

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 1  
NASSAU COUNTY

\_\_\_\_\_  
KELLY CAR WASH, LLC and WALTER KELLY,

Plaintiffs,

INDEX No. 21518/10

MOTION DATE: Feb. 18, 2011  
Motion Sequence # 001

-against-

COTTAGE CAR WASH, INC., DONNA'S  
DETAILING CORP., CHARLES SEMINARIO,  
NICHOLAS SEMINARIO, NICHOLAS PETIKAS  
and DONNA RISALO, individually and as officers,  
directors and shareholders of Cottage Car Wash, Inc.  
and Donna's Detailing Corp.,

Defendants.

\_\_\_\_\_  
The following papers read on this motion:

Notice of Motion..... X  
Affirmation in Opposition..... X  
Memorandum of Law..... XX  
Reply Memorandum of Law..... X

Motion by defendants for summary judgment dismissing the complaint is **denied**.

This is an action for breach of contract. On April 12, 2010, plaintiff Walter Kelly entered into a written agreement to purchase the assets of defendant Cottage Car Wash, Inc for \$750,000. Cottage operated a car wash facility located at 960 Stewart Avenue in Bethpage. The assets to be transferred included the good will of Cottage's business as a

going concern. The agreement was signed by defendant Charles Seminario, as president of Cottage Car Wash.

The transaction closed on July 6, 2010. The bill of sale delivered at the closing contains a provision that the transferor would not “re-establish, re-open, be engaged in, nor in any manner whatsoever become interested, directly or indirectly, either as employee, as owner, as partner, as agent or as stockholder... in any business, trade or occupation similar to the one hereby sold” within a five mile radius of the car wash for a period of five years. Plaintiff now operates a business known as Kelly Car Wash, LLC at the facility.

Plaintiffs allege that in violation of the covenant not to compete defendants have operated a business known as defendant Donna’s Detailing Corp. Donna’s Detailing is located at 170 Engineers Drive in Hicksville, which is less than two miles from Kelly Car Wash. Plaintiffs further allege that defendants have solicited three of Cottage’s key employees, including defendant Donna Risolo, who was Cottage’s office manager and cashier for over five years.

In support of their motion for summary judgment, defendants assert that, except for Donna Risolo, they are not officers, directors, or shareholders in Donna’s Detailing and are not competing with plaintiff’s business. In opposition, plaintiffs allege that Charles Seminario gave or lent money to Donna Risolo to start the business.

On a motion for summary judgment, it is the proponent’s burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers(Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

One who sells a business to another has a legal duty to refrain from acting to impair the good will transferred to the purchaser in exchange for part of the purchase price (*Hyde Park Products v Maxilmilian Lerner Corp.*, 65 NY2d 316, 321 [1985]). Defendants have not established prima facie that they have not impaired the good will of Cottage by assisting Donna Risolo to set up a competing enterprise. Defendants’ motion for summary judgment

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dismissing the complaint is denied.

A Preliminary Conference has been scheduled for June 23, 2011 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.

So ordered.

Dated APR 11 2011

  
J.S.C.

**ENTERED**  
APR 13 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE