

Spotted Friend LLC v Vigme, Inc.

2017 NY Slip Op 31408(U)

June 29, 2017

Supreme Court, New York County

Docket Number: 653322/2014

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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SPOTTED FRIEND LLC and FIMA POTIK,

Plaintiffs,

DECISION/ORDER

-against-

Index No. 653322/2014
Motion Seq. No. 003

VIGME, INC., LINDSAY LOHAN, MICHAEL LOHAN,
and CHRISTOPHER ROTH,

Defendants.

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HON. SALIANN SCARPULLA, J.:

Plaintiffs Spotted Friend LLC (“Spotted Friend”) and Fima Potik move to discontinue this action without prejudice pursuant to CPLR § 3217(b). The defendants cross-move to: (a) strike the complaint or deem the issues resolved in their favor pursuant to CPLR § 3126; or (b) to condition any discontinuance of this action upon plaintiffs’ payment of the defendants’ attorney’s fees and costs, and the losses that they sustained from the injunction.¹

The complaint alleges that Spotted Friend is “a social commerce start-up company” and Fima Potik is the company’s founder and chief executive officer. In 2013, defendants Lindsay Lohan, Michael Lohan, and Christopher Roth (collectively, “the Lohan defendants”) became members of Spotted Friend. Plaintiffs allege that the Lohan defendants worked “surreptitiously to use plaintiffs’ business plan and proprietary information as a blueprint to form a competing

¹ The defendants also moved to vacate the temporary restraining order issued on October 31, 2014 and to dismiss Spotted Friend’s complaint based on its failure to appear through counsel. Both of these issues are now moot. On November 4, 2015, the parties stipulated to vacate the temporary restraining order. Spotted Friend has also now appeared through counsel.

company, Vigme, which is an online shopping community and interactive web and mobile-based marketplace that is identical in nearly every aspect to Spotted Friend.”

Plaintiffs assert six causes of action against the defendants for: (1) a permanent injunction; (2) breach of contract; (3) breach of fiduciary duties; (4) misappropriation of trade secrets and confidential information; (5) unfair competition; and (6) for a declaratory judgment.

Plaintiffs now move to discontinue this action without prejudice because they can no longer afford to pay counsel. Plaintiffs’ former attorneys have withdrawn as counsel. In opposition, the defendants argue that the Court should strike the complaint based on the plaintiffs’ failure to comply with discovery demands and court orders. In the alternative, the defendants assert that this action should be dismissed with prejudice because the plaintiffs misused the litigation process to obtain a temporary restraining order.

Discussion

The determination of a motion for leave to voluntarily discontinue an action without prejudice, pursuant to CPLR § 3217(b), rests within the sound discretion of the court. *Bank of America, Nat. Ass’n v. Douglas*, 110 A.D.3d 452, 452 (1st Dep’t 2013).

After this action was commenced, plaintiffs obtained a temporary restraining order on October 31, 2014. The temporary restraining order enjoined the “Lohan Defendants and Vigme’s employees, advisors, and/or agents from any and all efforts: (i) to publicize, promote, or market their application; (iii) or seek partnerships and/or endorsements for, or investments in, the application at issue; the Lohan Defendants “from working for, or performing any services in connection with, any business that competes concerning the application at issue; and the Lohan Defendants and Vigme’s employees, advisors, and/or agents from disclosing Spotted Friend’s

confidential and proprietary information, trade secrets, and/or intellectual property about the application at issue, making such information available to any person, company, or other party, or using such information for Defendants' own benefit or for the benefit of any third party." I granted the temporary restraining order based on the plaintiffs' assertion that the defendants misappropriated their trade secrets and confidential information.

After obtaining the temporary restraining order, the parties were ordered to produce documents related to their claims by April 27, 2015, pursuant to this Court's preliminary conference order dated February 25, 2015. At the next discovery conference before the Court on May 13, 2015, the deadline for plaintiff's document discovery was extended to June 8, 2015 and the deadline for defendants' document discovery was extended to June 29, 2015. To date, the plaintiffs have not produced any documents to support the existence of their web application.

On July 14, 2015, plaintiffs' counsel moved to withdraw based on unpaid fees. I granted plaintiffs' counsel's motion to withdraw. At the next conference before the Court on November 4, 2015, the parties informed the Court that they would stipulate to vacate the temporary restraining order. Plaintiffs further informed the Court that they would move to discontinue this action.

Based on the circumstances present here, I deny plaintiffs' motion and find that this action should be discontinued with prejudice. At oral argument before the Court, plaintiffs stated that they moved to discontinue this action without prejudice, in part, based on their concern that the defendants may "go after them" to commence a malicious prosecution action. In light of the plaintiffs' concerns and the advanced progress of this case, I find that it would be fair for both parties to dismiss this action with prejudice to avoid future harassment to either party. *Fiacco v. Engler*, 79 A.D.3d 1206, 1207 (3d Dep't 2010) ("An order of discontinuance with prejudice is

appropriate where such is necessary to prevent the plaintiff from harassing the defendant with further litigation”).

The defendants move for an order conditioning the discontinuance of this action upon plaintiffs’ payment of their attorney’s fees and costs, as well as their losses sustained from the injunction. This portion of the defendants’ cross-motion is denied because the defendants fail to make any showing that they are entitled to recover attorney’s fees and costs, or that they sustained any losses from the temporary restraining order.

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs’ motion for leave to voluntarily discontinue this action pursuant to CPLR § 3217(b) is granted only to the extent that this action is discontinued with prejudice, and it is otherwise denied; and it is further

ORDERED that defendant’s cross-motion is granted only to the extent that this action is discontinued with prejudice, and otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATE :

6/29/17


SALIANN SCARPULLA, JSC