

Casual Water E., LLC v Casual Water Ltd.
2012 NY Slip Op 31571(U)
June 11, 2012
Supreme Court, Suffolk County
Docket Number: 14037/12
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/18/12
ADJ. DATES _____
Mot. Seq. # 001 - MG
CDISP Y N x

CASUAL WATER EAST, 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

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.

In November of 2007, 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 purchase encompassed 143 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 sale was memorialized in a written agreement which was executed by, among others, the plaintiff, two of its principals, the LTD defendant and two of its principals, both of whom have been joined herein as party defendants.

The terms of the purchase agreement 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 143 Acquired Subscribers whose accounts and contracts were subject to transfer to the plaintiff at the closing of the purchase agreement (see ¶ 7 of the purchase "Agreement"; *see also* ¶ 1(a) of the purchase of "Agreement" attached as exhibit 1 to

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the complaint). In addition, the plaintiff, as purchaser, agreed to support all warranties related to sellers' installed pools. The terms of ¶ 9 also obligated the plaintiff, as purchaser, "to refer all construction related business in the aforementioned zip codes to the seller".

In ¶ 9 of the purchase agreement, 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 11976, 11963 11930, and 11954 to purchaser. Seller will not support or refer subscribers to any other servicing organizations in zip code 11976 11930 and 11954".

The purchase agreement further provided that both the purchaser and the seller "would execute Non-compete Agreements in the forms annexed hereto in schedule D". The purchase agreement further provided in ¶ 15 that "this agreement may not be terminated by either party absent a material breach".

A Non-Compete Agreement of the type referred to in ¶ 9 of the purchase agreement of November 13, 2007 was indeed executed by all signatories to said purchase agreement. In ¶ 1 thereof, 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 codes 11976, 11963, 11962, 11975, 11937, 11930 and 11954.
- ii. Aid, assist or support any other swimming pool or spa servicing or maintenance organization except for purchaser in zip codes 11976, 11963, 11962, 11975, 11937, 11930 and 11954.

The individual defendants further agreed in subparagraph iv of ¶ 1 of the Non-compete agreement as follows:

- iv. 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 Agreement 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 December of 2011 and February of 2012, the defendants announced that they wanted to terminate the purchase agreement of November 13, 2007 so that they could start servicing pools and spas within geographical areas that were the subject of said agreement. On March 21, 2012, the defendants advised the plaintiff that they were taking away one of the plaintiff's customers (see ¶ 22 of the complaint). In April of 2012, the defendants allegedly advised

the plaintiff that the LTD defendant had secured five accounts that had belonged to the plaintiff. Also, in April of 2012, the plaintiff was advised by a customer that it had received a servicing contract from the LTD defendant. On or about May 2, 2012, the defendants purportedly advised the plaintiff in writing that the "old deal was dead" and that they had no intention of further performing any of the obligations imposed therein. Two days thereafter, the complaint was filed and the action was initialized by the plaintiff's submission of an order to show cause by which this motion was interposed.

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 and servicing accounts belonging to the plaintiff in the area covered by the purchase agreement 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. The opposing papers do, however, contain admissions on the part of the LTD defendant that it or its agents have serviced two subscribers formerly serviced by the plaintiff under the terms of the purchase agreement. The defendants nevertheless claim the servicing of these two accounts does not constitute a breach of the purchase agreement, because the plaintiff breached said agreement first by failing to provide quality service to account subscribers.

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 NYS2d 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 Maint. 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*, 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. A demonstration of a likelihood of success on the merits of the plaintiff’s claims for relief in this action is apparent from the moving papers and from the defendants’ admission in their opposing papers that they are servicing subscribers’ accounts that were the subject of the purchase and/or Non-Compete agreements executed on November 13, 2007. 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 purchase agreement terminated prior to the defendants’ engagement in any competition of the plaintiff, by solicitation of its former clients or otherwise, is unavailing since no proof of any breach, let alone of a material breach, was advanced by the defendants in their opposing papers.

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 East LLC or engaging in the business of swimming pool or spa servicing or maintenance within the zip codes 11930, 11937, 11954, 11962, 11963, 11975 and 11976; or (b) aiding, assisting or supporting any other swimming pool or spa servicing or maintenance organization, except for Casual Water East LLC, in zip codes 11930, 11937, 11954, 11962, 11963, 11975 and 11976.

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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.

DATED: 6/11/12



THOMAS F. WHELAN, J.S.C.