Decided on January 21, 2014

Supreme Court, Nassau County

Liberty Ashes, Inc., Plaintiff,

against

Michael Taormina and EMPIRE STATE ENVIRONMENTAL COMPANY, LLC, Defendants.

603812-13

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Vito M. DeStefano, J.

The following papers and the attachments and exhibits thereto have been read on this motion:

Order to Show Cause1

Affirmation in Opposition2

Reply Affirmation3

The Plaintiff, Liberty Ashes., Inc. moves for an order pursuant to CPLR 6301 enjoining the Defendants, Michael Taormina and Empire State Environmental Company, LLC from "contacting, soliciting or contracting for services with any of its customers, and from inducing or [*2]attempting to induce any of its customers to reduce its business with [Liberty] during the pendency of this action".

Factual Background

Since 1989, Liberty Ashes, Inc. ("Liberty") has been in the business of commercial refuse collection and waste management in the New York City and Long Island areas. Defendant Michael Taormina was employed by Liberty as a salesman for seven years until his resignation on November 15, 2013. As a salesman, it was Taormina's job to "locate and approach prospective customers and to thereafter obtain a signed contact from them for the services provided by [Liberty]. From that point on, the customer was serviced in all ways by the

office personnel and Taormina was not required to be in contact with them" (S. Bellino Affidavit in Support at ¶ 5).

Liberty's customers are tenants in commercial buildings. Liberty obtains its customers by establishing relationships with superintendents and building managers. The "agreement with the superintendents and the building managers are private and confidential. Knowing who our customers are and what we charge, as well as which superintendents or building managers we have agreements with and what we pay them for bringing the trash to the curb for our customers is an incalculable advantage to a competitor" (S. Bellino Affidavit in Support at ¶¶ 7, 8).

After Taormina resigned on November 15, 2013, Liberty discovered that Taormina was purportedly using Liberty's "confidential and proprietary information" to solicit its customers and contacts in New York City on behalf of his new employer, Defendant Empire State Environmental Company, LLC ("Empire"), and, because the waste collection and disposal business is "extremely competitive and price sensitive", Liberty is "being damaged every day this conduct continues." Further, in order to "reassure and retain customers" approached by Taormina, Liberty "has, and will continue to be forced to make price and service concessions" (S. Bellino Affidavit in Support at ¶¶ 9, 10; D. Bellino Affidavit in Support at ¶ 11; Ex. "B" to Affirmation in Support).

Thereafter, on or about December 19, 2013, Liberty commenced an action against Taormina and Empire asserting causes of action for, *inter alia*, tortious interference with contractual relationships and breach of the Employee Confidential Information and Non-Competition Agreement ("Agreement") signed by Taormina on June 11, 2007. The Agreement provided as follows:

In view of my job duties and responsibilities. *I have been and will continue to be privy to the Company's highly confidential and proprietary processes and*

methods of providing services and products to its customers, including certain trade secrets consisting of among other things, information and data regarding costs, profits, pricing, sales, markets, products, key personnel, operational methods, technical processes, computer and software programs or systems developed or improved by the Company (in various stages of development), customers and vendors, customers [*3]and vendors representatives and contacts, the nature of the services required by the Company's actual and prospective customers and vendors, the services performed by the Company for its customers and vendors, other unique needs and requests of the Company's vendors, and other business affairs, methods and strategies, plans for future development, *and other information of the Company that is not readily available to the public* (such information referred to collectively as "Confidential Information").

I *shall not during or at any time after the termination of my employment with the Company,* and notwithstanding the cause of termination or the party terminating,*use for myself or others, or disclose or divulge to others,* for purposes other than the Company's business, *any Confidential Information of the Company, unless such information shall have become public knowledge through sources other than me, or is information generally known to competitors*. I further agree not to copy or record, electronically, on disk or tape, or otherwise, any data owned by the Company, including but not limited to software programs, databases, or customer or vendor lists.

With respect to any and all customers and vendors with whom I have or will have a relationship during my employment with the Company. I recognize that the Company subsidizes and otherwise financially supports my recruitment efforts as part of the Company's focus on customer and vendor development and retention, and such relationships are not the result of my efforts alone.

For good and valuable considerations, and in consideration of my being employed by the Company, I agree that upon termination of my employment, and not withstanding the cause of termination or the party terminating, *I shall not Compete with the business of the Company.* The term "Compete" as used in this Agreement is intended to mean only that I shall not, directly or indirectly, or in any other capacity, on my own behalf or on behalf of any other individual, firm or entity: (i) Engage in, whether as an employee, employer, consultant, independent contractor, agent, officer, director or in any other capacity, any business engaged in the transportation, collection, disposal, processing, handling, or storage of waste of any type; (ii) Solicit or assist in the solicitation of any customer or vendor of the Company; or (iii) induce or attempt to induce any customer or vendor of the Company to reduce its business with the Company.

These restrictions apply for a period of two years commencing with the effective date of termination of my employment, apply to customers or vendors that are existing or that have been solicited by the Company during the one-year period prior to the termination of my employment, and apply within the geographic area defined to include the area within the Counties of Nassau, Queens, and Kings. I expressly acknowledge that these restrictions are reasonable in view of my position with the Company and the significant investment, financial and otherwise, which the Company has made in my employment (Ex. "A" to Order to Show Cause [emphasis added]).

On December 23, 2013, Liberty moved, by order to show cause, for an order preliminarily enjoining Taormina and Empire from "contacting, soliciting or contracting for services with any of its customers, and from inducing or attempting to induce any of its customers to reduce its business with [Liberty] during the pendency of this action".

On January 7, 2014, the court issued a temporary restraining order ("TRO") enjoining Taormina from: "working in any business, as an employee or otherwise, which is engaged in the transportation, collection, disposal, processing, handling, or storage of waste of any type in the counties of Nassau, Queens and Kings, and that the Defendants are enjoined from contacting and soliciting for services any of Plaintiff's customers in the counties of Nassau, Queens and Kings, including also, those businesses that have been solicited by Plaintiff in the year prior to November 15, 2013, and from inducing or attempting to induce any of such customers or businesses to reduce its business with the Plaintiff."

In support of the motion for a preliminary injunction, Liberty argues that the restrictions set forth in the Agreement are limited and reasonable in both time and geographic scope; that Liberty has a legitimate interest in preventing Taormina from exploiting or appropriating the goodwill of Liberty's customers, which had been created and maintained at Liberty's expense; and last, that enforcement of the Agreement will not be harmful to the general public or unreasonably burdensome to the Defendants (Affirmation in Support at ¶¶ 6-8).[FN1]

In opposition, the Defendants argue that: Taormina does not possess any of Liberty's proprietary material; Taormina did not remove any client files or information from Liberty's offices; any of Liberty's customers could be identified by any third party simply by perusing databases or phonebooks; and that Liberty has failed to identify what information, if any, is confidential (Affirmation in Opposition at ¶ 14).

For the reasons that follow, Liberty's motion for a preliminary injunction is granted.

The Court's Determination

A party moving for a preliminary injunction must demonstrate by clear and convincing evidence, a likelihood of ultimate success on the merits, irreparable injury if the injunction were not granted, and a balancing of equities in favor of granting the injunction (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2d Dept 2010]). An injunction is a provisional remedy to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual, not to determine the ultimate rights of the parties. In addition, mandatory preliminary injunctions should not be granted absent extraordinary or unique circumstances or where the final judgment may otherwise fail to afford complete relief (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727[2d Dept 2005]). The decision whether to grant or [*4]deny a preliminary injunction is within the sound discretion of the court (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d at 738, *supra*; *Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942 [2d Dept 2009]).

Likelihood of Success on the Merits

Liberty commenced an action against Taormina and Empire asserting causes of action for, *inter alia*, tortious interference with contractual relationships and breach of the Agreement signed by Taormina on June 11, 2007.

With respect to the cause of action alleging breach of the Agreement, New York has adopted a "standard of reasonableness in determining the validity of employee agreements not to compete." In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is 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 Assocs. v Strauman*, 40 NY2d 303, 307 [1976]).

The court concludes that the Agreement is not harmful to the general public, and not unreasonably burdensome to Taormina. The sole determination, thus, is whether the Agreement in no greater than is required for the protection of Liberty's "legitimate interest" (*see id* at 388). In this regard, New York courts have strictly "limited the cognizable employer interests under the first prong . . . to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary" (*Id*. at 389, quoting *Reed, Roberts Assocs. v Strauman*, 40 NY2d at 308, *supra*).

Here, Liberty argues that knowing who its customers are and what it charges, and knowing which superintendents or building managers have agreements with Liberty, as well as the terms of those agreements, "is an incalculable advantage to a competitor" (S. Bellino Affidavit in Support at ¶¶ 7, 8). Notwithstanding Liberty's admission that its customer base is generally tenants in commercial buildings, Liberty nevertheless obtains its customers by establishing relationships and agreements with superintendents and building managers which are, according to Liberty, private and confidential (S. Bellino Affidavit in Support at ¶¶ 7, 8).[FN2] [*5]

It is well settled that solicitation of an employer's customers by a former employee is not actionable unless the customer list could be considered a trade secret or there was wrongful conduct by the employee such as physically taking or copying the employer's files or using confidential information (*Starlight Limousine Service, Inc. v Cucinella*, 275 AD2d 704 [2d Dept 2000]). "Generally, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the

employee from soliciting his employer's customers" (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392-93 [1972] *Amana Express Int'l v Pier-Air Int'l*, 211 AD2d 606 [2d Dept 1995] ["[t]rade secret protection will not attach to customer lists where such customers are readily ascertainable from sources outside the former employee's business unless the employee had stolen or memorized the customer lists"]). Conversely, where the customers are not known in the trade or are discoverable only by extraordinary efforts courts have not hesitated to protect customer lists and files as trade secrets. This is especially so where the customers' patronage had been secured by years of effort and advertising effected by the expenditure of substantial time and money" (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392-93 [1972]*BDO Seidman v Hirshberg*, 93 NY2d at 391, supra [employer's legitimate interests subject to protection when the good will and relationships that an employee develops with the employers client at the employers expense during his employment] *Stanley Tulchin Assoc. v Vignola*, 186 AD2d 183 [2d Dept 1992] [customer list will be treated as a trade secret where the names and addresses of the customers are not known in the trade or can be obtained only through extraordinary effort]).

The evidence before the court establishes that Taormina, as a sales manager, became intimately familiar with Liberty's business and developed significant relationships with Liberty's clients and customers. As a salesman, Taormina was entrusted with "customer lists, customer contacts and price and cost information as well as vendor lists and other trade secrets" (D. Bellino Affidavit at ¶ 7). This sensitive and confidential business information concerning Liberty's business and pricing information is subject to the protection of the covenants in his employment agreement with Liberty (*Stanley Tulchin Assoc. v Vignola*, 186 AD2d 183 [2d Dept 1992] [an employer has a "substantial interest in retaining its present clients, an interest which may be seriously eroded through a competitor's use of this information"]).

Liberty has also shown that Empire is a direct competitor of Liberty. Taormina was entrusted with confidential information, including detailed information regarding particular customers and prices, all of which allow Liberty to compete for and obtain the patronage and repeat business of its customers. Indeed, Taormina does not contest that he enjoyed significant relationships with Liberty's customers. Rather, Taormina denies having misappropriated anything from Liberty. Specifically, according to Taormina's affidavit:

At no time after I left the employ of Liberty Ashes did I ever breach the terms and conditions of my agreement with Liberty. The agreement they forced me to sign covers the Counties of Queens, Kings and Nassau . . . [*6]

I have never used Plaintiff's trade secrets, business model, software or any other item that is not available to the trade or to the general pubic. I have [not] reached out to any of Plaintiff's customers in the geographic area of Brooklyn, Queens or Nassau County.

* * *

As this Court is undoubtedly aware, any customer is free to use the services of any vendor it wants to. In fact the Business Integrity Commission of this industry expressly provides such a right (Affidavit in Opposition at ¶¶ 8, 10, and 12).

Taormina's argument, however, misses the point.

There is no doubt that Taormina had access to certain information not known to persons outside Liberty which would be of significant value to a competitor who does not possess such information (*see Ashland Management,*

Inc. v Jarmien, 82 NY2d 395 [1993]). Thus, Liberty has a legitimate interest in protecting its confidential information (*see BDO Seidman v Hirshberg*, 93 NY2d at 382, *supra* [check page cite]). It is clear on the present record that the need to protect this confidential information provides a firm ground for enforcing the agreement, including the non-compete, non-disclosure and non-solicitation covenants therein.

Irreparable Harm

Where the movant can be fully compensated by a monetary award, an injunction will not be granted because no irreparable harm will be sustained in the absence of injunctive relief (*306 Rutledge, LLC v City of New York*, 90 AD3d 1026 [2d Dept 2011]).

Liberty argues that it is being damaged every day in which Taormina purportedly continues to use of Liberty's "confidential and proprietary information" to solicit Liberty customers and contacts in New York City on behalf of Empire and that in order to "reassure and retain customers" approached by Taormina, Liberty "has, and will continue to be forced to make price and service concessions" (S. Bellino Affidavit in Support at ¶¶ 9, 10; D. Bellino Affidavit in Support at ¶ 11; Ex. "B" to Affirmation in Support). Liberty further contends that if Defendants are allowed to poach liberty's current customers and employees, "[t]hese relationships, once damaged, may not be reparable in the event [Liberty] is successful"; that Liberty only services about 25 buildings in Manhattan and that the failure to issue the injunction there "could result in the evisceration" of Liberty's business there (Reply Affirmation at ¶¶ 6 -7).

Here, Liberty has demonstrated that it will suffer irreparable injury if the Defendants are not enjoined from utilizing the confidential and proprietary information obtained by Taormina while employed with Liberty.[FN3] [*7]

It is well settled in New York that the loss of the business relationship which ostensibly took time and money to cultivate, constitutes irreparable harm that cannot be compensated by money damages (*Clarion Associates, Inc v D.J. Colby Co., Inc.*, 276 AD2d 461 [2d Dept 2000] *Laro Maintenance Corp. v Culkin*, 255 AD2d 560 [2d Dept 1998] *Stanley Tulchin Assoc. v Vignola*, 186 AD2d 183 [2d Dept 1992] [misappropriation of employer's client lists threatened the type of irreparable injury warranting injunctive relief] *Nassau Soda Fountain Equipment Corp. v Mason*, 118 AD2d 764 [2d Dept 1986] [irreparable injury where defendants might significantly diminish the amount of business conducted by plaintiff by virtue of the allegedly improper acts]). As stated by the Appellate Division in *Alside Division of Associated Materials Inc. v Leclair* (295 AD2d 873, 874 [3d Dept 2002]):

With regard to irreparable harm, the affidavits submitted by Plaintiff demonstrate that is has endeavored to cultivate relationships with its customers to develop important repeat business and if defendants are permitted to compete unfairly by using plaintiff's confidential and proprietary pricing information to underbid it, Plaintiff will not only lose business, but will also suffer a dilution of the good will it has developed with its customers. Such a loss of customer good will can constitute irreparable harm for preliminary injunction purposes.

Balance of Equities

When considering the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief (*Washington Deluxe Bus, Inc. v Sharmash Bus Corp.*, 47 AD3d 806 [2d Dept 2008]). Specifically, to obtain an injunction at bar, Liberty is required to show that the burden caused to Taormina by the imposition of the injunction is less than the harm caused to Liberty by Taormina's activities without the injunction (*Lombard v Station Square Inn Apartments Corp.*, 94 AD3d 717 [2d Dept 2012]).

Here, the record offers no basis to conclude that Taormina has suffered or will in the future suffer significant hardship from the limited restraints imposed from an injunction, whereas Liberty would likely suffer injury if the injunction were denied. Notably, the relief that Liberty seeks will not prevent Taormina from working. It will only prevent him from unfairly misappropriating client relationships and disclosing confidential information that Liberty entrusted to Taormina. In this regard, Taormina is free to compete with Liberty, subject to the restrictions set forth in the contract he signed.

Based on the foregoing, it is hereby

Ordered that the Temporary Restraining Order issued on January 7, 2014 is vacated; and [*8]it is further

Ordered that the Plaintiff's motion for a preliminary injunction is granted, to the extent that: 1) Defendant Taormina is enjoined from working in any business, as an employee or in any other capacity, which is engaged in the transportation, collection, disposal, processing, handling, or storage of waste of any type in the counties of Nassau, Queens and Kings for a two-year period, commencing on November 15, 2013; 2) Defendant Taormina is enjoined from contacting or soliciting for services any of Plaintiff's customers in the counties of Nassau, Queens and Kings, including also those businesses that have been solicited by Plaintiff in the year prior to November 15, 2013, and from inducing or attempting to induce any of such customers or businesses to reduce its business with the Plaintiff; and 3) Defendant Taormina is enjoined from utilizing any confidential information, as such term is defined in the Employee Confidential Information and Non-Competition Agreement dated June 11, 2007, to solicit any business or unfairly compete with the Plaintiff; and it is further

Ordered that the Plaintiff is directed to post an undertaking in the amount of $10,000 within 10 days of the date hereof.

This constitutes the decision and order of the court.

Dated: January 21, 2014

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Hon. Vito M. DeStefano, J.S.C.

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Footnotes

Footnote 1: According to Liberty, under "no conceivable set of circumstances" will enforcement of the Agreement be "unreasonably burdensome to the defendants" as the defendants are "free to solicit" from those who are not customers of Liberty, "both in and out of [Liberty's] operating areas". Liberty is "simply" seeking to bar the Defendants from "unfairly poaching [Liberty's] customer base due to their knowledge of [Liberty's] confidential information and trade secrets" (Affirmation in Support at ¶ 8)

Footnote 2: According to Liberty, "[i]t is extremely rare for a building to have more than one refuse collection company, and it almost universally was the company recommended by the Manager that the tenants utilized so as to take advantage of the Manager's service of collecting and transporting the waste to the collection point". These relationships with the Managers were established over a period of years and at great cost to Liberty, including salaries, expenses and perks. The Managers of "only particular building is not published anywhere and takes time and money to find and cultivate" (Affirmation in Reply to ¶¶ 11,12).

Footnote 3: In its reply affirmation, Liberty also contends that, "if Michael Bellino's information is correct that the Defendants do not possess a license from the Business Integrity Commission for any trucks, and do not possess a brokerage or sub-contracting license from that Commission, there would be no

legal damage to the Defendants as they could not legally service the stolen accounts in any event" (Reply Affirmation at ¶ 8). The court notes that this contention was raised for the first time in reply and, as such, is improper (*Haggerty v Quast*, 48 AD3d 629 [2d Dept 2008]).