SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

INDEX No. 005~~82/08~~ 5821/08

MOTION DATE: Jan. 28, 2009
Motion Sequence # 001

LANCE OSEFF, JENNIFER OSEFF, BALCO SECURITY SERVICES, INC. and SECURITY CENTRAL ALARM SERVICES, INC.,

Plaintiffs,

-against-

FRANK SCOTTI, BALCO ALARM SERVICES CORP. and ELECTRONIC SECURITY SYSTEMS OF NEW YORK,

Defendants.

The following papers read on this motion:

Order to Show Cause..... X
Affirmation in Opposition..... X
Reply Affidavit.... X
Memorandum of Law..... X

This motion, by the attorneys for the plaintiffs, for a preliminary injunction is determined as hereinafter set forth.

On or about January 2, 2007, defendant Balco Alarm Services Corp. (BAS) entered into an Agreement of Sale (the Agreement) to sell certain assets to plaintiff Balco Security Services, Inc. (BSS) a company formed by plaintiff Lance Oseff (Oseff) and his wife Jennifer Oseff. Plaintiff Security Central Alarm Services, Inc. (SCAS) is another corporation organized by Oseff. The plaintiff BSS is required to cease the use of the

"Balco" name on the third anniversary of the date of the Agreement. Defendant Frank Scotti (Scotti) is the sole shareholder of defendant BAS. Oseff alleges that defendant Electronic Security Systems of New York (ESS) is a sole proprietorship set up by Scotti for the purpose of interfering with the contractual relationship of the parties to the Agreement. Throughout his affidavit in opposition Scotti contends neither he nor BAS has any connection to ESS. Defendant BAS was and continues to be in the business of installing, servicing and monitoring electronic security systems. Oseff worked for BAS for 17 years.

The purchase price under the Agreement was $650,000.00 (of which $1,000 was for the equipment and $649,000 for the goodwill). $25,000 was paid when the Agreement was signed and $300,000 on the closing date. A further $15,000 was satisfied by the cancellation, at the closing, of BAS's pre-existing debt to Oseff in that amount. The balance was paid by delivery of a promissory note at the closing in the principal amount of $310,000 payable with interest in 60 monthly installments of $6,435.09 secured by a security interest in the transferred assets and a personal guarantee from Mr. and Mrs. Oseff.

The plaintiff alleges eight separate causes of action against the defendant, first for fraud and misrepresentation; second for interference with contractual relations; third for wrongful inducement of breach of contract; fourth for prima facie tort; fifth for breach of contract; sixth for defamation; seventh cause of action, for a permanent injunction; and the eighth cause of action, for attorneys fees.

In the seventh cause of action the plaintiff requests the issuance of a permanent injunction restraining the defendants from "any acts in violation of the terms of the Agreement, and specifically prohibiting the Defendants . . . from taking any action whatsoever in violation of the restrictive covenants by which the defendants are bound." (¶ 51st of the complaint).

Paragraph 14th Restrictive Covenant of the Agreement provides that:

> (a) For Five (5) years following the closing (the "Restricted Period") Seller shall not solicit, perform installations, service, provide central station monitoring, or otherwise contact customers listed in Schedule "B" of this Agreement for Central Station Based Alarm Services, subject to the following exceptions:

(i) Seller shall be permitted to make one mailing within a one year period from the Closing Date, wherein Seller shall be permitted to inform Schedule "B" customers that, except for those items listed in subdivision (a) in this paragraph, Seller will be available to those customers in providing them with electronic security, entertainment, communication and automation systems. Seller's mailings will not solicit any client to engage Seller to provide Central Station Based Alarm Services or in any manner directly or indirectly dissuade Schedule "B" customers from continuing to use Purchaser to provide Central Station Based Alarm Services.

(ii) Seller may sell goods or provide services to Schedule "B" customers other than Central Station Based Alarm Services. (emphasis added).

(iii) Seller shall be unrestricted in the services it performs for a Schedule "B" customer at a location not listed on Schedule B.

(b) Seller covenants that should any Schedule "B" customers contact him during the Restricted Period for Central Station Based Alarm Services at a location listed on Schedule B he shall direct them to Purchaser except as provided in subdivisions (a)(ii) and (a)(iii) herein.

(c) Schedule "B" will only include customers at locations that were fully installed and online with central station by June 30, 2006.

(d) Seller agrees to provide Purchaser during the Restricted Period with the right of first refusal to perform installation work as Seller's contractor for any services that Seller is permitted herein to perform for Schedule "B" customers at locations listed on Schedule B unless Seller has its own employees perform the installation.

The defendant seller argues that ¶ 14(b)(ii) of the agreement should be interpreted to mean that he could continue to provide other types of services to the customers on Schedule B "such as installing or servicing equipment for alarm systems that activated a local siren or bell, for example; or generated an alarm system to the subscriber's cell

phone or directly to the Police or Fire Department, and could provide even the listed services for those customers at other locations, or at the listed locations after the five-year restrictive period had elapsed." (Scott affidavit in opposition ¶ 4). The plaintiff purchaser argues that the latter language is nowhere in the Restrictive Covenant, being nothing more than an excuse for the seller to violate the terms of the Restrictive Covenant. Rather, the buyer argues that the clause stating (14a) "For Five (5) years following the closing (the "Restricted Period") seller shall not solicit, perform installations, service, provide central station monitoring, or otherwise contact customers listed in Schedule "B" . . ." (emphasis added) limits the defendant seller from contacting customers on Schedule B.

Plaintiff argues that the defendant contacted customers on Schedule B in violation of the Restrictive Covenant. Plaintiffs contend that defendant wrongfully contacted customer Biunno on Schedule B and referred them to Balco Alarm Services Corp. (see Exhibit A, Reply Affidavit Oseff). Further, plaintiff submitted credible proof that customer Maletta, also on Schedule B, may have been solicited by the defendants in violation of the Restrictive Covenant. Also, plaintiffs have presented credible proof that the defendants may have wrongfully solicited or contacted customer Jerry Harary. Defendant asserts that his contacting the customers on Schedule B was permissible and not in violation of the Restrictive Covenant.

There are over 600 customers on Schedule B. Defendant further contends that he "has no shortage of new business since entering into the Agreement of Sale (BAS's revenue was about $450,000 last year, and the total amount of work I performed for Schedule B customers was worth perhaps about one percent of that)." (Scott affidavit in opposition ¶ 19). Two of the contracts on Schedule B were with federal agencies and their contracts were unassignable. After some dispute as to the price, defendants offered to pay for these two customers. The defendant denies contacting any customers on Schedule B in violation of the Agreement. Defendant contends that if he contacted the customers on Schedule B he was permitted to do so pursuant to the terms of the Agreement; and in one year they were not worth more than 1% of $450,000.00 or $4,500. Plaintiffs assert that by incrementally and wrongfully chipping away at the customers on Schedule B, defendants are diluting the company's goodwill and threaten to jeopardize the viability of the business.

In order to be entitled to a preliminary injunction, a movant must clearly demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (***Aetna Ins. Co. v Capasso***, 75 NY2d 860; ***Doe v Axelrod***, 73 NY2d 748; ***Ruiz v***

Meloney, 26 AD3d 485; *Stockley v Gorelik*, 24 AD3d 535; *Matos v City of New York*, 21 AD3d 936).

The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*Ruiz v Meloney, supra*; *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642; *Weinreb Management, LLC v KBD Management, Inc.*, 22 AD3d 571). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*Doe v Axelrod, supra*, at 750; *Ruiz v Meloney, supra*; *Weinreb Management, LLC v KBD Management, Inc., supra*). "It is well settled that absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727; *St. Paul Fire and Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 348-349; *MacIntyre v Metropolitan Life Ins. Co.*, 221 AD2d 602).

It is most unfortunate Mr. Oseff and Mr. Scotti who have known each other for over 17 years and have apparently had a good business relationship, enter into a contract, crafted after many hours of negotiation, end up in contentious litigation over how to implement the terms of the Agreement.

A contract should be read as a whole to determine its purpose and intent (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162). "[I]n searching for the probable intent of the parties, lest form swallow substance, our goal must be to accord the words of the contract their 'fair and reasonable meaning' " (*Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555, quoting *Heller v Pope*, 250 NY 132, 135). We have long been guided by the rule that "every contract contains an implied obligation by each party to deal fairly with the other and to eschew actions which would deprive the other party of the fruits of the agreement" (*Miller v Almquist*, 241 AD2d 181, 184; *Greenwich Village Associates v Salle*, 110 AD2d 111, 115; *Gross v Neuman*, 53 AD2d 2, 5). "It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Breed v Insurance Co. of North America*, 46 NY2d 351, 355). Accordingly, "[w]hen sophisticated and counseled business persons" "set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198; *W.W.W. Assocs. v Giancontieri, supra*). Notably, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby "make a new contract for the parties under the guise of interpreting the writing" (*Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157, quoting from *Morlee Sales Corp. v Manufacturers*

Trust Co., 9 NY2d 16, 19; *see also* ***Reiss v Financial Performance Corp.***, ***supra***, at 199-200). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary th writing" (***W.W.W. Associates, Inc. v Giancontieri***, ***supra***). Rather, "[e]ffect and meaning must be given to every term of the contract" (***Village of Hamburg v American Ref-Fuel Co. of Niagara, L.P.***, 284 AD2d 85, 89; *see* ***County of Columbia v Continental Ins. Co.***, 83 NY2d618, 628) and reasonable effort must be made to harmonize all of its terms (***Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Associates***, 63 NY2d 396; ***National Conversion Corp. v Cedar Bldg. Corp.***, 23 NY2d 621, 625). The contract must be interpreted so as to give effect to, not nullify, its general or primary purpose (***Williams Press, Inc. v State***, 37 NY2d 434, 435), and "where two seemingly conflicting provisions reasonably can be reconciled, a court is required to do so and to give both effect (***Bijan Designer For Men v Fireman's Fun Ins. Co.***, 264 AD2d 48, 53, quoting from ***Proyecfin de Venezuela v Banco Indus. de Venezuela***, 760 F2d 390, 395-396).

While the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact (***Amusement Bus. Underwriters v American Intl. Group***, 66 NY2d 878, 880; ***Hartford Acc. & Indem. Co. v Wesolowski***, 33 NY2d 169, 172). In the within action there are issues of fact as to the interpretation of the terms of the Restrictive Covenant, and the plaintiff may prevail on the merits. The existence of an issue of fact on a motion for a preliminary injunction is not, standing alone, sufficient basis for the denial of the motion. CPLR 6312(c).

Irreparable injury may be defined as "that which cannot be repaired, restored or compensated in money or where the compensation cannot be measured" (13 Weinstein-Korn Miller NY Civ. Prac. Sec. 6301.15). The loss of the tangible asset of goodwill may cause irreparable harm and be restrained by the issuance of a preliminary injunction (*see* ***Mohawk Maintenance v Kessler***, 52 NY2d 276 at p. 287). Balancing of the equities favors the granting of the preliminary injunction. By granting a preliminary injunction the court will be preserving the tangible asset of goodwill during the pendency of this litigation.

The plaintiffs' motion for a preliminary injunction is **granted** to the extent that the terms and provisions of the temporary restraining order dated March 28, 2008 previously signed by this Court shall be continued during the pendency of this action.

The parties are admonished that an injunction is not a determination on the merits or the law of the case (***Bonded Concrete Inc. v Town of Saugerties***, 42 AD3d 852; ***Icy Splash Food & Beverage, Inc. v Henckel***, 19 AD3d 595).

Upon granting a preliminary injunction, the Court is required to direct that plaintiffs post an undertaking to assure that the plaintiff will pay all damages incurred by the defendants if it is ultimately determined that the preliminary injunction was improvidently issued. (CPLR 6312(b); *see also* ***Margolies v Encounter, Inc.***, 42 NY2d 475).

Plaintiffs shall post an undertaking as required by CPLR 6312(b) in the sum of $1,000.00 within fifteen (15) days of this Order or the motion for a preliminary injunction is **denied**.

Counsel for plaintiff shall serve a copy of this Order on defendants, by service upon their attorneys pursuant to CPLR 2103 b on or before March 6, 2009.

A Preliminary Conference has been scheduled for March 30, 2009 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated FEB 17 2009

J.S.C.

ENTERED

FEB 20 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE