

Zoosse, Inc. v Burton
2011 NY Slip Op 32822(U)
October 11, 2011
Supreme Court, New York County
Docket Number: 113232/11
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE

PART 10

Justice

Zoose JAC

INDEX NO.

103232/11

MOTION DATE

- v -

MOTION SEQ. NO.

001

MOTION CAL. NO.

Gregory Burton

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED ..

FILED

OCT 13 2011

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

Motion decided in accordance with annexed decision + order.

PC scheduled for 12/8/11 @ 9:30am

Dated: 10/11/11

J. GISCHE
HON. JUDITH J. GISCHE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----x

Zoosse, Inc.,
Plaintiff (s),

-against-

Gregory Burton
Defendant (s).
-----x

DECISION/ ORDER
Index No.: 113232/11
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
JSC

FILED

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

OCT 13 2011
NEW YORK
COUNTY CLERK'S OFFICE **Numbered**

Papers	
OSC, MY affirm., exhibits.....	1
JLR supplementary affirm., exhibits.....	2
TRF affirm., exhibits.....	3
NMF affirm., exhibits.....	4
Dept. Of State certificate of authority to do business.....	5

Upon the foregoing papers, the decision and order of the court is as follows:

By Order to Show Cause ("OSC") dated March 17, 2011, plaintiff, Zoosse, Inc.

("Zoose") sought an order¹ directing that defendant, Gregory Burton ("Burton"):

(i) cease all actions and activities which violate the provisions of the ono-competition, non-disclosure and non-solicitation provisions of an Employment agreement dated April 27, 2010;

(ii) cease all actions and activities intended to harass, threaten and disseminate false information about Zoosse

¹Although the original moving papers were unclear about whether the relief was seeking a preliminary or permanent injunction, the supplementary affirmation submitted by plaintiff's new counsel makes it clear that Zoosse is only seeking a preliminary injunction at this time.

and those associated with Zoosse to all persons or entities, including those doing business with Zoosse and certain particularly named individuals;

(iii) cease all actions and activities which otherwise interfere with Zoosse's ability to conduct business, or irreparably damage its good will

(iv) cease using all Zoosse property and assets and return same to Zoosse.

The motions is opposed by Burton. The court issued a limited temporary restraining order ("TRO"), directing that Burton not offer any stock of Zoosse for sale (see Order 3/30/11), That TRO has continued pending the determination of this motion. Since the motion was subjudice, Zoosse has filed for the necessary authorization to do business as a foreign business corporation in New York State. In addition, Burton's counsel separately moved, and was granted, an order relieving the law firm as counsel. As a consequence, the action was stayed through and until October 10, 2011. Now that the stay has expired, the court is issuing this decision.

The facts as presented by Zoosse in support of its motion are as follows: Zoosse is a Delaware corporation that was formed in 2010. According to Robert C. Galler ("Galler"), Chairman of the Board of Directors ("Board"), Zoosse was formed "to provide sports/athletic internet-based information and services, to engage in sports/athletic e-commerce and to be a social network/web-based media/interaction platform, with a focus on persons in the United States engaging in recreational or organized non-professional athletic activities."

On or about April 27, 2010 Zoosse entered into an employment agreement ("employment agreement") to hire Burton as its Chief Operating Officer ("CEO").

Galler claims that in January 2011, he learned that Burton had, without knowledge and/or approval of the Board, sold \$25,000 of Zoose stock to an investor named Pepi and then deposited the proceeds of that sale into Burton's personal bank account. Thereafter, on January 31, 2011 the Board, including Burton, met. It was resolved by a majority of members present that Burton's employment was terminated for cause. This meeting was not memorialized until March 30, 2011 by a Secretary's Certificate of Richard G. Klein, who was also present at the January 31, 2011 Board meeting.

Zoose claims that since his termination, Burton has been breaching those portions of the employment agreement which require him to maintain Zoose's confidentiality, prohibit him from soliciting employees and competing with Zoose post termination. Zoose claims that Burton has otherwise been making false statements and interfering with Zoose's business. The offending acts identified consist of the following:

On March 2, 2011, after he was terminated, Burton purported to act on behalf of the Board and at a meeting attended by himself, Melissa L Burton and James M. Murphy, adopted minutes removing Galler and board member Harold Sirota ("Sirota") from the Board and any position of ownership of Zoose. On March 3, 2011 Burton e-mailed a Zoose vendor, Zoo Zoo Web, Inc. ("Zoo"), informing it that he was in control of Zoose and will be replacing prior management. Burton opened a new checking account for Zoose. On or about June 23, 2010, Burton purported to license a trademark for "Zoose" to Zoose.

In opposition, Burton relies upon his attorney's affirmation. He argues that because Zoose, a Delaware corporation, is not authorized to do business in New York

State, it cannot proceed in this action against him. BCL §1312. Burton also claims that because Zoosse is delinquent in paying its taxes in Delaware, it cannot proceed with this action in New York State. Collaterally, but without formally cross-moving, he claims that he "would be" entitled to sanctions pursuant to 22 NYCRR Part 130.

In reply, Zoosse has provided documentation showing that all outstanding Delaware taxes are now up to date. As for Zoosse's failure to qualify to do business in New York State as a foreign corporation, Zoosse claims that Burton, as CEO, failed to pay the fees required. In any event, Zoosse is now so authorized.

Discussion

Burton's arguments about Zoosse's authority to maintain this action are easily disposed of. Regardless of the history, Zoosse is now authorized as a foreign corporation to do business in New York State. Failure to qualify under BCL §1312 is not a jurisdictional defect. A corporation can, after commencing an action, obtain authority and, thereafter, continue an existing lawsuit. Tri-Terminal Corp. V. CITC Industries, Inc. (1st dept. 1980); Al Trade Finance, Inc. v. Petra Bank, 989 F2d 76 (CA2 1993). Moreover, there is no authority to suggest that the prohibition in BCL § 1312 for non-payment of taxes refers to taxes other than those payable in New York State. Even if the statute did apply to out of state taxes, Zoosse has shown, through documentary evidence, that its Delaware taxes are paid up to date. Burton's ancillary claim for sanctions is, likewise, unavailing for the same reasons. Burton's arguments that this case cannot go forward are rejected.

The court turns now to the request for a preliminary injunction. In order to obtain a preliminary injunction the moving party must show: [1] a likelihood of success on the

merits; [2] irreparable injury and [3] a balancing of equities in his/her favor. W.T. Grant Co. v. Srogi, 52 NY2d 496 (1981); Coinmach Corp. V. Alley Pond Owners Corp., 25 AD3d 642 (2nd dept. 2006). Although no complaint was served, the underlying summons with notice states that it is seeking to “[r]estrain Defendant from interfering with plaintiff’s business.”

Plaintiff has shown, for the purposes of this motion, that it terminated Burton for cause. The employment agreement provides for non-disclosure of confidential information both during the term of employment and after termination. (Employment agreement page 3). The employment agreement also prohibits Burton from soliciting employees of Zoosse both during the term of employment and for twenty-four months thereafter (Employment agreement p.4). The employment agreement also contains a non-compete clause, effective for the longer of 12 months post termination or the end of a severance period (employment agreement p.5). The employment agreement expressly provides that if Burton breaches or proposes to breach any portion of the non-disclosure, non-solicitation and non-compete provisions of the employment agreement, Zoosse is entitled to an injunction (in addition to any other available legal remedy) without showing any actual damages.

The offending conduct, which Zoosse claims to have occurred after Burton was terminated, did not actually or propose to violate the non-disclosure, non-solicitation or the non-compete clauses in the employment contract. Burton did not divulge or attempt to divulge confidential information. He did not solicit or attempt to solicit Zoosse employees. The contact Burton had with others was not with customers, but with a vendor. The non-compete clause only prohibits certain contact with customers. Thus,

the contractual provisions permitting Zoosse to obtain injunctive relief are not implicated in this motion. As a result, the injunctive relief sought in terms of Burton ceasing all actions and activities which violate the provisions of the non-competition, non-disclosure and non-solicitation provisions of an employment agreement, is denied.

Zoosse has shown that Burton disseminated information to Zoo, its vendor, that Zoosse claims is false. Burton does not deny this claim. The information, which tells Zoo that Burton is in control of Zoosse, on its face interferes with Zoosse's ongoing ability to do business. The injunctive relief actually sought, however, is far too broad for the claimed mis-conduct (see OSC items (ii) and (iii)). It is, therefore, only granted to the extent that Burton is enjoined, during the pendency of this action, from disseminating false information about Zoosse, and those associated with Zoosse, to all persons or entities, including those doing business with Zoosse.

Zoosse has failed to make any preliminary showing that Burton is currently using Zoosse property, so that any requested relief related to use or retention of same is denied.

Conclusion

In accordance herewith, it is hereby;

ORDERED that the motion is granted only to the extent that, pending the earlier of the final determination of this action or further court order, defendant, Gregory Burton is preliminarily enjoined from disseminating false information about Zoosse and those associated with Zoosse, to all persons or entities, including those doing business with Zoosse, and it is further

ORDERED that the matter is set down for a preliminary conference on

* 8]
December 8, 2011 at 9:30 am. No further notices will be sent.

ORDERED that in all other respects the motion is denied.

FILED

This constitutes the decision and order of the court.

OCT 13 2011

Dated: New York, NY
October 11, 2011

SO ORDERED: NEW YORK
COUNTY CLERK'S OFFICE

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J.G. J.S.C.

