

Constructure Tech. LLC v Pironti

2016 NY Slip Op 32844(U)

September 28, 2016

Supreme Court, Suffolk County

Docket Number: 15/602835

Judge: Jerry Garguilo

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E-FILE

SHORT FORM ORDER

INDEX NO. 15/602835

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

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

CONSTRUCTURE TECHNOLOGIES LLC,

Plaintiff,

-against-

MARIO G. PIRONTI and CBDN SYSTEMS
INC,

Defendants.

ORIG. RETURN DATE: 1/29/16
FINAL SUBMISSION DATE: 9/4/16
MOTION SEQ#002, 003
MOTION: 002-MotD; 003-MD

PLAINTIFF'S ATTORNEY:
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JERICHO, NY 11753

DEFENDANTS' ATTORNEY:
DAVID GROSSMAN & ASSOC, PLLC
1 VILLAGE PLAZA, SUITE 401
KINGS PARK, NEW YORK 11754

Upon the following e-filed papers numbered 27 to 76 read on this motion to renew the prior motion, with related relief, and motion to vacate the order dated March 23, 2015 and related relief ; Notice of Motion/ Order to Show Cause and supporting papers 27 - 42, 54 - 57, 74 - 76 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 48 - 49, 61 - 71 ; Replying Affidavits and supporting papers 58 - 60, 72 - 73 ; Other Defendants' memorandum of law 17 - 18 ; (and after hearing counsel in support and opposed to the motion) it is,

In this action, plaintiff alleges that defendants have contacted its customers in violation of an employment agreement executed on January 4, 2010 which restricts defendant Mario Pironti from, *inter alia*, accepting employment from any person or entity other than the company or its affiliates, to include any person or entity which previously employed defendant or which are plaintiff's clients or customers. In addition the agreement provided that defendant agreed not to compete with plaintiff during his employment and for two years after termination from the plaintiff. After defendant Pironti was terminated from plaintiff in or about October 2014, he started his own company and in early 2015, defendant allegedly contacted plaintiff's customers, and began performing work for them. This action was commenced on March 23, 2015.

Procedurally, plaintiff obtained a temporary restraining order on March 23, 2015 restraining

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defendants from communicating with plaintiff's customers, and directing defendants to preserve electronic data, return customer lists. By order dated May 18, 2015 (Garguilo, J.), this court rescinded any relief in the order to show cause which was granted on March 23, 2015.

Pursuant to a so-ordered stipulation, dated September 8, 2015 (Garguilo, J.), the defendants agreed not to contact plaintiff's customers during the pendency of this action, account for all monies billed to plaintiff's customers, and the parties agreed that defendants would be permitted to continue to service AMB Mortgage and TMS-The Money Store and provide plaintiff with an accounting. Pursuant to a so-ordered stipulation, dated November 24, 2015 (Garguilo, J.), the parties agreed that defendants would not contact or be employed by any of plaintiff's customers, and would not contact plaintiff's employees.

Plaintiff now moves (Mot. Seq. 002) by order to show cause for an order punishing defendants for contempt of court for failing to follow the so-ordered stipulations dated September 8, 2015 and November 24, 2015, for reasonable attorney fees, to renew the prior motion submitted on March 23, 2015 seeking a preliminary and permanent injunction preventing defendants from using customer lists, from communicating with plaintiff's customers, directing defendants not to remove electronic data, return customer lists, refrain from contacting plaintiff's employees, and to pay to plaintiff all monies received from plaintiff's customers.

Defendants move (Mot. Seq. 003) by order to show cause to vacate this court's temporary restraining order dated March 23, 2015, as modified by order dated May 18, 2015, and stipulations dated September 8, 2015 and November 24, 2015, issuing sanctions against plaintiff, directing plaintiff to reimburse defendants in expert fees, dismiss the action, permit defendants to file and serve an amended answer, and disqualify plaintiff's attorney.

Turning to plaintiff's motion, the branch of the motion seeking to renew the prior motion which resulted in an order dated May 18, 2015 is granted. In support, plaintiff submits copies of the stipulations dated September 8, 2015 and November 24, 2015, copies of the prior motion papers, copies of invoices, a copy of the employment agreement dated January 4, 2010, copies of the pleadings, and the personal affidavit of Michael Calabria. Mr. Calabria avers that he is the president and co-owner of plaintiff. Calabria states that defendants have contacted plaintiff's employees and have not produced all the promised documentation to determine which of plaintiff's clients were being serviced and how much of plaintiff's customers' monies were improperly diverted pursuant to the employment agreement. Calabria states that the amount of business performed by defendants is now up to \$75,000. Calabria further states that he was contacted by a customer who stated that defendant Pironti called him and sought his business. Calabria states that defendants have also contacted another customer.

In opposition, and in support of its motion, defendants submit copies of the order to show cause, a report by Patricia Zippo, a forensic document examiner, and the report of Jeffrey H. Lober, a handwriting expert, and the personal affidavit of Mario Pironti. Mr. Pironti states that he left

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plaintiff after 11 years of amicable employment and then resigned on October 1, 2014. Approximately six weeks later, plaintiff's office manager called defendant to sign a severance agreement which included a non-compete clause. Pironti states he refused to sign it. Subsequently, plaintiff sued him. Pironti states he solicited a customer with whom he had a positive relationship. Pironte states that he never signed the employment agreement and hired two handwriting experts, which state that the signature on the employment agreement is a forgery. In addition, a document labeled a performance review dated 2005 which was purportedly signed by Pironti was also found to be a forgery by these experts. In addition, after Pironti left plaintiff's employment, Calabria began to harass and intimidate Pironti. Pironti further states that Calabria entered his business and damaged property. Pironti states that plaintiff has fabricated agreements, forged legal documents and lied to the court.

It is well settled that a motion for leave to renew must be supported by new or additional facts which, although in existence at the time of the prior motion, were not known to the party seeking renewal, and consequently, not made known to the court (*see, Brooklyn Welding Corp. v Chin*, 236 AD2d 392, 653 NYS2d 631 [2d Dept 1997]). Further, leave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original motion (CPLR 2221(e)(3); *Cannistra by Cannistra v Gibbons*, 224 AD2d 570, 639 NYS2d 48 [2d Dept 1996]). Here, plaintiff's submission did not set forth any new facts or information not readily available at the time of the original motion, and the excuse for not submitting the additional evidence on the original motion was insufficient (*Hausmann v Wolf*, 187 AD2d 371, 589 NYS2d 481 [1st Dept 1992]). Accordingly, the motion to renew is denied. In any event, the court, in its discretion, denied the original motion on the ground that the parties were less than candid. Likewise, the court finds in the instant motions that there are credibility issues on both sides, inasmuch as each party is accusing the other of despicable behavior, which prevents the court from making a determination on motion papers alone. Therefore, upon renewal the court adheres to its original determination.

Turning to the remaining branches of plaintiff's motion, under the circumstances presented, the court declines to sanction defendants at this time or to grant an award of attorney fees. The remaining application by plaintiff to restrain defendant from contacting its customers or employees or to account for monies obtained from plaintiff's customers, shall be determined at trial. The remaining requested relief is denied as without merit.

Turning to the branch of defendants' motion seeking leave to amend the answer to add several counterclaims, the court notes that pursuant to the Commercial Division Rules, Rule 24, a pre-motion conference is required, and defendants failed to submit a proposed amended answer. Accordingly, the motion is denied with leave to renew upon submission of proper papers and after a pre-motion conference is held.

That branch of defendants' motion which seek to disqualify plaintiff's attorney is denied as without merit. Defendants fail to support this application with credible facts or law. In addition, that

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branch of the motion which seeks to vacate the order dated May 18, 2016 is denied as academic. The remaining requested relief is denied as without merit.

Accordingly, it is:

ORDERED that the branch of plaintiff's motion (002) seeking to renew the prior motion which resulted in an order, dated May 18, 2015 (Garguilo, J.), which denied a permanent injunction and restrictions against defendants is granted. Upon renewal, the court adheres to its original determination; and it is further


ORDERED that the remaining branches of plaintiff's motion are denied; and it is further

ORDERED that the branch of defendants' motion (003) seeking to vacate the order dated March 23, 2015, as modified on May 18, 2015 is denied; and it is further

ORDERED that the remaining branches of defendants' motion are denied; and it is further

ORDERED that the parties are directed to complete discovery and to appear with clients at a conference in Part 48 for the purpose of certifying for trial on Tuesday, November 15, 2016 at 9:30 a.m.

DATED: September 28, 2016


J.S.C.
HON. JERRY GARGUILO