SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

PLYMOUTH MANAGEMENT & ADVISORS LLC,

Plaintiff,

- against –

LUMIODE, INC. and XYZ CO.,

Defendants.

Index No.: 651164/2014

Motion Seq. 001

DECISION/ORDER

In this breach of contract action, plaintiff Plymouth Capital Management & Advisors LLC (Plymouth) seeks to preliminarily enjoin defendant Lumiode, Inc. (Lumiode) from violating the parties' non-disclosure agreement, and "from negotiating or consummating any financing transaction with any third party" in violation of an alleged oral investment agreement.

It is well settled that a preliminary injunction is an extraordinary provisional remedy that will be granted "only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant's favor." (Grant Co. v Srogi, 52 NY2d 496, 517 [1981]; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606 [2d Dept 1986]; Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996]; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005].) The proponent of a motion for a preliminary injunction must meet its burden by clear and convincing evidence. (Delta Enterp. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012].) While the proponent "need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, a party seeking the drastic

remedy of a preliminary injunction must nevertheless establish a clear right to that relief under the law and the undisputed facts upon the moving papers. Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." (1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23 [1st Dept 2011] [internal citations, quotation marks and brackets omitted].)

Lumiode's principal, Vincent Lee, developed micro-display technology while pursuing a Ph.D. in electrical engineering at Columbia University, and founded Lumiode in 2012 to exploit that technology in a marketable form. (Verified Complaint, ¶ 3; Aff. of Vincent Lee, ¶¶ 23-24.) Plymouth is a fund manager and "makes early stage investments in and works with the management of technology companies." (Complaint, ¶ 2.) According to Lee, Columbia University holds the patent(s) on which the Lumiode technology is based, and Lumiode must license that technology from Columbia University. (Lee Aff., ¶¶ 25-26.) Lumiode and Plymouth were introduced to each other by an affiliate of Columbia University, Columbia Technology Ventures, for the purpose of obtaining a possible investment in Lumiode. (Reply Aff. of Robert Simensky, ¶ 2; Lee Aff., ¶ 27.)

It is undisputed that Plymouth and Lumiode exchanged some information and negotiated toward an investment agreement for a "potential purchase" by Plymouth of 500,000 Lumiode common shares for $300,000. (Complaint, ¶ 22 and Ex. B [Draft Letter of Intent]; Lee Aff., ¶¶ 4-5.) In the course of those negotiations, the parties signed a non-disclosure agreement, dated March 27, 2014. (Complaint, Ex. A.) Plymouth alleges that it provided Lumiode with valuable confidential information, including but not limited to specific proposals such as "determining the market need for brighter primary displays;" changing "Lumiode's strategy to focus on primary"

displays; and providing "ideas" regarding a corporate structure, potential investors, valuation, and future funding strategies for Lumiode. (Complaint, Ex. D [cease and desist letter].)

Plymouth alleges that the parties had also reached a binding oral agreement in February 2014 which, among other things, precluded Lumiode from negotiating with other potential investors and/or entering into financing agreements with other investors. (Complaint, ¶¶ 8, 21-23.) Plymouth contends that it sent Lumiode a draft "letter of intent" in early April 2014 solely to memorialize the terms of the existing oral agreement, and that the parties' failure to execute the letter of intent does not invalidate the oral agreement. (Simensky Aff., ¶¶ 5, 12.) Lumiode agrees that it was in negotiations with Plymouth for an investment agreement, but alleges that material terms remained open and that no agreement, oral or otherwise, was ever reached. (Lee Aff., ¶¶ 4, 6-11.)

In order to recover for breach of the investment agreement, Plymouth must prove that the parties entered into a binding agreement as to all essential terms. (Silber v New York Life Ins. Co., 92 AD3d 436, 439 [1st Dept 2012].) The court reviews "the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract." (Id. [internal citation omitted].) To be enforceable, "[a]n agreement must have sufficiently definite terms and the parties must express their assent to those terms." (Id. [internal citation omitted]. See also Brown Bros. Elec. Contractors, Inc. v Beam Const. Corp., 41 NY2d 397, 399 [1977] [holding that "the existence of a binding contract is not dependent on the subjective intent of [the parties]" and that "[i]n determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds"] [internal citations omitted].)

Plymouth contends that it made an offer to Lumiode on February 6, 2014, including that Plymouth would invest $300,000 if and when other investments were secured. (Simensky Aff., ¶ 3.) Plymouth further asserts that the offer contained various legal terms, reflected in the subsequently drafted letter of intent. (Complaint, Ex. B.) Among these terms was an exclusivity provision that precluded Lumiode from engaging "in any discussions regarding a transaction, including the sourcing of equity or debt financing for [Lumiode] or an alternative transaction." (Id.) In addition, the terms required Lumiode to indemnify Plymouth "from and against any and all losses, claims, damages and liabilities" related to the contemplated investment and to select New York as the forum for resolution of all disputes. (Id.) Finally, the terms allowed either Plymouth or Lumiode to terminate the agreement on 15 days written notice. (Id.) Plymouth describes these terms as "customary" and "non-negotiable," and contends that Lumiode knew Plymouth considered these terms mandatory. (Simensky Aff., ¶ 3.) Plymouth further contends that Lumiode then made a counter offer, asking that Plymouth's $300,000 investment be made "up-front." (Id., ¶ 4.) Plymouth alleges that it accepted this counter-offer of investing $300,000 up front and that, at that point, the parties had a meeting of the minds. (Id., ¶ 5.) Plymouth contends that Lumiode violated the exclusivity provision by engaging in discussions with another prospective investor, identified as XYZ Co. (Complaint, ¶ 67.) Lee acknowledges that he spoke with another party (Lee Aff., ¶¶ 48-49) but, as discussed above, denies that Plymouth and Lumiode reached an investment agreement or that he intended to bind Lumiode.

At best, Plymouth alleges that Plymouth itself accepted Lumiode's counter-offer as to one term – the $300,000 upfront capital investment. Plymouth fails, in contrast, to show that Lumiode agreed to any of the other terms contained in the draft letter of intent, including exclusivity for Plymouth. The emails relied upon by Plymouth demonstrate ongoing

negotiations up to and including early April 2014 regarding the investment agreement, but not Lumiode's assent to these terms. (Complaint, Ex. C.) For example, in early April, in response to what it perceived to be Lumiode's unacceptable delay, Simensky on behalf of Plymouth cancelled a scheduled call, stating "I think it would be best for both of us to get this letter behind us before moving forward any further, so I'm not sure it makes sense for us to have the call today if we are not yet in a position to sign a commitment to each other." (Id.) In an effort to reconcile this email with its contention that the parties had previously reached a binding oral agreement, Simensky offers the questionable explanation that this email was intended as "a polite way of saying that Plymouth would not be bound to assist Lee with his endeavors if Lumiode breached the agreement with Plymouth." (Simensky Aff., ¶ 15.) Plymouth does not submit any documentary evidence that supports Simensky's conclusory assertion that the parties reached a meeting of the minds. (See e.g. Complaint, ¶ 23; Simensky Aff., ¶ 23.) Further, the letter of intent, which purported to memorialize an agreement previously reached, provided that the parties were to sign it after "confirm[ing] that the foregoing sets forth our agreement" and that "all necessary corporate or company approvals to enter into this Agreement" had been obtained. (Complaint, Ex. B.)

"Even where the parties acknowledge that they intend to hammer out details of an agreement subsequently, a preliminary agreement may be binding." (Richbell Information Services, Inc. v Jupiter Partners, L.P., 309 AD2d 288, 298 [1st Dept 2003].) Here, however, the emails and the text of the letter of intent, although not determinative, raise a sharp factual issue as to whether the parties reached a meeting of the minds as to all of the essential terms of the investment agreement. Moreover, the parties have submitted sharply conflicting affidavits as to their negotiations, and nothing in this record shows that Lumiode agreed specifically to the

exclusivity provision of the investment agreement or other terms such as the indemnification and termination provisions. The mere existence of an issue of fact does not require a denial of a preliminary injunction. (Bell & Co., P.C. v Rosen, 114 AD3d 411, 411 [1st Dept 2014].) Under these circumstances, however, Plymouth wholly fails to meet its burden of showing that the parties reached an oral agreement on all material terms.

The branch of plaintiff's motion for an injunction preventing disclosure of confidential information must also be denied. An injunction against disclosure of confidential information may be granted where the plaintiff shows "that the use and disclosure of [its] confidential information . . . [is] likely to occur." (Willis of New York, Inc. v DeFelice, 299 AD2d 240, 243 [1st Dept 2002].) As set forth in its cease and desist letter, Plymouth asserts that its confidential information includes strategies imparted to Lumiode regarding marketing of the displays and investment opportunities. (Complaint, Ex. D [cease and desist letter].)

Even assuming arguendo that this information may be characterized as confidential, Plymouth admitted at oral argument on this motion that it was unaware of any disclosures of confidential information to date. Moreover, Lee categorically denies that he disclosed any information that he received from Plymouth to the potential third-party investor with whom he had discussions in April 2014. (Lee Aff., ¶ 49.) This denial is not contradicted. Plymouth thus fails to meet its burden of showing a likelihood of success on the merits of its claims of breach of the non-disclosure agreement. (See U.S. Re Cos., Inc. v Scheerer, 41 AD3d 152, 154-155 [1st Dept 2007] [holding that preliminary injunction for breach of non-disclosure agreement was improperly granted where defendant employee's denials that he revealed plaintiff's confidential information were uncontroverted].) Further, any claim by Plymouth that disclosure is inevitable is based solely on speculation. (Id.)

Accordingly, it is hereby ORDERED that Plymouth's motion for a preliminary injunction is denied; and it is further

ORDERED that the temporary restraining order imposed by order dated April 16, 2014 is hereby vacated; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 60, Room 248, 60 Centre Street, New York, New York on July 22, 2014 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
June 17, 2014

MARCY FRIEDMAN, J.S.C.