

Fortified Holistic LLC v Lucic
2018 NY Slip Op 32400(U)
August 10, 2018
Supreme Court, Queens County
Docket Number: 711627/2017
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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FORTIFIED HOLISTIC LLC, Index No.: 711627/2017
Plaintiff, Motion Date: 8/10/18
- against - Motion No.: 1
ANTHONY LUCIC, Motion Seq.: 5
Defendant.

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ANTHONY LUCIC, individually and
derivatively on behalf of FORTIFIED
HOLISTIC LLC,

Third-Party Plaintiff,
- against -

PHILIP FORTINO and DOMINICK FORTINO,
Third-Party Defendants.
and

FORTIFIED HOLISTIC, LLC,
Nominal Defendant.

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The following electronically filed documents read on this Order to Show Cause by plaintiff FORTIFIED HOLISTIC LLC (Fortified) for an order granting plaintiff leave to file its verified second amended complaint and supplemental summons; granting plaintiff a temporary restraining order and preliminary injunction: (I) restraining defendants, Anthony Lucic, Karl Brunhuber, and Seven Line Fitness LLC, from utilizing Fortified's trade secrets, names, marks, logos, and digital and internet assets, including the trade name "Bell" and all iterations, deviations, and variations of the same, such as Bell Fitness, Bell Bootcamp, Bell

Strong, Bell OCR, Bell Endurance, Bell Judo, Bell Kids, CrossFit Bell, and Bell CrossFit in addition to the internet domains crossfitbell.com and bell.fitness; and (ii) restraining defendants, Anthony Lucic, Karl Brunhuber, and Seven Line Fitness LLC from soliciting and/or servicing Fortified customers and/or employees:

Papers
Numbered

Order to Show Cause-Affirmation-Exhibits-

Memo. of Law.....EF 103 - 110
Affirmation in Opposition-Exhibits-Memo. of Law...EF 111 - 124

In support of the application seeking a preliminary injunction, Dominick Fortino submits an affidavit dated July 18 2018. He is the managing member of Fortified, which he alleges will be irreparably harmed if defendants Lucic, Seven Line and Brunhuber continue to use Fortified's trade secrets, names, marks, logos, and digital and internet assets as well as continue to solicit Fortified's customers and employees. Brunhuber and Lucic began soliciting Fortified's customers as early as August 2017, formed an LLC, Seven Line Fitness LLC, and now operate Bell Fitness. Moreover, Lucic has applied for a trademark over the Bell logo and name. He further affirms that the parties understood that irreparable injury would inure Fortified if one of the parties breached the operating Agreement. Lastly, at the time this action was commenced he was not aware that Lucic and Brunhuber were making preparations to open a second facility with the intention of using Fortified's trade names, marks, and logos, and stealing its customers and/or employees.

In opposition, Anthony Lucic submits an affidavit dated August 9, 2018, affirming that Fortified has rebranded itself as CrossFit Dutch Kill and Dutch Kills Fitness on September 1, 2017 and ceased using the names CrossFit Bell and Bell. He has used the names CrossFit Bell and Bell for at least the past ten months. He licensed the name CrossFit Bell from CrossFit, Inc.

Upon the review of the application papers, opposition, and the oral arguments in open Court, this Court finds as follows:

To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction (see Stockley v Gorelik, 24 AD3d 535 [2d Dept. 2005]; Brach v Harmony Servs., Inc., 93 AD3d 748 [2d Dept. 2012]; Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd., 53 AD3d 612 [2d Dept. 2008]; Montauk-Star Is.

Realty Group v Deep Sea Yacht & Racquet Club, 111 AD2d 909 [2d Dept. 1985]). The movant must also show that the irreparable harm is imminent and not remote or speculative (see Family-Friendly Media, Inc. v Recorder Tel. Network, 74 AD3d 738 [2d Dept. 2010]; Golden v Steam Heat, 216 AD2d 440 [2d Dept. 1995]).

Here, plaintiff ceased using the name "CrossFit Bell" on or about September 1, 2017 when it rebranded itself as "CrossFit Dutch Kills". Moreover, it is undisputed that Lucic utilized his CrossFit Bell Affiliate Agreement and opened a new gym under the name CrossFit Bell on October 1, 2017. Although Fortino contends that he only recently became aware that Lucic and Brunhuber were making preparations to open a second facility, the Amended Verified Complaint filed on October 3, 2017, alleges, inter alia, that Lucic intended to recreate CrossFit blocks away from plaintiff, that the new gym was to be called CrossFit Bell, and that CrossFit Bell was scheduled to have a grand opening on October 1, 2017. Based on such, this Court finds that plaintiff failed to demonstrate that it will suffer an imminent harm in the absence of an injunction as CrossFit Bell has already been operating for almost one year and plaintiff has not sought an injunction until now.

Regarding that branch of the motion seeking to amend the complaint to add additional parties and amend the causes of action, plaintiff contends, inter alia, that Lucic formed Seven Line Fitness LLC with plaintiff's then employee, Karl Brunhuber, to steal plaintiff's customers, employees, trade secrets, names, marks and logos. In opposition to this branch of the application, Lucic contends that the allegations are devoid of merit.

In the absence of significant prejudice or surprise to the opposing party, leave to amend a pleading should be freely given unless the proposed amendment is palpably insufficient or patently devoid of merit (see CPLR 3025[b]; Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983]; Russo v Lapeer Contr. Co., Inc., 84 AD3d 1344 [2d Dept. 2011]; Martin v Village of Freeport, 71 AD3d 745 [2d Dept. 2010]; Malanga v Chamberlain, 71 AD3d 644 [2d Dept. 2010]). "No evidentiary showing of merit is required under CPLR 3025(b). The court need only determine whether the proposed amendment is 'palpably insufficient' to state a cause of action or defense, or is patently devoid of merit (Lucido v Mancuso, 49 AD3d 220, 229 [2d Dept. 2008]).

Here, the proposed amendments are not palpably insufficient or devoid of merit based on Fortino's affidavit.

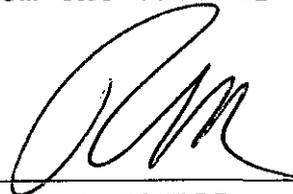
Accordingly, for the above stated reasons, it is hereby,

ORDERED, that the branch of plaintiff's application seeking a preliminary injunction is denied, and the temporary restraining order contained in the Emergency Order to Show Cause dated July 18, 2018 is vacated; and it is further

ORDERED, that the branch of plaintiff's application seeking to amend the complaint is granted, and plaintiff shall serve a copy of the supplemental summons and verified second amended complaint in the proposed form annexed to the motion papers as Exhibit A (NYSCEF 88) along with a copy of this order with notice of entry in conformance with the rules of service; and it is further

ORDERED, that the defendants shall serve an answer to the third amended complaint within 20 days from the date of said service.

Dated: Long Island City, NY
August 10, 2018



ROBERT J. McDONALD
J.S.C.

FILED
AUG 17 2018
COUNTY CLERK
QUEENS COUNTY