Casual Water Easst, LLC v Casual Water Ltd.
2013 NY Slip Op 31861(U)
August 5, 2013
Sup Ct, Suffolk County
Docket Number: 14037-12
Judge: Thomas F. Whelan
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SHORT FORM ORDER

CONSOLIDATED INDEX No. 14037-12

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/25/13; 5/31/13
ADJ. DATES 6/7/13
Mot. Seq. # 005 - MD
Mot. Seq. # 006 - MD
CDISP Y____ N X

CASUAL WATER EAST, LLC and CASUAL WATER BRIDGEHAMPTON, LLC,

Plaintiffs,

-against-

CASUAL WATER LTD., GREGORY P. KIRWAN and MICHAEL HARTMAN,

Defendants.

PHILLIPS LYTELL LLP
Attys. For Plaintiff
437 Madison Ave.
New York, NY 10022

LEWIS, JOHS, AVALLONE, ETAL
Atty. For Defendants
425 Broad Hollow Rd.
Melville, NY 11747

Upon the following papers numbered 1 to 26 read on this motion (#005) by each plaintiff for partial for summary judgment on their separate complaints in this consolidated action and the separate motion (#006) by the defendants for mandatory and prohibitive injunctive relief ; Notice of Motion/Order to Show Cause and supporting papers 1-3 ; Separate Notice of Motion and supporting papers 4-5; 6 ; Answering Affidavits and supporting papers 7; 8; 9; 10; 11 ; Replying Affidavits and supporting papers 12-13; 14-15; 16-17 ; Other 18-19 (plaintiffs' reply memorandum); 20 (defendants' memorandum); 21 (plaintiffs' memorandum); 22-23 (plaintiffs' memorandum); 24 (defendants' memorandum); 25-26 (defendants' reply memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#005) by the plaintiffs for partial summary judgment on their claims for permanent injunctive relief and an award of attorney's fees is considered under CPLR 3212 and is denied; and it is further

ORDERED that the separate motion (#006) by the defendants for both mandatory and prohibitive injunctive relief is considered under CPLR Article 63 and is denied.

The plaintiffs commenced separate actions to recover damages and/or to enforce by way of injunctions, the terms of their respective service account purchase agreements and Non-compete agreements by which they acquired, among other things, rights to maintain and service swimming pools constructed by defendant Casual Water, Ltd. in certain geographical areas defined by zip codes. The terms of the purchase agreements obligated the plaintiffs, as purchasers, to use their best efforts in securing customer satisfaction by performing their contractual obligations to service and maintain pools and spas of all "Acquired Subscribers" sold under the purchase agreements in accordance with the highest standards of professional behavior and ethics so as to protect and enhance the Casual Water name and logo (*see* ¶ 7 of the Casual Water East Purchase Agreement and ¶ 6 of the Casual Water Bridgehampton Purchase Agreement of May 21, 2008). In addition, the plaintiffs, as purchasers, agreed to support all warranties related to sellers' installed pools. The agreement also obligated the plaintiffs, as purchasers, "to refer all construction related business in the aforementioned zip codes to the seller" (*see* ¶¶ 9 & 6 of the Purchase Agreements).

The LTD defendant agreed "that it will not at any time solicit or service any of the Acquired Subscribers sold to the purchaser under this agreement" (*see* ¶¶ 9 & 7 of the Purchase Agreements). The LTD defendant further agreed "to refer all new Subscribers [in the designated zip codes] to the plaintiffs as purchasers". In connection therewith, the plaintiffs agreed to pay a quarterly fee of 10% of their quarterly net revenues to the defendant LTD for its ongoing support and for its further customer referrals" (*see* ¶¶ 5(a) & 4(a) of the Purchase Agreements). However, payment of this quarterly fee was dependent upon the sellers' annual referral of a certain number of minimum future accounts within the specified zip codes to the plaintiffs (*see* ¶¶ 12 & 10 to the Purchases Agreements). The purchase agreements further provided in ¶ 15 that the "agreement[s] may not be terminated by either party absent a material breach".

The purchase agreements also provided that both the purchaser and the seller "would execute Non-compete Agreements in a form prescribed and such agreements were indeed executed by all corporate entities and their principals or owner members. However, the promises and covenants contained therein bind only the individual defendants and the individual member owners of the plaintiff LLCs. In ¶ 1 of the Non-compete Agreements, the individual defendants agreed not to compete, directly or indirectly, in any manner with the plaintiffs as purchasers or engage in the business of swimming pool or spa servicing or maintenance, within designated zip codes. They further agreed that they would not aid, assist or support any other swimming pool or spa servicing or maintenance organization except for the plaintiffs in their designated zip codes for a period of three years after leaving the employment of either the seller or the purchaser. The owner members of the plaintiff LLCs agreed not to "support any other construction firm other than the seller [defendant Ltd]". 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.

By separate orders issued on June 11, 2012 and July 31, 2012, each plaintiff was granted preliminary injunctive relief under CPLR 6311 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 those areas. The two actions were thereafter consolidated by stipulation and order dated October 5, 2012. In December of 2012, the individual defendants were adjudicated to be in contempt of the preliminary injunctions issued by court.

Shortly thereafter, the plaintiffs interposed this motion for partial summary judgment against the defendants. Set forth in each of the complaints served are two causes of action, namely, one for injunctive relief, both prohibitory and mandatory in nature and one for recovery of damages by reason of the defendants' breaches of the separate purchase agreements and the Non-compete agreements. The plaintiffs' joint motion is limited to the following demands: "an order: 1) pursuant to CPLR 3212 for a permanent injunction against the defendants Casual Water, LTD., Gregory P. Kirwan and Michael Hartman; 2) requiring the defendants to pay the plaintiffs' costs, including attorney's fees, for bringing the action; and 3) such other relief as the court deems proper" (*see* Notice of Motion dated January 25, 2013 and ¶ 25 of attorney Obersheimer's Affirmation in Support).

The defendants oppose the plaintiffs' motion principally on the grounds that material breaches of each Purchase Agreement and/or Non-compete Agreements on the part of the plaintiffs preclude the granting of the summary judgment demanded. The defendants also jointly move (#006) for mandatory injunctive relief compelling the plaintiffs to pay the Support Fees due under the terms of the agreements and prohibiting them from competing with the business of the defendant LTD by referring account holders to contractors other than the defendant LTD and/or otherwise.

Apparent from the record are the existence of the following undisputed facts: 1) that in April of 2012, the defendants formed a new service company named Service 4.0 which competed with the plaintiffs in their purchased territories by servicing new accounts that were not referred to the plaintiffs by defendant LTD in accordance with its promise to do so in ¶¶ 9 & 7 of the Purchase Agreements and in v iolation of the promises by the individual defendants set forth in the Non-compete Agreements; 2) that the plaintiffs have failed to pay defendant LTD the quarterly "Support Fees" conditionally mandated by ¶ ¶ 5(a) & 4(a) of the Purchase Agreements since 2012; and 3) that the counterclaims asserted in the answers of the defendants, all of which seek recovery of money damages for breach of the subject agreements, are cognizable only against the plaintiff LLCs, as the defendants failed to jurisdictionally join the individual owner members as party defendants to such counterclaims.

First considered is the plaintiffs' motion for a summary judgment on their pleaded claim for permanent injunctive relief restraining the defendants from competing in the designated zip code terrorites with the plaintiffs and aiding any other companies from doing so and compelling the defendants to perform their contractual promises. In support thereof, they rely upon a grant of

preliminary injunctive relief awarded to each of them on prior motions (*see* orders dated June11, 2012 and July 31, 2012), and upon the order of December 21, 2012 wherein the defendants were adjudicated to be in contempt of the preliminary injunctions granted. The plaintiffs further rely upon various affidavits from parties and non-parties alike who assert knowledge of the contractually violative conduct engaged in by the defendants that was the subject of one or more of the prior orders of the court.

Claims to recover damages for a breach of contractual provisions generally preclude the granting of preliminary injunctive relief due to the availability and adequacy that such damages afford and the absence of irreparable harm since economic harm alone is not irreparable harm (*see* ***306 Rutledge, LLC v City of New York***, 90 AD3d 1026, 935 NYS2d 619 [2d Dept 2011]; ***Rowland v Dushin,*** 82 AD3d 738, 917 NYS2d 702 [2d Dept 2011]; ***Quick v Quick***, 69 AD3d 827, 892 NYS2d 769 [2d Dept 2010]). Where, however, a plaintiff seeks to enforce and/or to recover damages by reason of the defendant's breach of non-compete promises, covenants and agreements, the remedy afforded by a preliminary injunction is not likewise precluded where the plaintiff can show that the harm inflicted adversely affects the goodwill and other like assets of a going business and thus goes beyond mere money damages (*see* ***Delta Enter. Corp. v Cohen***, 93 AD3d 411, 940 NYS2d 43 [1st Dept 2012]; ***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]; ***Nature's Best Group, Inc. v CPC Intern., Inc***., 269 AD2d 578, 703 NYS2d 756 [2d Dept 2000]). In such cases, the harm is sufficiently definite and irreparable and a balancing of the equities will generally weigh in favor of the plaintiff (*see* ***Mr. Natural, Inc. v Unadulterated Food Prods***., 152 AD2d 729, 544 NYS2d 182 [2d Dept 1989]; ***U.S. Ice Cream Corp. v Carvel Corp***., 136 AD2d 626 523 NYS2d 869 [2d Dept 1988]).

Permanent injunctive relief may also be premised upon violations of non-compete promises or agreements and the standard governing the issuance likewise rests upon consideration of the harm to be alleviated and whether the equities weigh in favor of the plaintiff (*see* ***Parry v Murphy***, 79 AD3d 713, 715, 913 NYS2d 285 [2d Dept 2010]; ***Suffolk Anesthesiology Assoc., P.C. v Verdone***, 74 AD3d 953, 903 NYS2d 91 [2d Dept 2010]). However, factors unique to the issuance of permanent injunctive relief are often paramount to the court's final determination as to the issuance of permanent injunctive relief. In this regard the court notes that "[a]lthough it is permissible to plead a cause of action for a permanent injunction, ... permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted" (***Weinreb v 37 Apts. Corp***., 97 AD3d 54, 943 NYS2d 519 [1st Dept 2012] *quoting* ***Corsello v Verizon N.Y., Inc***., 77 AD3d 344, 368, 908 NYS2d 57 [2010], *mod. on other grounds* 18 NY3d 777, 944 NYS2d 732 [2012]). Considered a drastic remedy (*see* ***Sybron Corp. v Wetzel***, 46 NY2d 197, 204, 413 NYS2d 127 [1978]), the issuance of permanent injunctive relief is generally reserved for post- trial victors who have "actually succeed[ed] on the merits of the case, rather than merely demonstrate[d] that success is likely in a future proceeding" (***Weizmann Inst. of Science v Neschis***, 229 F.Supp2d 234, 258 [SDNY 2002]; *see*

Moore v Ruback's Grove Campers' Assn., Inc., 85 AD3d 1220, 1221, 924 NYS2d 197 [3rd Dept 2011]). Such injunctive relief is "to be invoked only to give protection for the future ... [t]o prevent repeated violations, threatened or probable, of the [plaintiffs'] property rights" (***Merkos L'Inyonei Chinuch, Inc. v Sharf***, 59 AD3d 403, 873 NYS2d 148 [2d Dept 2009] *quoting* ***Exchange Bakery & Rest. v Rifkin***, 245 NY 260, 264–265, 157 NE 130 [1927]), and only to those who demonstrate that they will suffer irreparable harm absent the injunction (*see* ***Parry v Murphy***, 79 AD3d 713, *supra*; ***Merkos L'Inyonei Chinuch, Inc. v Sharf***, 59 AD3d 403, *supra*; ***Forest Close Assn., Inc. v Richards***, 45 AD3d 527, 529, 845 NYS2d 418 [2d Dept 2007]; ***Icy Splash Food & Beverage, Inc. v Henckel***, 14 AD3d 595, 596, 789 NYS2d 505 [2d Dept 2005]). Due to its drastic nature, permanent injunctive relief is not available where other remedies are available (*see* ***Severino v Classic Collision, Inc.***, 280 AD2d 463, 719 NYS2d 902 [2d Dept 2001]).

Here, the claims expressly pleaded in the complaint of the plaintiffs are damages for the defendants' breach of the Purchase Agreements and/or separate Non-compete Agreements and claims for prohibitory and mandatory injunctive relief predicated upon the defendants' violations of their Non-compete promises and agreements. Claims for specific performance of said agreements are not advanced in the complaints, although the plaintiffs' demands for injunctive relief may fairly be characterized as demands for such enforcement (*see* ***Nature's Best Group, Inc. v CPC Intern., Inc.***, 269 AD2d 578, 703 NYS2d 756 [2d Dept 2000]). However, the proof adduced on the instant motion by the plaintiffs was insufficient to warrant the granting of their motion for summary judgment.

While the plaintiff's claims for enforcement of the covenants of non-compete set forth in both the Purchase Agreement and the separate Non-compete agreements via the issuance of prohibitory injunctive relief furnish the requisite support for the issuance of permanent injunctive relief, there was a failure of proof with respect to the plaintiff's entitlement to such relief. Rather than demonstrate the need for a permanent injunction due to the defendants' new or continuing engagement in conduct violative of their promises and covenants not to compete, the plaintiffs rely upon the instances of such conduct that formed the basis of the court's prior orders, including the December 21, 2012 order of contempt of the preliminary injunctions issued herein, as proof of the plaintiffs' entitlement to the summary judgment requested by them (*see* ***Merkos L'Inyonei Chinuch, Inc. v Sharf***, 59 AD3d 403, *supra*). The newly asserted claims set forth in the plaintiffs' reply papers regarding the defendants' failure to include the plaintiffs in the "cure process" are insufficient to warrant the granting of the permanent injunctive relief demanded by them. The cure process is not defined in the agreements as constituting as maintenance or service work and the lost revenues which the plaintiffs claim to be suffering as a result of the defendants' failure to include them in the "cure process", may be recovered if and when the plaintiffs succeed on their money damages claims. Those claims remain pending as they were expressly excluded from this motion and reserved for later determination following the parties' engagement in discovery (*see* Notice of Motion and Page 1 footnote of the plaintiffs' Memorandum of Law in Support of Motion).

Nor did the moving papers demonstrate the plaintiffs' entitlement to summary judgment on their demands to enforce the defendants' contractual referral promises via a mandatory injunction requiring the defendants to obey their contractual obligations to refer all their new construction customer accounts to plaintiffs. The moving papers were devoid of proof that the plaintiffs performed their contractual obligations to pay the quarterly Support Fees due for such references (*see* ***Suffolk Anesthesiology Assoc., P.C. v Verdone***, 74 AD3d 953, *supra*; ***Dixon v Malouf***, 70 AD3d 763, 894 NYS2d 127 [2d Dept 2010] [*entitlement to specific performance requires proof of the claimants performance under the contract sought to be enforced*]). For this reason and all of those set forth above, the court denies the plaintiffs' motion (#005) for summary judgment on its demands for permanent injunctive relief and its incidental demand for an award of attorney's fees under the terms of the agreements at issue.

Also denied is the defendants' separate motion (#006) for "an order pursuant to CPLR Article 63" compelling the plaintiffs to pay the Support Fee payments due under the term of the subject agreements and enjoining them from competing with the plaintiffs' business by engagement in marble dusting of pools and other conduct that by custom and practice has been considered "construction work". The defendants assert that they "are entitled to interim injunctive relief since they are entitled to the benefit of their bargain and to enforce the Sales Agreements and the Non-compete Agreements that were executed by the plaintiffs" (*see* Page 2 of defendants' Memorandum of Law in Support of Motion). However, a review of the answers served herein by the defendants reveal that no claims for the enforcement of any provisions of the Purchase and Non-compete agreements as counterclaims or otherwise are set forth in the answers of the defendants. All of the counterclaims are limited to recovery of damages by reason of purported breaches of such agreements by the plaintiffs and one or more of their member owners, none whom were joined herein as party defendants on the counterclaims.

It is well established that in the absence of the assertion of pleaded claims for relief that provides a jurisdictional predicate for the granting of preliminary injunctive relief to the movant, , the court is without authority to grant preliminary injunctive relief to such a movant (*see* ***BSI, LLC v Toscano***, 70 AD3d 741, 896 NYS2d 102 [2d Dept 2010]; ***Seebaugh v Borruso***, 220 AD3d 573, 632 NYS2d 800 [2d Dept 1995]). Pursuant to CPLR 6001 and 6301, a jurisdictional predicate for the issuance of preliminary injunctive relief is provided by the assertion of 1) a pleaded claim for permanent injunctive relief; or 2) allegations that an adverse party threatens or is about to do, or is doing or procuring an act in violation of the claimant's rights respecting the subject of the action *and* tending to render the judgment ineffectual. Since the counterclaims interposed against the plaintiffs sound solely in the recovery of money damages under theories of contract and/or tort, no violation of the defendants' rights respecting the action and tending to render the judgment ineffectual are threatened. Thus, the pleaded claims of the defendants do not provide the requisite jurisdictional predicate for the granting of preliminary injunctive relief to the defendants. Denial of the defendants' motion on this procedural ground is thus warranted.

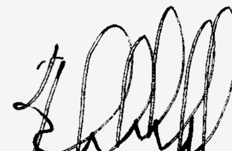
[* 7]

In any event, the defendants' moving papers failed to demonstrate any entitlement to either the mandatory or prohibitive injunctive relief demanded by them. The standard used to determine a party's entitlement to preliminary injunctive relief rests upon the establishment of the following three elements: 1) a likelihood of success on the merits; 2) irreparable harm if the relief is not granted; and 3) that a balance of the equities tilts in its favor (*see* ***Butt v Malik***, 106 AD3d 849, 965 N.Y.S.2d 540 [2d Dept 2013]; ***Blinds and Carpet Gallery, Inc. v E.E.M. Realty, Inc***., 82 AD3d 691, 917 NYS2d 680 [2d Dept 2011]). Where mandatory injunctive relief is requested, that is, relief requiring affirmative action on the part of the non-moving party that confers upon the movant some form of ultimate relief, the traditional three prong test is enlarged to include a showing of "unusual" or "extraordinary" circumstances (*see* ***Roberts v Paterson,*** 84 AD3d 655, 923 NYS2d 326 [1st Dept 2011]; ***Board of Mgrs. of Wharfside Condominium v Nehrich***, 73 AD3d 822, 900 NYS2d 747 [2d Dept 2010]; ***Second on Second Café, Inc. v Hing Sing Trading, Inc***., 66 AD3d 255, 884 NYS2d 353 [1st Dept 2009]; ***SHS Baisley, LLC v Res Land, Inc***., 18 AD2d 727, 728, 795 NYS2d 690 [2d Dept 2005]).

Here, there was insufficient proof of the defendants' entitlement to the preliminary injunctive relief under the above cited authorities. Aside from the lack of any predicate claims on which a likelihood of success on the merits thereof should have been made, there was no showing of irreparable harm since the economic losses which are the subject of the defendants' damages claim, do not constitute irreparable harm (*see* ***306 Rutledge, LLC v City of New York***, 90 AD3d 1026, *supra*; ***Quick v Quick***, 69 AD3d 827, *supra*). Accordingly, the defendants' separate motion (#006) for preliminary injunctive relief is denied.

In view of the foregoing, the plaintiffs' motion (#005) for partial summary judgment on their claims for permanent injunctive relief and their demands for an award of counsel fees is denied. Also denied is the defendants' motion (#006) for preliminary injunctive relief.

DATED: 8/5/13



THOMAS F. WHELAN, J.S.C.