciting patients and referral sources that did business with the corporate plaintiff, (3) by using the corporate plaintiff's patient lists and confidential information, and (3) by competing with the corporate plaintiff within 15 miles of its business location.

The court finds that the plaintiffs have established, prima facie, their entitlement to judgment as a matter of law on their claims that the defendant solicited their referral sources and competed with the corporate plaintiff within 15 miles of its business location. The defendant testified at his deposition that, after leaving the plaintiffs' employ in 2009, he visited every nursing home in

Suffolk County, even the ones that did business with the plaintiffs, to advise them that he had opened his own prosthetics and orthotics practice. The defendant also testified that, after leaving the plaintiffs' employ in 2009, he provided prosthetics and orthotics services to patients at various hospitals and nursing homes in Suffolk County, some of which were within 15 miles of the corporate plaintiff's business location. In opposition, the defendant raises various arguments that challenge the enforceability of the restrictive covenants in the parties' shareholder agreement and this court's determinations that they are reasonable and enforceable and that the sale of the defendant's shares in the plaintiff corporation to his father was invalid. The defendant's arguments are nothing more than a belated attempt to reargue the court's previous determinations. Those determinations are the law of the case, and the court declines to reconsider them. Accordingly, the court finds that the defendant has failed to raise a triable issue of fact in opposition to the plaintiff's prima facie case.

The defendant has failed to establish, prima facie, his entitlement to judgment as a matter of law on the plaintiffs' claims that he solicited their patients and that he used their patient lists and confidential information. In support thereof, the defendant argues that the plaintiffs cannot establish these claims. As a general rule, a party does not carry his burden in moving for summary judgment by pointing to gaps in his opponent's proof, but must affirmatively demonstrate the merits of his claim or defense (*see*, **Corrigan v Spring Lake Building Corp.**, 23 AD3d 604, 605). The failure of the proponent of a summary-judgment motion to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see*, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853). The court finds that the defendant's reliance on deficiencies in the plaintiffs' proof is insufficient to establish his entitlement to judgment as a matter of law on the patient-solicitation and use-of-information claims. However, the defendant has raised triable issues of fact with respect to those claims, which is sufficient to deny the plaintiffs' motion insofar as it seeks summary judgment thereon.

The defendant contends that he is entitled to judgment as a matter of law with respect to those patients and referral sources with whom he had a relationship prior to working for the corporate plaintiff and with whom he did not interact while employed by the corporate plaintiff. Relying on **BDO Seidman v Hischberg** (93 NY3d 382), the defendant argues that the restrictive covenants in the parties' shareholder agreement are overly broad and unenforceable and that the plaintiffs may not claim a protectable interest in relationships that he developed before he started working for them and with whom he had no involvement. This argument ignores the court's prior determination that the restrictive covenants are reasonable and enforceable. As previously discussed, the court declines to reconsider that determination. However, the court notes that the restrictive covenants limit the patients and referral sources which the defendant is enjoined from soliciting and from which he may accept work or business to those patients and referral sources that did business with or referred business to the corporate plaintiff during the three-year period prior to the sale of the defendant's shares. Accordingly, any recovery by the plaintiffs will be so limited.

The defendant contends that the plaintiffs may not recover damages for those patients and referral sources that they lost due to their own conduct. This argument goes to the issue of damages and may be raised at trial.

Finally, the court finds that there are triable issues of fact with respect to the employee-solicitation claim. Accordingly, neither party is entitled to summary judgment on that claim.

In sum, the plaintiffs are awarded summary judgment on their referral-source solicitation and non-competition claims on the issue of liability only, and the parties are directed to proceed to trial on the remaining issues and on the issue of damages.

The Third Cause of Action

The court finds that the defendant is entitled to summary judgment on the third cause of action for tortious interference with business relations. The parties' rights and obligations with respect to this dispute are governed by the shareholder agreement. The plaintiffs' claim for tortious interference with business relations is based on the defendant's purported solicitation of the plaintiffs' patients, which is a breach of one of the restrictive covenants contained in the shareholder agreement. When, as here, the tortious-interference claim does no more than restate the plaintiffs' claim for breach of contract and no legal duty independent of the contract is alleged, the tortious-interference claim is properly dismissed (*see*, **Allerand, LLC v 233 East 18th Street Co., L.L.C.**, 19 AD3d 275, 277-278; *see also*, **Clark-Fitzpatrick, Inc. v Long Island R.R. Co.**, 70 NY2d 382, 389-390).

The Fourth Cause of Action

The court finds that the defendant has failed to establish, *prima facie*, his entitlement to judgment as a matter of law on the fourth cause of action for conversion. The defendant argues that the plaintiffs cannot establish that he converted their confidential information because they cannot identify the information that was taken or establish that it was confidential, nor can they establish that he actually used the information that was purportedly taken. As a general rule, a party does not carry his burden in moving for summary judgment by pointing to gaps in his opponent's proof, but must affirmatively demonstrate the merits of his claim or defense (*see*, **Corrigan v Spring Lake Building Corp.**, 23 AD3d 604, 605). The failure of the proponent of a summary-judgment motion to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see*, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853). The court finds that the defendant's reliance on deficiencies in the plaintiffs' proof is insufficient to establish his entitlement to judgment as a matter of law on the plaintiffs' conversion claim.

The Fifth Cause of Action

The fifth cause of action seeks a permanent injunction enjoining the defendant (1) from using the plaintiffs' confidential information, (2) from soliciting the plaintiffs' employees, patients, and referral sources for a period of two years, (3) from accepting any work or business from the plaintiffs' patients and referral sources for a period of two years, and (4) from engaging in any competitive business within 15 miles of the corporate plaintiff's business location.

It is well settled that, in order to obtain a permanent injunction in New York, there

must be a showing that irreparable injury will result if the injunction is not granted. In addition to irreparable injury, the plaintiff must show that other remedies are inadequate and that a balancing of the equities favors the applicant (*see*, **Sheppard v Advances Acoustic Concepts, Inc.**, 22 Misc 3d 1112[A] at *6; **A&G Research, Inc. v GC Metrics, Inc.**, 19 Misc 3d 1136[A] at *16). A permanent injunction should be awarded only when right to such relief is clear and the plaintiff has established a strong case therefor (**Id.**). While the plaintiffs have shown irreparable injury (*see, infra*), they have made no showing that other remedies are inadequate and, in fact, seek money damages for their injuries. Accordingly, the court finds that the plaintiffs have failed to establish their entitlement to a permanent injunction as a matter of law.

The Counterclaim

The defendant has failed to establish, prima facie, his entitlement to judgment as a matter of law on the counterclaim for defamation. To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor (*see*, CPLR 3212[b]), and he must do so by tendering evidentiary proof in admissible form (*see*, **Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065, 1067). The court finds that the defendant's evidence fails to establish defamation a matter of law. Neither the verified answer nor the affidavit of Julia Kibler, upon which the defendant relies, identifies with sufficient specificity when the alleged defamatory statements were made and by whom (*see*, **Bell v Alden Owners, Inc.**, 299 ADd2d 207, 208) or quotes the alleged defamatory words verbatim (*see*, **Varela v Investors Ins. Holding Corp.**, 185 AD2d 309, 310, *affd* 81 NY2d 958). Moreover, the Kibler affidavit contains hearsay statements by Ms. Kibler's uncle. The failure of the proponent of a summary-judgment motion to make a prima facie showing of entitlement to judgment as a matter of law requires denial of the motion regardless of the sufficiency of the opposing papers (*see*, **Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853).

Attorney's Fees

As the defendant correctly contends, there is neither a contractual nor a statutory basis for the plaintiffs' claims for attorney's fees. Accordingly, they are dismissed.

Preliminary Injunction

Preliminary injunctive relief is a drastic remedy which is not routinely granted (**Marietta Corp. v Fairhurst**, 301 AD2d 734, 736). In order to demonstrate that it is entitled to a preliminary injunction, the moving party must show a probability of success on the merits, a danger of irreparable injury in the absence of a preliminary injunction, and a balance of the equities in its favor (**Atena Insurance Co. v Capasso**, 75 NY2d 860, 862). The burden of proof rests with the moving party, who must establish each of the three elements by clear and convincing evidence (**Network Fin. Planning v Prudential-Bache Sec.**, 194 AD2d 651, 652).

Given that the court has already determined that the restrictive covenants in the parties'

shareholder agreement are reasonable and enforceable and that the plaintiffs are entitled to partial summary judgment on their first cause of action, the court finds that the plaintiffs have established a probability of success on the merits.

The court also finds that the plaintiffs have demonstrated a strong probability of irreparable harm if the preliminary injunction is not granted. Irreparable injury may be shown through a loss of patients in a medical specialty, a permanent loss of revenues from those patients, and a loss of referral business (*see*, **Battenkill Veterinary Equine P.C. v Cangelosi**, 1 AD3d 856, 859). Moreover, loss of the goodwill associated with a business, which is difficult to quantify, can constitute irreparable harm even if money damages are requested (**Id.**; *see also*, **Alside Div. of Associated Materials v Leclair**, 295 AD2d 873, 874). The plaintiffs have demonstrated that, since the defendant left their employ and set up a competing practice, they have lost patients, revenues, and referral business, as well as goodwill.

In balancing the equities, the court should consider various factors including, inter alia, whether the plaintiff has unclean hands (**United for Peace and Justice v Bloomberg**, 5 Misc 3d 845, 849 [and cases cited therein]). The defendant contends that the plaintiffs have unclean hands because they defamed him and because they breached the parties' shareholder agreement by failing to deliver his shares in the plaintiff corporation to his father after he sold them. In view of the deficiencies in the defendant's proof in support of his defamation counterclaim and this court's prior determination that the sale of the defendant's shares to his father was invalid, the court finds that the defendant has failed to sustain his burden of proof with respect to the defense of unclean hands. The court also finds that the benefit to the plaintiffs in granting the injunction and the irreparable harm to them in denying the injunction substantially outweigh any injury to the defendant in granting the injunction (*see*, **Brown v Nelson**, 55 AD3d 317, 318). Accordingly, the preliminary injunction is granted to the extent indicated.

Dated: December 13, 2013

HON. ELIZABETH HAZLITT EMERSON

J.S.C.