Atalanta Corp. v Mapelli
2018 NY Slip Op 32494(U)
October 1, 2018
Supreme Court, New York County
Docket Number: 656431/2016
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

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ATALANTA CORPORATION,

Plaintiff,

- against -

RICCARDO MAPELLI,

Defendant.

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DECISION AND ORDER

Index No. 656431/2016

MELISSA A. CRANE, J.:

This case causes the court to contend with conflicting public policies. Plaintiff Atalanta Corporation moves, pursuant to CPLR 3212, for summary judgment for breach of contract against defendant Riccardo Mapelli.

Background

Plaintiff is a privately-owned specialty food products importer based in Elizabeth, New Jersey (complaint, ¶ 7). Defendant had worked in plaintiff's cheese department, where his duties included increasing sales and communicating with plaintiff's suppliers. In January 14, 2016, plaintiff fired defendant for allegedly arranging and accepting kickbacks of more than $550,000 from two Italian suppliers: Societa Coop. Unione Pastori Nurri ("Nurri") and Coop. Allevatori Mores ("Mores") (*id.*, ¶¶ 11, 13 and 18).

Plaintiff sued defendant to recover damages of $550,000, punitive damages, and attorneys' fees and costs and for an accounting (*Atalanta Corp. v Riccardo Mapelli*, Sup Ct, NY County, index No. 153076/2016) (*Atalanta I*) (*id.*, ¶ 18). The parties negotiated a settlement of that action, and memorialized it in a written agreement dated August 11, 2016 (the Settlement Agreement) (*id.*, Exh B [Settlement Agreement] at 1).

The provisions relevant to this action appear in paragraphs 2, 3 and 10 of the Settlement Agreement. Paragraph 2 discusses restrictive covenants and reads, in part:

> "Restrictive Covenants. For a period of three (3) years from the Termination Date, Mapelli will not directly or indirectly on a worldwide basis:
> (a) whether on behalf of [defendant] or for any entity or person employing or engaging [defendant], render any services in connection with the purchase, sale, marketing, importing, exporting or any distribution of the Products.
> (b) Solicit or conduct business with any vendor, manufacturer, supplier or distributor with the intention of doing business in or with the Products;
> (c) Solicit or seek to do business with any customer for the sale, purchase or distribution of the Products. . . ."

(*id.* at 2). The Settlement Agreement defines "Products" as "pecorino cheese and prosciutto" (together, the Prohibited Products) (*id.*, at 1). The pertinent portion of paragraph 3 reads, "[defendant] further acknowledges and agrees that (1) without the prior written consent of [plaintiff] not to disclose to any third party any Confidential Information about [plaintiff] which he may possess . . ." (*id.* at 2). "Confidential Information" is defined as "[plaintiff's] products (including the Products), distribution chain and logistics, sourcing, know-how, financing, customers, vendors, suppliers, personnel, trade secrets and other sensitive and proprietary information including records reflecting same . . . [and] does not include information that is in the public domain . . ." (*id.* at 1). Lastly, paragraph 10 provides that, "[i]n the event of any breach or action concerning this Agreement, the prevailing Party shall be entitled to receive its costs, and reasonable attorneys' fees, in enforcing its rights hereunder" (*id.* at 4). In accordance with the Settlement Agreement, plaintiff filed a stipulation discontinuing *Atalanta I* after receiving $287,500 and a general release from defendant (complaint, ¶ 27).

Plaintiff alleges that defendant materially breached the Settlement Agreement within four months of its execution, when he became an employee of Liaison West Distribution, Inc. (Liaison West), a rival California-based specialty food importer and one of plaintiff's former customers (*id.*, ¶¶ 28-30). Plaintiff alleges that defendant attempted to solicit business from its

customers and suppliers, including Avalon Fine Foods, Gourmet Food Solutions, and Nurri, related to the purchase or sale of the Prohibited Products (*id.*, ¶¶ 31-35).

Procedural History

On December 9, 2016, plaintiff filed the summons and complaint in this action. The complaint asserts a cause of action for breach of contract and for declaratory relief that the general release plaintiff executed in settling *Atalanta I* is null and void.

On December 23, 2016, defendant brought suit against plaintiff in California alleging that the restrictive covenant in the Settlement Agreement was unenforceable under California law (*Riccardo Mapelli v Atalanta Corporation*, Cal Super Ct, Los Angeles County, case No. BC645227) (the California action) (affirmation of plaintiff's counsel, ¶ 6; plaintiff's Rule 19-a statement, ¶ 37). The court denied defendant's motion for summary judgment in the California action. Moreover, defendant's appeals in California were unsuccessful, and the California action has been stayed[1] (affirmation of plaintiff's counsel, ¶¶ 6-7).

After filing a note of issue and certificate of readiness, plaintiff now moves for summary judgment. It seeks an order enforcing the Settlement Agreement, specifically the three-year period contained in the restrictive covenants in paragraph 2 and the nondisclosure provision in paragraph 3, an award of $3 million in damages for loss of business defendant's breach caused, and $187,901.48 in attorney's fees and costs. Defendant opposes the application.

The Parties' Contentions

Plaintiff argues that the Settlement Agreement requires defendant to refrain from engaging in the business of purchasing or selling the Prohibited Products for a period of three years, and from using plaintiff's proprietary information, such as its customer and vendor lists and pricing information. Plaintiff claims the record is replete with instances where defendant

[1] *Mapelli v Superior Court*, 2017 Cal LEXIS 6037 (2017); *Mapelli v Atalanta Corp.*, 2017 WL 5652495 (Cal Super Ct, Apr. 19, 2017, No. BC645227); and *Mapelli v Atalanta Corp.*, 2017 WL 5652499 (Cal Super Ct, Mar. 21, 2017, No BC645227).

admittedly sold the Prohibited Products in contravention of the Settlement Agreement. Plaintiff submits excerpts from defendant's depositions in the California action, and this action and an affidavit from Thomas Gellert ("Gellert"), a vice president and owner of plaintiff.

Defendant testified that his duties while working for plaintiff included sourcing and promoting the Prohibited Products. He claims responsibility for the rise in annual sales of those products from $6 million to $15 million for Pecorino Romano and from zero dollars to $10 million for prosciutto (affirmation of plaintiff's counsel, exhibit I [defendant tr Mar. 22, 2017] at 74 and 164). Defendant understood that the Settlement Agreement barred him from selling the Prohibited Products (affirmation of plaintiff's counsel, exhibit H [defendant tr Sept. 19, 2017] at 83). Defendant testified that he signed the Settlement Agreement because he "had no choice [as] . . . [t]he alternative was worse," explaining that the settlement amount plaintiff demanded kept increasing (defendant tr Mar. 22, 2017 at 116, lines 19-25).

Defendant began working at plaintiff's competitor, Liaison West, in October 2016 (*id.* at 74). Plaintiff and Liaison West sell the same food products and share the same customers (*id.* at 66 and 187). His job at Liaison West involves selling the Prohibited Products (defendant tr Sept. 19, 2017 at 99). Despite the conditions set forth in the Settlement Agreement, defendant admitted to selling a "small quantity" of pecorino cheese (*id.* at 84, lines 2-5; defendant tr Mar. 22, 2017 at 67), and selling various types of prosciutto such as "Parma, San Daniele . . . [and] prosciutto crudo" (defendant tr Mar. 22, 2017 at 78, lines 9-10 and 80, lines 18-19). In addition, he acknowledged contacting several producers of pecorino cheese, including Nurri and Mores, after he executed the Settlement Agreement (*id.* at 233). He also attempted to sell the Prohibited Products to one of plaintiff's customers, Obica Pizzeria (*id.* at 123).

Defendant testified that he could not recall telling Liaison West's president, Roberto Saracino (Saracino), about the Settlement Agreement, and he did not provide Saracino with a copy of it (*id.*). Nonetheless, defendant's workload at Liaison West has increased since the day

that he was hired, and he is "increasing sales on prosciutto and Pecorino and cheese to Liaison West" (*id.* at 112, lines 8-11).

In a declaration filed in the California action, defendant repeated his understanding that the "non-compete clause [prevented him] from selling prosciutto or pecorino cheese" (affirmation of plaintiff's counsel, exhibit J [Declaration of Riccardo Mapelli in Support of Motion for Summary Judgment by Plaintiff Riccardo Mapelli], ¶ 12).

Gellert avers that defendant was responsible for sourcing, selecting, negotiating and purchasing the Prohibited Products for plaintiff, and that plaintiff sold more than $20 million worth of those items in 2015 (Gellert aff, 4-5). Defendant had direct access to plaintiff's inventory of those products, and defendant set the prices at which plaintiff purchased them (*id.*, ¶ 5). In addition, defendant had direct access to the sales data and history plaintiff kept on its customers and vendors (*id.*, ¶ 7). Gellert also states that plaintiff agreed to settle *Atalanta I* "for less than its damages" in exchange for a restrictive covenant whereby defendant could not "directly or indirectly purchase, sell, market, import, export or distribute [the Prohibited Products] for 3 years" (*id.*, ¶¶ 10 and 11). The restriction was "limited only to the cheese and prosciutto markets impacted by Defendant's illegal acts" (*id.*, ¶ 10). Gellert states that defendant used his knowledge of plaintiff's vendors and customers to solicit their business (*id.*, ¶ 21). His actions have caused a significant decrease in plaintiff's sales of pecorino cheese from $12,173,516 in 2016 to $8,290,128 in 2017 (*id.*, ¶ 24). The decrease in plaintiff's sales corresponded with a significant increase in Liaison West's sales of that product[2] (*id.*, ¶ 21). Plaintiff has incurred fees of $105,296.13 in the California action (*id.*, exhibit C at 1 and 2), and

[2] At oral argument, plaintiff's counsel summarized Saracino's deposition testimony about Liaison West's sales of pecorino cheese. Counsel stated that Liaison West's gross sales of pecorino cheese in 2016 was $35,099, yielding $9,494 in profit (oral argument tr at 7-8). Liaison West's gross sales of pecorino cheese in 2017 rose to $597,637, yielding $91,447 in profit (*id.*). Although plaintiff submitted excerpts of Saracino's deposition transcript on the motion, those portions of the transcript where Saracino discussed his company's sales were not provided. Liaison West's profit/loss statements also were redacted (affirmation of plaintiff's counsel, exhibit E).

$82,605.35 in this litigation, for a total of $187,901.48 (Gellert aff, ¶ 27). Plaintiff has not moved for relief on its second cause of action for a declaratory judgment.

Defendant opposes the motion on three grounds. First, he argues that plaintiff cannot show that it suffered a loss due to an alleged breach. Although plaintiff claims that defendant had access to its proprietary information, such as the identity of its suppliers or customers, this information was publicly available (defendant aff, ¶ 8). Gellert's testimony, that customs information was available through Panjiva.com, a paid subscription service that provides the names of shippers and consignees of products brought into the U.S., supports this contention (Gellert tr at 97-98 and 101). Moreover, defendant avers that he used his personal contacts to source products (defendant aff, ¶ 7). In any event, defendant states that did not retain any of plaintiff's proprietary information because he was escorted off plaintiff's property after Gellert terminated him (*id.*, ¶¶ 3 and 5).

In addition, plaintiff's sales figures for pecorino cheese are not reliable indicators of its damages. Defendant explains that Gellert's affidavit omitted the total volume of pecorino cheese plaintiff sold (defendant aff, ¶ 17). Taking the products weight into consideration, defendant actually sold a greater volume of pecorino cheese in 2017 (2,933,534 pounds) than in each of the three preceding years (*id.*). Therefore, defendant questions plaintiff's damages.

Moreover, defendant argues that plaintiff merely speculates that the decrease in its sales of the Prohibited Products are attributable to defendant. With respect to defendant's use of plaintiff's proprietary information, Gellert testified repeatedly that he was unable to point to a "specific mechanism" (Gellert tr at 77, lines 15-17), or a "specific tool [defendant] may have used to injure [plaintiff's] business" (*id.* at 84, lines 4-6). Gellert further testified, "I only know I could point to . . . a decline in sales and profitability. I can only point to the result. I can't point to how it was achieved" (*id.* at 77, lines 17-21). Likewise, Gellert could not identify "specific customers related to damages" (*id.* at 125, lines 7-8). To the extent plaintiff seeks injunctive

relief, the request must be denied because plaintiff cannot show that it has suffered an irreparable injury that monetary damages cannot cure.

Second, defendant argues that plaintiff cannot show he breached the Settlement Agreement. Saracino testified that defendant attempted to sell the Prohibited Products for Liaison West, but was unsuccessful (Saracino tr at 22). Saracino understood the word "sell" to mean "[closing] the deal" and "actually [making] an invoice" (*id.* at 61, lines 3-4). Defendant states that Saracino directed him to refrain from selling the Prohibited Products when Saracino learned of the Settlement Agreement (defendant aff, ¶ 13). Defendant maintains that he complied with Saracino's directive, and that Saracino was solely responsible for Liaison West's purchases and sales of the Prohibited Products (*id.*). Saracino confirmed that he asked plaintiff to stop selling the Prohibited Products in December 2016 (Saracino tr at 20), and that defendant told customers interested in purchasing those products that Saracino would contact them (*id.* at 44-45). Saracino also testified that he tasked defendant with sourcing new products (*id.* at 56), and increasing sales of Liaison West's products, except the Prohibited Products, to its existing customers (*id.* at 61).

Third, defendant argues that the restrictive covenants provision in the Settlement Agreement is not enforceable because it is contrary to public policy. Defendant avers that plaintiff inserted the provision into the Settlement Agreement for the sole purpose of preventing him from "earning a living in the only industry [he] had worked in this country (defendant aff, ¶ 11). While restrictive covenants may be used to protect an employer against the misappropriation of trade secrets by a former employee, in this action, plaintiff cannot identify a specific trade secret that defendant used to plaintiff's detriment, nor can plaintiff establish that defendant was a unique employee. In addition, a restrictive covenant will not be enforced when it deprives an employee of his or her livelihood.

In reply, plaintiff argues that the Settlement Agreement prohibited defendant from disclosing its proprietary information, including "customers, vendors, suppliers," to any third party (Settlement Agreement, at 1). Defendant, though, used the information gleaned from his years working for plaintiff to aid his new employer. Additionally, defendant does not dispute plaintiff's position that he breached the noncompete provision in the Settlement Agreement, having admitted that he "unsuccessfully attempted to sell Pecorino Cheese and Prosciutto" between October to December 2016, and that he "may have made *de minimis* sales during that time" (def aff, ¶ 14).

Discussion

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Evidence in admissible form must support the motion (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) along with pleadings, affidavits, depositions, and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

The court will first address whether the restrictive covenants provision in the Settlement Agreement is unenforceable. If it is not enforceable, as defendant suggests, then a breach of that provision is immaterial.

Defendant likens paragraph 2 of the Settlement Agreement to a restrictive covenant in an employment agreement. A restrictive covenant in an employment agreement will be enforced if it is "'reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee'" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 389 [1999], quoting *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976], *rearg denied* 40 NY2d 918 [1976]). An employer's legitimate business interests include "protection against misappropriation of . . . trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary" (*BDO Seidman*, 93 NY2d at 389), and preventing a former employee from "exploiting or appropriating the goodwill of a client or customer" (*id.* at 392). Defendant argues that the Settlement Agreement is unenforceable because it contains a restrictive covenant that deprives him of his livelihood.

The court rejects defendant's position. The "courts have long favored and encouraged the fashioning of stipulations as a means of expediting and simplifying the resolution of disputes" (*Mitchell v New York Hosp.*, 61 NY2d 208, 214 [1984]). A stipulation of settlement is binding upon the parties when: (1) parties have legal capacity to negotiate and (2) the agreement was reduced to writing subscribed to by the parties' or their attorneys or agreed to on the record in open court (*McCoy v Feinman*, 99 NY2d 295, 302 [2002]; *see also* CPLR 2104). "Judicial acceptance of compromises in which the most fundamental of rights are waived is not uncommon" (*Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450, 455 [1979], *rearg denied* 46 NY2d 1076 [1979], *cert denied* 444 US 845 [1979]). "Substantial public policy considerations favor the enforcement of settlement agreements as a matter of contract" (*Matter of Hofmann*, 287 AD2d 119, 121 [1st Dept 2001]; *see also McCoy*, 99 NY2d at 302 [stating that a stipulation of settlement "is an independent contract subject to settled principals of contract interpretation"]). Therefore, courts

will "not lightly cast aside" stipulations settling a civil action (*Hallock v State of New York*, 64 NY2d 224, 230 [1984] [refusing to invalidate a settlement agreement in the absence of fraud, collusion, mistake or accident in the making and execution of that agreement]). However, courts will not enforce an agreement that is illegal (*see Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]), or an agreement that violates public policy (*see Mitchell*, 61 NY2d at 214 [describing an affront to public policy as one that implicates "our sense of justice or threatening the public welfare"]; *1420 Concourse Corp. v Cruz*, 135 AD2d 371, 372 [1st Dept 1987], *appeal dismissed* 73 NY2d 868 [1989] [stating that a stipulation of settlement that is "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense" violates public policy]).

The parties here negotiated the Settlement Agreement for the express purpose of settling *Atalanta I*. Defendant does not dispute that he counsel represented him in that action. Nor does he dispute that he understood and consented to the terms of the Settlement Agreement before he chose to execute it. That defendant perceives the provisions as undue restrictions on his ability to maintain a livelihood is no bar to enforcement. "[P]arties are generally free to reach agreements on whatever terms they prefer" (*Brown & Brown, Inc. v Johnson*, 25 NY3d 364, 368 [2015]).

Thomas A. Sbarra Real Estate, Inc. v Lavelle-Tomko (117 AD3d 1210 [3d Dept 2014], *lv denied* 26 NY3d 907 [2015]) is instructive. That case involved a settlement agreement of a prior lawsuit plaintiff brought against a former employee, who had engaged in certain actions harmful to plaintiff after plaintiff terminated her. The plaintiff in *Thomas A. Sbarra Real Estate, Inc.* then sued the defendant for a breach of the settlement agreement. The agreement required the defendant to surrender her real estate broker's license and to cease acting as a real estate agent or broker in New York. Nevertheless, the defendant began to sell real estate two years after executing the agreement. A nonjury trial resulted in a determination in the plaintiff's favor,

finding that the parties' intent "when the settlement agreement was executed -- as reflected by the agreement and the credible proof at trial -- was that defendant would permanently cease acting as a real estate agent or broker in New York" (117 AD3d at 1210). The Court rejected the defendant's attempt to compare the restrictive covenant in the settlement agreement to noncompete clauses in employment contracts (*id.* at 1211). The defendant had entered into the agreement to settle a lawsuit against her, and not as a condition for continued employment with the plaintiff (*id.*).

As with the defendant in *Thomas A. Sbarra Real Estate, Inc.*, the defendant in this action entered into the Settlement Agreement in order to settle plaintiff's prior lawsuit against him. Accordingly, the settlement agreement is not unenforceable.

Other than *Thomas A. Sbarra Real Estate, Inc.*, neither plaintiff nor defendant cited another case that is factually similar. The court has been unable to locate another decision in New York on addressing the issue of whether the inclusion of a restrictive covenant in a settlement agreement renders the settlement agreement unenforceable. Nevertheless, support for the court's determination is found in the Restatement (Second) of Contracts § 187, entitled Non-Ancillary Restraints on Competition, that reads, "[a] promise to refrain from competition that imposes a restraint that is not ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade." Courts in other jurisdictions have interpreted the phrase "ancillary to an otherwise valid transaction or relationship" to encompass settlement agreements with noncompetition provisions and have upheld those agreements (*see Cranston Print Works Co. v Pothier*, 848 A2d 213, 220 [R.I. 2004] ["the noncompetition provisions are ancillary to an otherwise valid contract because they are subordinate to a settlement agreement and to a mutual release resolving contested litigation between . . . a former employer, and . . . a former employee"]; *Justin Belt Co. v Yost*, 502 SW2d 681, 684 [Tex 1973] ["the noncompetition covenant at issue was ancillary to an agreement that settled the dispute between [plaintiff] and

his former employees and accomplished a termination of the pending litigation"]; *Kroner v Singer Asset Fin. Co.*, 814 So 2d 454, 456 [Fla Dist Ct App 2001] [denying a motion to set aside a settlement agreement with a noncompetition agreement that barred the plaintiff from engaging in the lottery business for five years because the defendant "gave up valuable monetary claims for breach of that agreement" . . . "by agreeing to accept the non-competition agreement from [the plaintiff], settling a lawsuit"]; *McClain & Co., Inc. v Carucci*, 2011 WL 1706810, *6, 2011 US Dist LEXIS 48404, *17 [WD Va, May 4, 2011, No. 3:10-cv-00065 (NKM)] [upholding a noncompete covenant in a settlement agreement negotiated between parties because "the noncompete covenant is one element of an agreement settling a private dispute, which, as a highly favored agreement in the law, should not be subjected to undue limitations on its enforceability"]).

Particularly instructive is *Novelty Bias Binding Co. v Shevrin*, 342 Mass 714, 717 [1961]. In that action, the plaintiff corporations terminated the defendant employee when the plaintiffs discovered that the defendant had embezzled more than $130,000 from them. As part of a settlement of a criminal proceeding initiated against him, the defendant agreed, in a writing filed with the court, that he would not disclose the plaintiffs' confidential information and that he would refrain from competing against them in 28 states for a three-year period. Shortly thereafter, the defendant began working for one of the plaintiffs' competitors, solicited business from the plaintiffs' customers, and disclosed certain secrets to his new employer. The issue before the Court was whether the restrictive covenant was unenforceable because it was contained in a settlement agreement. The Court determined that the "covenant entered into was at least ancillary to a permissible transaction . . . namely, an agreement for restitution for the thefts committed during employment" (342 Mass at 717 [citation omitted]). Therefore, the covenant was not illegal and unenforceable (*id.*)

Further, the restrictive covenants provision in the Settlement Agreement are not unreasonable or overbroad. Although the provision imposes a "worldwide" ban, the provision prohibits defendant from engaging in the purchase or sale of only two specific of food products -- pecorino cheese and prosciutto ham (complaint, exhibit B at 2). Defendant, Gellert and Saracino all testified that plaintiff and Liaison West sold other Italian food products, and that defendant was free to sell those other items. The three-year time period is also reasonable given the nature of the claims in *Atalanta I*. Notably, the Court in *Thomas A. Sbarra Real Estate, Inc.* upheld an agreement that imposed a permanent restriction upon the defendant (117 AD3d at 1210). Thus, the Settlement Agreement in this action "does not prevent [defendant] from pursuing his career" (*Frenkel Benefits, LLC v Mallory*, 142 AD3d 835, 838 [1st Dept 2016]).

As for a purported breach, a plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

The evidence establishes the existence of a valid agreement, plaintiff's performance, and defendant's breach of paragraph 2, subsections (a) through (c) of the Settlement Agreement. Defendant admits that he sold a small quantity of pecorino cheese and ham while working in California (defendant tr Sept. 19, 2017 at 84; defendant tr Mar. 22, 2017 at 67 and 78). In addition, defendant admitted contacting suppliers of those products (defendant tr Mar. 22, 2017 at 233). Defendant's averment that he "unsuccessfully attempted to sell" the Prohibited Products creates only a feigned issue of fact (*see Mermelstein v East Winds Co.*, 136 AD3d 505, 505 [1st Dept 2016]). Defendant's admission that he "may have made *de minimis* sales" of pecorino cheeses defeats defendant's last statement (defendant aff, ¶ 14).

However, plaintiff has not established that defendant breached paragraph 3 of the Settlement Agreement by disclosing confidential or proprietary information. Gellert testified that the names of suppliers and customers are matters of public knowledge, and defendant

testified that he maintained personal contacts within the prosciutto industry that he had cultivated outside of his employment with plaintiff (defendant aff, ¶ 7). Further, testimony from Saracino and defendant raise an issue of fact whether defendant disclosed plaintiff's pricing information to Liaison West.

Nor has plaintiff established that it sustained $3 million in damages. Plaintiff calculated its total damages, couched as lost profits over three years, based upon the total dollar amount of pecorino cheese sold per year. New York permits the recovery of lost future profits as damages in breach of contract cases (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). In order to recover, "it must be demonstrated with certainty that such damages have been caused by the breach and . . . the alleged loss must be capable of proof with reasonable certainty" (*id.*). Here, Gellert testified that the purchase price for pecorino cheese was "particularly volatile" from year to year (Gellert tr at 38, line 11), based upon changes in the exchange rate, inflation or deflation, and sales patterns (*id.* at 39). Defendant added that the price of Pecorino Romano changes weekly because of "weather, exchange rates and other factors" (defendant aff, ¶ 6). Thus, plaintiff has not shown that using a base number of $1 million in lost profits per year is a reliable measure. Further, the annual sales figures set forth in Gellert's affidavit omitted the total volume of pecorino cheese sold. This number changed every year. Moreover, these figures included sales for ricotta salata, but it is unclear if ricotta salata falls outside the pecorino cheese category for purposes of the Settlement Agreement. Because the total volume of cheese sold between 2013 and 2017 changed each year, together with fluctuating prices for pecorino cheese, the court finds that the total dollar amount plaintiff seeks as lost profits is speculative at this juncture.

Plaintiff also seeks to recover $187,901.48 in attorneys' fees. The general rule is that "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule"

(*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989] [citations omitted]). Paragraph 10 of the Settlement Agreement permits the prevailing party to recover its reasonable attorneys' fees in any action for an alleged breach. Plaintiff, the prevailing party, is entitled to recover its reasonable attorneys' fees and costs (*see Sanchez v Hay*, 122 AD3d 533, 534 [1st Dept 2014], *lv dismissed* 24 NY3d 1213 [2015]). However, the reasonableness of the fee depends on the following:

> "[T]ime and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved"

(*Matter of Freeman*, 34 NY2d 1, 9 [1974]). Absent from the motion is supporting documentation showing how plaintiff's attorneys calculated their fees. Therefore, plaintiff has not demonstrated the reasonable amount of its attorneys' fees. Accordingly, the court denies this branch of the motion.

Finally, plaintiff seeks an order enforcing the Settlement Agreement. The relief sought, though, is equitable in nature because enforcement would entail enjoining defendant from violating certain provisions of the Settlement Agreement. Here, plaintiff has not demonstrated that it lacks an adequate remedy at law, namely monetary damages (*Regini v Board of Mgrs. of Loft Space Condominium*, 107 AD3d 496, 497 [1st Dept 2013]). Thus, this branch of the motion seeking an order of enforcement is denied.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment on the issue of defendant's liability on the first cause of action with respect to paragraph 2, subsections (a) through (c) of the Settlement Agreement dated August 11, 2016, and is otherwise denied; and it is further

ORDERED that the amount of damages due to plaintiff for defendant's breach of paragraph 2, subsections (a) through (c) of the Settlement Agreement dated August 11, 2016, including plaintiff's reasonable attorneys' fees and costs, shall be assessed at the time of trial.

The parties are directed to attend a status conference on December 13, 2018 at 10 a.m.

Dated: 10/1/2018
New York, NY

ENTER:

J.S.C.
HON. MELISSA A. CRANE
J.S.C.