

<b>Maggie Creative Nail Spa Inc. v Fen Zhu Chen</b>
2015 NY Slip Op 30388(U)
March 17, 2015
Supreme Court, New York County
Docket Number: 653548/2014
Judge: Debra A. James
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## SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
Justice

PART 59

MAGGIE CREATIVE NAIL SPA INC.,

Index No.: 653548/2014

Plaintiff,

Motion Date: 02/20/15

- v -

Motion Seq. No.: 001FEN ZHU CHEN, WEN FEN JIANG and WENDY STAR  
NAIL, INC,

Motion Cal. No.: \_\_\_\_\_

Defendants.

The following papers, numbered 1 to 2 were read on this motion for a preliminary injunction.

PAPERS NUMBERED

Order to Show Cause -Affidavits -Exhibits

1

Answering Affidavits - Exhibits

2

Replying Affidavits - Exhibits

Cross-Motion:  Yes  No

Upon the foregoing papers,

Plaintiff's motion for a preliminary injunction shall be denied.

In this action, plaintiff nail salon claims that defendants Chen and Jeng, its former employees who each resigned on August 31, 2014, and defendant Wendy's Star Nail Inc, a competing nail salon that located across the street from plaintiff's business, have misappropriated its customer lists, confidential property belonging to the plaintiff.

Plaintiff's claims are common-law based as the plaintiff has not produced any employment agreement with the individual

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITIONCheck if appropriate:  DO NOT POST  REFERENCE

defendants, who are its former employees, governing their loyalty or containing any promise not to compete. Nor has plaintiff produced any evidence that the materials sought to be protected were in fact subject to a confidentiality or non-compete agreement.

Defendants dispute plaintiff's characterization of the client lists as confidential property of the plaintiff. They maintain that the information is publicly available, and that the plaintiff never treated the lists as confidential. Plaintiff does not allege that defendants physically copied the customer lists. Nor does plaintiff contradict defendants' statements that plaintiff maintained only an appointment book that recorded the name, phone number and time of the customer's appointments, so that employees would know the schedule. Plaintiff does not describe any measures that it took to guard the secrecy of such lists. Plaintiff makes no showing countering defendants' assertions that the lists could be easily duplicated by others.

Generally, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's business as prospective users or consumer of the employer's services or products, trade secret protection will not attach and courts will not enjoin the employee from solicitation of his employer's customers. Leo Silfen, Inc v Cream, 29 NY2d 387, 392 (1972).

Plaintiff does not contradict that the appointment book in question is comprised of customers names who are readily ascertainable and offers no evidence that the customers'

patronage was secured by years of effort and advertisement. The facts at bar that involve manicure and pedicure services are similar to those in Leo Silfin, Inc., supra, where the Court of Appeals reversed the decision of the appellate court that affirmed the grant by the trial judge of a permanent injunction. Leo Silfin, Inc. concerned a seller of maintenance supplies for commercial and industrial uses, where the facts established that the "plaintiff's customer list were not trade secrets since the customers solicited are openly engaged in business locations and their addresses may readily be found by those engaged in trade". 29 NY2d at 393. So too here, the customers of plaintiff are likely residents or persons who work in the neighborhood, who are passersby who learn of plaintiff's business in the course of their passage through the neighborhood. Such customers, who are not seeking house calls, are distinct from those described in Town & Country House & Home Serv v Newbery, 3 NY2d 553 (1958), where the record showed that

the customers of plaintiff were not and could not be obtained merely by looking up their names in the telephone or city directory or by going to any advertised locations, but had to be screened from among many housewives who did not wish services such as respondent and appellant were equipped to render, but preferred to do their own housework.

On this motion for a preliminary injunction the plaintiff has failed to meet its burden to demonstrate a likelihood of success on the merits of its claim of confidentiality because it has not demonstrated that the information it seeks to protect,

i.e., its customer lists, constituted "trade secrets" or confidential information.

Plaintiff has not shown irreparable harm. Through discovery it may ascertain the names of customers of defendants who formerly patronized its salon from defendants' list of customers and estimate the loss of income from the alleged diversion of such customers based on its records of the number of appointments and amount of revenue generated from such customers.

Accordingly,

ORDERED that the motion for a preliminary injunction is DENIED.

This is the decision and order of the court.

Dated: March 17, 2015

ENTER:

~~Debra A. James~~  
**DEBRA A. JAMES** J.S.C.