SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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SHAUL REJWAN, derivatively on behalf of
BABY TIME INTERNATIONAL, INC.

Plaintiffs,

Decision and order

- against -

Index No. 515253/2022

FIRST ESSENTIALS CORP., FIRST ESSENTIALS LLC,
MENASHE BATTAT, and YAKIR BATTAT,

June 23, 2022

Defendant,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §6301 seeking a preliminary injunction staying the defendants Menashe and Yakir Battat from taking any action which will harm the plaintiff's interest in the company. Specifically, the plaintiff seeks to enjoin the defendants from utilizing Baby Time's proprietary and confidential information and trade secrets and from using that information in any way. Alternatively, the plaintiff seeks to enjoin the defendants from damaging Baby Time's business prospects. The defendants oppose the motion. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

The plaintiff Shaul Rejwan and the defendant Menashe Battat are each half owner of an entity called Baby Time International Inc. According to the complaint, Baby Time manufactures "baby products, including mattresses, playpens, cribs, crib sheets, cloth diapers, baby blankets, and other baby needs" (see,

Verified Complaint ¶ 15). Further, according to the complaint, in 2016 Baby Time expanded and began selling adult mattresses through an entity called Body Fit Bedding Co., and in 2020 began an e-commerce division called R&S Distributors selling baby products online.

In early 2022 the plaintiff discovered that the defendants were selling Baby Time's product line under a different entity called First Essentials. Investigations by the plaintiff revealed the defendants approached Baby Time's customers and sold them the identical items Baby Time had sold them previously. This action was commenced and the complaint alleges causes of action for breach of a fiduciary duty, and aiding and abetting such breach, misappropriation, unjust enrichment, misappropriation of trade secrets and the aiding and abetting of such misappropriation, unfair competition and the breach of the faithless servant doctrine. As noted, the plaintiff has moved seeking an injunction preventing the defendants from selling the same products that is sold by Baby Time. The motion is opposed.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the plaintiff has demanded and would be entitled to a judgement restraining defendant from the commission or the continuance of

an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id). A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Thus, a preliminary injunction is proper where evidence has been presented that an individual is misappropriating trade secrets to harm or disadvantage the protector of the secrets (L.F. O'Connell Associates Inc., v. Mcgetrick, 30 Misc3d 1238(A), 961 NYS2d 359 [Supreme Court Suffolk County 2012]). To establish the defendant in this case has misappropriated trade secrets the plaintiff must present evidence that the defendant is in possession of trade secrets and that it utilized such trade secrets in breach of a duty of loyalty or as a result of discovery by improper means (see, Integrated Cash Management Services Inc., v. Digital Transactions Inc., 920 F2d 171 [2d Cir. 1990]). In Parchem Trading Ltd., v. Depersia, 2020 WL 764211 [S.D.N.Y. 2020] the court noted that "'a customer list that

contains such information as the identities and preferences of client contacts' may be a 'protectable trade secret" (id). The court explained that "a trade secret may exist in a combination of characteristics and components, each of which, by itself is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage" (id). Therefore, customer lists will qualify as trade secrets where the list is within the exclusive knowledge of the company and cannot be "readily ascertained" by others in the industry without "extraordinary efforts" (Poller v. BioScrip Inc., 974 F.Supp2d 204 [S.D.N.Y. 2013]). However, contact information of customers that is "little more than a compilation of publicly available information" are not trade secrets (Art & Cook Inc., v. Haber, 416 F.Supp3d 191 [E.D.N.Y. 2017]).

The plaintiff argues the customer information is proprietary and thus constitutes trade secrets for two reasons. First, it was highly guarded and only the plaintiff and defendant had access to its information. Second, the customer list did not merely contain a list of customers but included far more proprietary and exclusive information. Thus, the customer information included "specifics of its customer relationships, such as which products each customer purchases, in what quantities, and at what prices" information that "is not readily ascertainable from any public source" (Memorandum of Law in Support, Page 14).

The affidavit of Shaul Rejwan includes information about the materials tested to insure unique products as well as supplier and manufacturing information (see, Affidavit of Shaul Rejwan, ¶¶ 8-11). Likewise, the Verified Complaint discusses the unique sourcing and manufacturing employed by Baby Time (see, Verified Complaint, ¶¶ 24-33). However, the plaintiff does not present any evidence supporting the contention the defendant unfairly utilized trade secrets relating to customer preferences regarding quantity, pricing or any other issue. Of course, the defendant would not be able to sell its products without obtaining the goods from a supplier. In this regard, the Verified Complaint itself cannot possibly support the contention the defendant utilized the same supplier as the plaintiff in some unlawful manner. The Verified Complaint admits that concerning the defendant's goods "the name of the manufacturer has been changed on the bills of lading" (see, Verified Complaint, ¶ 78) conceding no such utilization of the same suppliers and manufacturers occurred. However, the Verified Complaint insists that "the goods are being shipped from the same foreign port from which Baby Time's products are shipped and the descriptions of the products as listed are largely the same as the descriptions of the products in the bills of lading sent to Baby Time" (id). Thus, the Verified Complaint concludes that "upon information and belief, First Essentials is using Baby Time's supplier to

manufacture, inter alia, their portable cribs" (see, Verified Complaint ¶ 79). Thus, while further discovery may support the allegations the defendants improperly utilized the manufacturers and suppliers of Baby Time, if such utilization is even improper, the Verified Complaint, in the face of proof that undermines such an allegation, nevertheless, asserts otherwise. That is surely an insufficient basis upon which to grant any injunctive relief.

Examining the conclusory allegations of customer specifications, it is true that such information can constitute trade secrets (Jay's Custom Stringing Inc., v. Yu, 2001 WL 761067 [S.D.N.Y. 2001]). However, marketing strategies or the "mere knowledge of the intricacies of a business" are not trade secrets (Accenture LLP v. Trautman, 2021 WL 6619331 [S.D.N.Y. 2021]). The case of West Publishing Corporation v. Coiteux, 2017 WL 4339486 [S.D.N.Y. 2017] is instructive. In that case, Coiteux was an employee of West Publishing with access to information of a branch of West called Elite, a business management product. Coiteux was not involved in Elite's product and only dealt with West's products. Twelve years later Coiteux took another job with West's competitor Aderant. West accused Coiteux of divulging trade secrets to Aderant, specifically, "confidential information regarding Elite customers, pricing, and sales strategies in connection with those joint sales efforts" (id). The court noted that West asserted that "Coiteux had access to

'pricing, incentives offered and actual prices offered'; Elite customers' contact information, 'product needs and purchasing history'; and "information regarding West's sales strategies for Elite products, lists of customers West intended to target for the sale of Elite products and Elite product development details'" (id). The court declined to grant any injunction prohibiting Coiteux from working at Aderant. First, the court held that the identity of Elite's clients was not a trade secret. Moreover, the court stressed that pricing data, business strategies and the intricacies of the business did not amount to any trade secrets. Further, there can really be no trade secret concerning the mere preferences of customers when the customer can simply be asked about their particular preferences and needs (Kadant Inc., v. Seeley Machine Inc., 244 F.Supp2d 19 [N.D.N.Y. 2003]). Moreover, any information that could easily be recalled by the defendant in his dealings with the same customers is not a trade secret. As the court observed in Catalogue Service of Westchester Inc., v. Henry, 107 AD2d 783, 484 NYS2d 615 [2d Dept., 1985]), "remembered information as to specific needs and business habits of particular customers is not confidential" (id). Cases that have held customer lists are trade secrets where it would be difficult to acquire that information from other sources since they contains customer preferences, refers to such information that cannot simply be asked of the customer

(North Atlantic Instruments Inc., v. Haber, 188 F3d 38 [2d. Cir 1999]). In instances where the customer preferences are part of "a long, difficult process to educate and convert a prospective customer to the benefits of the process" being offered then such preferences, like the customer list itself may afford trade secret protection (see, Webcraft Technologies Inc., v. McCaw, 674 F.Supp. 1039 [S.D.N.Y. 1987]). The plaintiff has failed to demonstrate there is a likelihood of success the defendants utilized such information that could constitute trade secrets. That does not mean that upon the proper presentation of evidence the plaintiff will not be able to prevail upon these claims at trial. Rather, at this stage the plaintiff has failed to present sufficient evidence that any trade secrets were utilized sufficient to grant an injunction.

However, the defendants have all but admitted that they breached fiduciary duties owed to the corporation. The defendants argue that they "have every right to compete with Plaintiff as Plaintiff doesn't claim any sort of non-compete with these Defendants" and that "there is nothing improper about the competition" (Memorandum of Law, pages 14 and 15). While that may be true in a general, abstract way, current employees and owners of a corporation may not actively engage in competition at the expense of that corporation (Ritani LLC v. Aghjayan, 970 F.Supp. 232 [S.D.N.Y. 2013]). Of course, former employees of a

corporation may compete with that corporation (Abraham Zion Corp., v. Lebow, 593 F.Supp. 551 [S.D.N.Y. 1984]). The defendants assert "the absence of any agreement between the parties restricting these Defendants from leaving Baby Time (or from constructively being terminated therefrom) and working for another competing business" (Memorandum in Opposition, page 2). However, at no point do the defendants concede they were constructively terminated from Baby Time. On the contrary, the defendant Menashe Battat remains an officer and director of the corporation and Yakir Battat remains an employee. Thus, Yakir Battat states that "I am still selling Baby Time inventory whenever I receive an order for those goods which I forward to Rejwan or his associates to fulfill the order" (see, Affirmation of Yakir Battat, ¶ 16). Further, Yakir's excuse that he may engage in competition as an employee or owner of First Essentials despite his current employment with Baby Time because his "'competition' is also not really competition because First Essentials makes a better quality product than Baby Time" (id) is not a basis at all upon which to engage in potential breaches of a fiduciary duty.

Thus to establish a claim for a breach of a fiduciary duty, a plaintiff must establish the existence of the following three elements: (1) a fiduciary relationship, (2) misconduct by the defendant, and (3) damages that were directly caused by the

defendant's misconduct (Kurtzman v Bergstol, 40 AD3d 588, 835 NYS2d 644, 646 [2d Dept., 2007], see, Birnbaum v. Birnbaum, 73 NY2d 461, 541 NYS2d 746 [1989]). Moreover, it is well settled that an employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties (McKinnon Doxsee Agency Inc., v. Gallina, 187 AD3d 733, 132 NYS2d 144 [2d Dept., 2020]). Further, an employee maintains a fiduciary duty to an employer. As the court noted in Nielson Co. (US) LLC v. Success Systems Inc., 2013 WL 1197857 [S.D.N.Y. 2013] "as a matter of law, an employee owes a fiduciary duty to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost faith and loyalty in the performance of his duties" (id).

Therefore, as current members and employees of the corporation Menashe and Yakir maintain a fiduciary duty not to undermine the corporation's fiscal vitality and directly compete with it. Thus, even if no trade secrets of the corporation were utilized at all in competing with the corporation the very act of competition itself created a potential breach of a fiduciary duty. Therefore, the plaintiff has demonstrated a likelihood of success on the merits regarding the breach of fiduciary duties. Concerning the irreparable harm prong, the plaintiff has demonstrated more than just mere economic loss, rather, the plaintiff may suffer the loss and goodwill of its client base.

Indeed, Mr. Rejwan states the actions of the defendants were causing Baby Time to go out of business (see, Affidavit of Shaul Rejwan, ¶ 28). These losses are irreparable and consequently injunctive relief is proper (see, Ayco Co., L.P., v. Frisch, 795 F.Supp2d. 193 [N.D.N.Y. 2011]). Further, the balancing of the equities favors the plaintiff. Consequently, as long as the defendants are connected in any way with the Baby Time, they maintain a fiduciary duty not to compete and thereby undermine Baby Time's success in the industry. Therefore, based on the foregoing, the motion seeking an injunction preventing the defendants from competing with the plaintiff is hereby granted.

So ordered.

ENTER:

DATED: June 23, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC