

Digital Warehouse USA Inc. v Hasan
2019 NY Slip Op 33657(U)
December 16, 2019
Supreme Court, New York County
Docket Number: 656350/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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DIGITAL WAREHOUSE USA INC.,NETFAST TECHNOLOGY SOLUTIONS INC.

Plaintiff,

- v -

NASHAUD HASAN, HOSEIN JOE ASADY,

Defendant.

-----X

INDEX NO. 656350/2018

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for CONTEMPT.

Upon the foregoing documents and for the reasons set forth on the record (12/13/2019), Digital Warehouse USA, Inc. and Netfast Technology Solutions, Inc. (Netfast) (collectively, the Plaintiffs)'s motion for contempt is granted solely to the extent set forth below.

The Relevant Facts and Circumstances

Reference is made to an Employment Agreement (the Agreement, NYSCEF Doc. No. 6), dated January 12, 2012, by and between Netfast Technology Solutions, Inc. and Nashaud Hasan pursuant to which Mr. Hasan agreed to a non-compete and confidentiality agreement which were to scheduled to terminate as of one year following the date of termination of employment or six months following termination of the employment if the employment period was less than one year. Mr. Hasan resigned from his employment with Netfast on November 15, 2018 and formed a new company, Agnostic Solution, Inc. (Agnostic) on November 16, 2018 (id., ¶¶ 16, 21).

Accordingly, per the terms of the Agreement, the non-compete was scheduled to terminate on November 15, 2019.

On December 20, 2018, the Plaintiffs commenced this action for breach of the Agreement and moved for a temporary restraining order and preliminary injunction (Mtn. Seq. 001). The parties voluntarily agreed to resolve the application for a temporary restraining order by stipulation, dated December 20, 2018 (the **2018 Order**, NYSCEF Doc. No. 8) which the court so-ordered.

The 2018 Order included, among other things, the following terms:

(b) Restraining and enjoining Hasan, either alone or in concert, from soliciting or contacting Plaintiffs' customers, either directly or indirectly, for himself or any third party;

(c) Restraining and enjoining Hasan from becoming engaged in any business or activity which is directly or indirectly in competition with any product or service sold by, or any business or activity engaged in by Plaintiffs; (*id.*, at 2).

Pursuant to a subsequently so-ordered stipulation (the **2019 Order**, NYSCEF Doc. No. 11), dated January 18, 2019, the parties resolved the Plaintiffs' motion for a preliminary injunction.

The 2019 Order included, among other things, the following terms:

A. Restraining and enjoining Hasan, from either alone or in concert, from continuing to possess, use, disseminate, transmit, or otherwise distribute, for any purpose whatsoever, any materials protected under the Restrictive Covenant and Confidentiality Agreement, dated January 12, 2012 (the "Agreement"), as that term is defined in Plaintiffs' moving papers, which is appended to and is a part of the Employment Agreement of the same date, as that term is defined in Plaintiffs' moving papers, specifically trade secrets, customer lists, pricing models, business methods, technical information related to Plaintiffs, emails and other correspondences, notes, memoranda, or any other person, entity, or otherwise;

B. Restraining and enjoining Hasan, either alone or in concert, from soliciting or contacting Plaintiffs' customers either directly or indirectly, for himself or any third party;

C. Restraining and enjoining Hasan from becoming engaged in, employed by, or having any ownership interest in any business which is directly or indirectly in competition with any product or service sold by, or any business or activity engaged in by Plaintiffs;

D. This order shall be in effect until November 15, 2019, thereby it will expire thereafter. (*id.*).

Subsequently in the course of discovery, the Plaintiffs discovered that Mr. Hasan did business with at least two of the Plaintiffs' clients, Sanoh America, Inc. (**Sanoh**) and the University of Saint Joseph after this action was commenced and the 2018 Order was entered. In an email dated, December 24, 2018, Mr. Alex Johnson of Agnostic wrote to Sanoh (the **December Email**, NYSCEF Doc. No. 40). On January 18, 2019, Agnostic deposited a check for \$6,400.00 from Sanoh, dated January 10, 2019, into its bank account (the **First Deposit**, NYSCEF Doc. Nos. 38, 39).

By letter, dated June 7, 2019, Mr. Hasan's counsel advised the Plaintiffs of a business transaction that Mr. Hasan conducted with the University of Saint Joseph in early December 2018, pursuant to which Agnostic received \$60,494 for performing certain network services (NYSCEF Doc. No. 41). Agnostic's bank records indicate that the sum of \$57,995.00 was deposited on January 22, 2019 (the **Second Deposit**, NYSCEF Doc. No. 39). On August 9, 2019, the Plaintiffs filed this motion seeking to impose criminal contempt and civil contempt on Mr. Hasan.

Discussion

Pursuant to Judiciary Law § 753 (A)(3) and § 750 (A)(3), a court may punish a party for civil and criminal contempt respectively. Civil contempt must be proved by clear and convincing evidence and its purpose is to compensate an injured private party or to ensure compliance with a court's order (*Classe v Silverberg*, 168 AD3d 603, 604 [1st Dept 2019]; *Dept. of Env'tl. Protection v Dept. of Env'tl. Conservation*, 70 NY2d 233, 239 [1987]). Criminal contempt requires proof beyond a reasonable doubt and has the dual purpose of protecting the integrity of the judicial process and punishing an individual for disobeying a court order (*id.*). Both civil and criminal contempt require that (1) a lawful order expressing an unequivocal mandate was in effect and (2) that the party charged with contempt had notice of the order and disobeyed it (*id.*). However, civil contempt will be imposed where failure to comply with an order prejudiced the rights of a party to the litigation (*Matter of Gallagher v Old Guard of the City of NY*, 172 AD3d 609, 610 [1st Dept 2019]), whereas criminal contempt requires a showing that the order was violated with a higher degree of willfulness than that required in a civil contempt proceeding (*Dept. of Env'tl.*, 70 NY2d at 239). If a finding of contempt is made, the court must impose a fine or imprisonment (Judiciary Law, § 753; *McCain v Dinkins*, 192 AD2d 217, 220 [1st Dept 1993]).

The Plaintiffs argue that Mr. Hasan should be held in civil and criminal contempt for his willful violation of the 2018 Order and the 2019 Order. In his affidavit in opposition, Mr. Hasan concedes that he violated the 2018 Order and 2019 Order and that he made the First Deposit and the Second Deposit (NYSCEF Doc. No. 49, ¶¶ 9-12). Accordingly, the court holds Mr. Hasan in civil contempt and orders Mr. Hasan to repay \$64,395.00 (*i.e.*, the total sum of the First Deposit

and Second Deposit) and the costs of his second deposition, which was taken to ascertain the extent of his non-compliance with the 2018 Order and the 2019 Order.

However, the branch of the motion for criminal contempt is denied. The Plaintiffs have not demonstrated that Mr. Hasan possessed the requisite level of willfulness to warrant the heavy penalty of criminal contempt (*contra Bayamon Steel Processors, Inc. v Platt*, 191 AD2d 249, 249 [1st Dept 1993] [affirming the trial court's imposition of civil and criminal contempt on the defendant in a case where defendant was directed to cease competition with the plaintiff's business, in part, because the defendant divorced his wife and transferred control of his business to her to circumvent the court-ordered injunctions]). In his affidavit in opposition, Mr. Hasan explains that he made the deposits due to financial hardship and that he has now ceased competition with the Plaintiffs (NYSCEF Doc. No. 49, ¶¶ 13-15, 23-24).

The Plaintiffs shall provide Mr. Hasan with a list itemizing all of the costs associated with his second deposition within 20 days of this decision and order. The list shall be accompanied by an attorney's affirmation, representing that the costs stated were actually incurred in connection with the second deposition. The list and affirmation are to be submitted to this Court at the same time as proof of service is submitted.

Accordingly, it is

ORDERED that Plaintiffs' motion is granted solely to the extent that Nashaud Hasan is held in civil and not criminal contempt and ordered to repay \$64,395.00 and to pay for the costs of his second deposition.



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12/16/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE