

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

NEW YORK MERCHANTS PROTECTIVE
CO., INC., d/b/a NATIONWIDE DIGITAL
MONITORING COMPANY, NATIONWIDE
DIGITAL MONITORING CO., INC. and
SENIORCARE911, LLC,

Plaintiffs,

INDEX NO.: 010114/2008
MOTION DATE: 06/16/2008
MOTION SEQUENCE: 001

-against-

PETER DECK,

Defendant.

The following papers read on this motion:

Order to Show Cause, Affidavit, Affirmation & Exhibits Annexed	1
Opposition to Order to Show Cause and Counterclaim, Affidavit of Peter Deck & Exhibits Annexed	2

In this action for money damages and for a preliminary injunction, plaintiffs have made application by an Order to Show Cause for an order restraining and enjoining the defendant, pending the trial of this action, from:

- 1) interfering with the business of New York Merchants Protective Co., Inc. ("NYM") d/b/a Nationwide Digital Monitoring Company, and Seniorcare911, LLC, by preventing defendant from contacting or communicating, in any adverse manner, with any

employees, vendors, dealers, customers, subscribers, independent contractors, or agents of plaintiffs; or

2) interfering with the business of New York Merchants Protective Co., Inc. d/b/a Nationwide Digital Monitoring Company, and Seniorcare911, LLC, by preventing defendant from contacting or communicating in any manner with any employees, vendors, customers, independent contractors, or agents of Smith & Wesson Corp.; or

3) interfering with the business of New York Merchants Protective Co., Inc. d/b/a Nationwide Digital Monitoring Company, and Seniorcare911, LLC, by preventing defendant from contacting or communicating in any manner with Network Solutions, PulseDirect, Reed Exposition (ISC Shows East and West), Cignus Publishing (Security Dealer magazine), BPM Publishing (SDm magazine), Security Systems News, and/or any other marketing firm, advertising firm or trade publication used by plaintiffs; or

4) interfering with or altering in any way the content of any and all websites or domain names owned, registered to, and/or operated by New York Merchants Protective Co., Inc. d/b/a Nationwide Digital Monitoring Company, and Seniorcare911, LLC, including but not limited to, the website found at www.nationwidedigital.com; or

5) interfering in any way with New York Merchants Protective Co., Inc. d/b/a Nationwide Digital Monitoring Company, and Seniorcare911, LLC's business by contacting or communicating in any manner with any banking or financial institution in business with plaintiffs, including but not limited to LaSalle Bank, N.A., and Bank of America; or

6) holding himself out, either directly or indirectly, in any capacity, as an agent, employee, officer, or owner of New York Merchants Protective Co., Inc. d/b/a Nationwide Digital Monitoring Company, and Seniorcare911, LLC; or

7) engaging in any action, directly or indirectly, on behalf of New York Merchants Protective Co., Inc. d/b/a Nationwide Digital Monitoring Company, and Seniorcare911, LLC which adversely effect these entities; or

8) engaging in any act detrimental to New York Merchants Protective Co., Inc. d/b/a Nationwide Digital Monitoring Company, Nationwide Digital Monitoring Co., Inc., and Seniorcare911, LLC, including, but not limited to, withholding any and all communications from

dealers and/or customers to plaintiffs, such as leads, complaints, messages, contracts, payments, receipts, and any other correspondence.

Improper Counterclaim

Defendant's opposition to the Order to Show Cause for plaintiff's preliminary injunction is an improper vehicle for asserting a counterclaim. Counterclaims are to be asserted at the pleadings level as a claim contained in the Answer, and not contained in the opposition to an Order to Show Cause. See generally CPLR § 3019. As such, the Court will disregard the counterclaim.

Analysis

A party seeking the drastic remedy of a preliminary injunction, which prevents litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits, must establish a clear right to that relief under the law and the undisputed facts upon the moving papers. See Gagnon Bus Co. v. Vallo Transp., Ltd., 13 Ad3d 334, 335 (2d Dep't 2004); Uniformed Firefighter Ass'n v. New York, 70 NY2d 236 (1992); Ragone v. Devoe Props., LLC, 836 NYS2d 503 (2007). The movant must establish (1) a probability of success on the merits, (2) the prospect of irreparable injury if the relief is withheld, and (3) that the balance of equities is in the movant's favor. See Coby Group, LLC v. Hasenfeld, 46 Ad3d 593, 595 (2d Dep't 2007). Furthermore, where the facts are in sharp dispute, a temporary injunction will not be granted. Matter of Related Props., Inc. v. Town Bd. of Town/Village of Harrison, 22 Ad3d 587, 590 (2d Dep't 2005).

In the instant case, Plaintiff does not meet the burden for a preliminary injunction.

Success on the Merits

For a preliminary injunction, the moving party must establish a probability of success on the merits. Plaintiff fails in this regard. Evidence submitted indicates a host of factual issues and claims which appear murky and cannot be fathomed. This task has not been aided by the relatively paltry submissions by both parties to the Court.

Plaintiff NYM seeks to stop Mr. Deck from "interfering" with the business of Nationwide Digital Monitoring Company (hereinafter NDMC). However, it remains to be seen precisely what relationship Defendant has with NDMC. Contrary to Plaintiffs claims that Mr. Deck is in

no way affiliated with NDMC, its letter of reincorporation indicates that Mr. Deck may in fact be President of said company.

In addition, numerous receipts indicated that Defendant was acting on behalf of NDMC in paying licensing fees to municipalities. Although Mr. Deck's role in NDMC is unclear, it is far from certain that he had no affiliations with the Company, and his actions in contacting customers, employees, or vendors are not necessarily to be viewed as interference.

Plaintiff's claim of tortious interference with a contract, as it pertains to the Smith and Wesson agreement, is misguided. Tortious interference with contractual relations consists of four elements: (1) the existence of a contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff. Monex Fin. Servs. Ltd. v. Dynamic Currency Conversion, Inc., 19 Misc 3d 1113A (N.Y. Sup. Ct. 2008). "Since damage is an essential element of the tort, the claim is not enforceable until damages are sustained." Kronos, Inc. v. AVX Corp., 81 NY2d 90 (1993). In this case, there is no evidence that Mr. Deck's actions, however flippant and blustering, caused any damage to New York Merchants. To the best of the Court's knowledge, the contract between Smith and Wesson and NDMC remains in effect, undamaged by Defendant's actions.

Irreparable Harm

NYM has also not adequately demonstrated that it would suffer irreparable harm if Defendant is not enjoined from his current activities. Monetary loss alone is insufficient to establish irreparable harm. Public Employees Federation v. Cuomo, 96 Ad2d 1118, 1119 (3d Dep't 1983); McCall v. State, 215 A.D.2d 1, 5 (3d Dep't 1995). Here, NYM has failed to state a harm ensuing from any action by Defendant that cannot be remedied through the award of monetary damages. It does not appear that the reputation of NYM is being damaged to the extent of the ruination of contractual agreements and business relationships. There is no evidence that NYM's agreement with Smith and Wesson has suffered or will suffer due to any actions taken by Mr. Deck, nor is there indication that Mr. Deck's communications with employees, vendors, and marketing firms are causing actual negative consequences. It is also worthy of note that many of the actions that NYM seeks to enjoin Defendant from undertaking would be against the very interest of Mr. Deck. Withholding sales leads, torpedoing customers, and confusing

employees and vendors all have the effect of diminishing Nationwide Digital's ability to conduct business. It is unclear why Defendant would not, of his own accord, abide by the agreements he has signed with New York Merchants, as he has every incentive to keep his good name.

Balance of Equities

To be entitled to a preliminary injunction, the applicant must demonstrate that it will suffer irreparable harm in the absence of the injunction and that such harm is greater than the harm which the opposing party will suffer if the injunction is granted. Public Employees Federation at 1119. As has been mentioned *supra*, the precise relationships of the parties in this action to the underlying businesses are obfuscated by contradictory evidence. Lacking determinative evidence on the matter, the Court cannot rule that the equities are balanced in favor of plaintiff. The theory advanced by NYM that the grant of an injunction will actually benefit the defendant is disingenuous. To the contrary, Mr. Deck's losing the ability to conduct any business on his own as a result of an injunction is not in his favor, even if NYM pledges to make certain payments as per the original agreement. While Mr. Deck will supposedly receive corporate income, his control will slip away, and his role in the venture minimized. Mr. Deck will be harmed unless he is allowed to conduct his marketing aspect of the business as was expected and collect his fees in the normal fashion.

At the same time, the Court recognizes that Mr. Deck has made threats to interfere with the customers and business of NYM. However, lacking any evidence that defendant has or actually will do something successful to interfere, the Court will not order his non-interference. Defendant's own interest in the business and whatever legal remedies could be taken against him for malicious conduct should be an adequate defense for NYM. In the balance, it cannot be shown that Mr. Deck's vacuous threats against NYM poses a harm greater to NYM than the injunction would cause to Deck.

Based on the above it is ORDERED and that New York Merchant's application for a injunction enjoining and restraining defendant from the activities number 1-8 above is denied.

Dated: August 11, 2008

ENTERED

B. B. Wushaus
J.S.C.

AUG 13 2008

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NASSAU COUNTY
COUNTY CLERK'S OFFICE