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SHORT FORM ORDER

INDEX NO. 12/14037

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

ORIG. RETURN DATE: 5/18/16
FINAL SUBMISSION DATE: 6/15/16
MOTION SEQ#010
MOTION: 010-MD

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

Plaintiff,

-against-

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

Defendants.

PLAINTIFF'S ATTORNEY:
PHILLIPS LYTLE, LLP
620 EIGHTH AVENUE, 23RD FLOOR
NEW YORK, NY 10018-1405

DEFENDANTS' ATTORNEY:
LEWIS JOHS AVALLONE AVILES, LLP
ONE CA PLAZA, SUITE 225
ISLANDIA, NY 11749

Upon the following Papers numbered 1 to 58 read on this motion for summary judgment granting a permanent injunction, for attorney fees, and to dismiss the first through fourth counterclaims; Notice of Motion/Order to Show Cause and supporting papers 1 - 32; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 33 - 54; Replying Affidavits and supporting papers 55 - 58; Other _____; and upon due deliberation; it is,

In this breach of contract action, plaintiff Casual Water Bridgehampton, LLC ("plaintiff") alleges that defendants breached two agreements not to compete in certain zip codes in which defendants sold confidential customer lists to plaintiff and also agreed to refer any new customers in the subject zip codes to plaintiff. The record reveals that the parties executed two agreements

executed on February 6, 2008, and May 21, 2008 which provided that plaintiff would pay defendants a service fee which was pro rated to the number of new customers referred to it by defendants, and in return, plaintiff would refer all pool construction requests to defendants. Sometime in 2012, defendants allegedly began competing with plaintiff for service and maintenance jobs, and refused to refer their new construction customers to plaintiff as agreed in the specified zip codes. Shortly thereafter, this action was commenced.

The complaint contains one cause of action alleging breach of the sale and noncompete agreements. The answer contains general denials, five affirmative defenses, and four counterclaims. The first counterclaim alleges that plaintiff failed to perform the service and maintenance in a professional manner, resulting in damages to defendants. The second counterclaim alleges that plaintiff failed to refer all construction related business to defendants in the specified zip codes, causing defendants to sustain damages. The third counterclaim alleges that plaintiff has refused to engage in meetings to resolve the conflicts between the parties, causing damage to defendants. The fourth counterclaim alleges that due to consumer complaints regarding plaintiff's unprofessional performance of the service and maintenance contracts, the brand name "Casual Water" and its reputation has been damaged, causing defendants to suffer monetary damages. The fifth counterclaim alleges that plaintiff has failed to pay the Support Fee in accordance with the sales agreements, and has caused defendants to suffer damages.

Procedurally, a temporary restraining order was entered against defendants on June 1, 2012 by order dated June 1, 2012 (Whalen, J.).The court granted plaintiff's motion for a preliminary injunction by order dated July 31, 2012 (Whalen, J.). By order dated December 21, 2012, the court held defendants in contempt. The history of this matter is relayed in detail in a decision and order, dated August 5, 2013 (Whalen, J.), and will not be repeated herein. In that order, the court denied plaintiff Casual Water East, LLC's motion for partial summary judgment.

Plaintiff now moves for summary judgment in its favor to permanently enjoin defendants from competing against plaintiff in accordance with the parties' agreement, for attorney fees, and to dismiss defendants' first, second, third, and fourth counterclaims. In support, plaintiff submits, *inter alia*, the personal affidavit of Matthew Garry ("Garry"), and portions of the deposition transcripts of Matthew Garry and Gregory P. Kirwan ("Kirwan"). In his affidavit, Garry avers that he is the sole member of plaintiff. He states that he purchased one hundred twenty (120) pool and spa service accounts in specific zip codes from defendants. He states that the parties used a referral system which worked seamlessly until defendants stopped referring their pool construction customers to plaintiff. Garry states that defendants have been competing with plaintiff in violation of the preliminary injunction. Garry notes three customers which were not referred after their pools were constructed by defendants on unknown dates. Garry also explains certain invoices which dispute defendants' counterclaims that plaintiff performed construction jobs in violation of the agreements.

At his deposition, Garry states that the reason that plaintiff began performing certain maintenance jobs was because defendants lacked the manpower to perform the jobs, were too busy to perform the jobs in a timely manner, or were unable to pay the subcontractors to perform the tasks. Therefore, plaintiff, with defendants' knowledge and consent, called the subcontractors itself to perform the minor maintenance jobs and billed the client. Garry states that in the earlier years, he called defendants to refer these jobs or asked for their advice regarding how to perform the jobs. However, as time passed, he became more familiar with the required work and also found that defendants did not perform the work themselves, but subcontracted the work to other companies and billed plaintiff. Garry states that these types of jobs were relatively few over the life of the agreements, and, at times, defendants directed him to do the job himself. Garry always referred new customers who wanted pools constructed and major renovations to defendants.

At his deposition, Kirwan states that the builders who originally sought out defendants to build pools at their new construction sites stopped calling defendants after having problems with plaintiff's service. In addition, he states that defendants lost bids on new construction of pools with local residential builders. He states that he estimates he lost twelve to fifteen pool construction jobs per year. Kirwan states that defendants are not honoring the non compete agreement because plaintiff was caught renovating pools in violation of their agreements. Kirwan stated he noticed that the company's income levels had dropped, which led him to believe that plaintiff was keeping the construction projects. Kirwan states that sometime in April 2012, his new service company, Service 4.0, began to service new clients from their new pool construction projects, who were not yet plaintiff's customers. After that time, Kirwan considered the non compete agreements to be dead. Kirwan states that he told plaintiff that going forward, defendants would not give plaintiff any more service accounts, but that Kirwan would keep them. Kirwan states that he wanted to service the big money pools, and leave the small projects to plaintiff. Subsequently, Kirwan states that there was a verbal agreement that the parties would dissolve the agreements. Kirwan states shortly thereafter, he was served with this lawsuit. Kirwan states that Garry was unresponsive to clients, did not answer phone calls, he was lazy, and missed all his deadlines. However, Kirwan could not recall any specific instances of these problems.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (***Giuffrida v Citibank Corp.***, 100 NY2d 72, 760 NYS2d 397 [2003]).

"A preliminary injunction is a provisional remedy and a decision concerning a preliminary injunction does not become the law of the case, nor would it constitute an adjudication on the merits so as to preclude reconsideration of that issue at a trial on the merits" (***Peterson v Corbin***, 275 AD2d 35, 40, 713 NYS2d 361 [2000]; see ***J. A. Preston Corp. v Fabrication Enterprises, Inc.***, 68 NY2d 397, 509 NYS2d 520 [1986]; ***Moody v Filipowski***, 146 AD2d 675, 678, 537 NYS2d 185 [2d Dept

1989]). The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits (see ***Moody v Filipowski***, *supra* at 678). A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction (see ***Kane v Walsh***, 295 NY 198, 205-206, 1946 NY LEXIS 842 [1946]).

As stated in the prior order, dated August 5, 2013 (Whalen, J.), ". . . 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 "although 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 [2d Dept 2010], *mod. on other grounds* 18 NY3d 777, 944 NYS2d 732 [2012]).

Here, plaintiff has failed to submit sufficient evidence to justify a permanent injunction before a trial on the merits. Plaintiff has failed to provide the court with any new or continuing competing behavior by defendants which violate their agreements not to compete since the prior order granting plaintiff's motion for a preliminary injunction. Plaintiff also fails to name customers which were not referred by defendants in the specified zip codes. Therefore, the court declines to determine that a permanent injunction is necessary until after trial.

Turning to that branch of the motion seeking summary judgment dismissing defendants' first, second, third, and fourth counterclaims, the court finds that plaintiff has failed to demonstrate, prima facie, its entitlement to judgment as a matter of law. Issues of credibility exist, which cannot be determined in a motion for summary judgment (***Combs v Freeport***, 139 AD2d 688, 527 NYS2d 443 [2d Dept 1988]; ***S. J. Capelin Associates, Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]; ***Zulferino v State Farm Auto. Ins. Co.***,123 AD2d 432, 506 NYS2d 736 [2d Dept 1986]). Therefore, that branch of the motion to dismiss the first through fourth counterclaims is denied. As a result plaintiff's application for attorney fees is denied as academic at this time.

Since plaintiff failed to satisfy its burden as the party moving for summary judgment, it is unnecessary to analyze the sufficiency of defendants' opposition (***McArthur v Muhammad,*** 27 AD3d 532, 810 NYS2d 352 [2006]; ***Valdez v Aramark Services, Inc.,*** 23 AD3d 639, 804 NYS2d 811 [2005]; ***Nationwide Property Casualty v Nestor,*** 6 AD3d 409, 774 NYS2d 357 [2004]). Accordingly, summary judgment is inappropriate and the defendants' motion is denied (*see generally*, ***Zuckerman v City of New York,*** *supra*).

Accordingly, it is

ORDERED that plaintiff's motion (010) is denied in its entirety; and it is further

ORDERED that the parties are directed to appear in Part 48 on Wednesday, September 12, 2016 at 9:45 a.m. with clients for the purpose of trial scheduling.

DATED August 22, 2016

J.S.C.

HON. JERRY GARGUILO