

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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M.H. MANDELBAUM ORTHOTIC & PROSTHETIC
SERVICES, INC., and MARTIN H. MANDELBAUM,

Plaintiffs,

-against-

MARC WERNER,

Defendant.
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INDEX NO.: 25256/2009
MOTION DATE: 10/1/2009
MOTION NO.: 001 MD

PLAINTIFFS' ATTORNEY:
GARFUNKEL, WILD & TRAVIS, P.C.
111 Great Neck Road
Great Neck, New York 11021

DEFENDANT'S ATTORNEY:
STEVEN E. LOSQUADRO, ESQ.
649 Route 25A, Suite 4
Rocky Point, New York 11778

Upon the following papers numbered 1 to 24 read on this motion for preliminary injunction: Notice of Motion/ Order to Show Cause and supporting papers 1-12; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 13-17; Replying Affidavits and supporting papers 18-24¹; ~~Other~~ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of plaintiffs M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. and Martin H. Mandelbaum, brought on by order to show cause (GARGUILO, J.) dated September 3, 2009, for an order pursuant to CPLR §6301 granting plaintiffs a preliminary injunction enjoining and restraining defendant Marc Werner from soliciting employees or soliciting or accepting work or business from patients or referral sources of the corporate plaintiff, or using or disclosing any customer or referral lists, trade secrets or confidential information of the corporation, or defaming or disparaging the corporation or the individual plaintiff is denied.

It is well established that a preliminary injunction is a "drastic remedy" which should be issued cautiously, particularly in the context of a non-competition agreement, and only upon a showing that there is a likelihood of success on the merits, the danger of irreparable injury if an injunction is not granted, and that the balance of the equities favors the party seeking the injunction. (*Merrell Benco Agency, Inc. v Safrin*, 231 AD2d 614 [2d Dept 1996]; *Rick J. Jarvis Associates, Inc. v Stotler*, 216 AD2d 649 [3d Dept 1995]). Plaintiff's submissions fail to establish the existence of the foregoing elements. The affidavits submitted in support of plaintiff's motion consist of conclusory and speculative assertions that rely exclusively on hearsay statements attributed to certain named individuals whose affidavits are not provided. The affidavits thus fail to establish *prima facie* that, as alleged by plaintiffs, defendant breached the shareholders' agreement between defendant and the corporate plaintiff by setting up a competing practice, by soliciting former employees and patients and referral sources to his new competing practice, by

¹ The Court declines to consider the October 15, 2009 submission of defendant which is in the nature of a "sur-reply" as the submission was made without authorization and after the October 1, 2009 return date of plaintiff's order to show cause. In a telephone conference on September 22, 2009, the Court had granted plaintiff permission to submit a reply to defendant's opposition papers, and authorized defendant to request a further telephone conference if a "sur-reply" were deemed necessary to respond to new material in plaintiff's reply. No such telephone conference was requested or held; accordingly, the submission of the unauthorized "sur-reply" is improper.

utilizing confidential information of the corporation, and by making false and disparaging statements to patients and employees regarding plaintiffs. Moreover, such allegations are expressly refuted by the affidavits submitted in opposition to the motion, executed by the individuals identified in plaintiff's order to show cause as having been solicited to defendant's new practice, who deny – as does defendant in his affidavit – that any such solicitations took place or that the affirmants have in fact become the employees or patients of defendant as alleged by plaintiffs. In light of the foregoing, plaintiffs have failed to meet the high threshold of proof required for the issuance of a preliminary injunction, and accordingly the motion is denied and the temporary restraining order set forth in the order to show cause is vacated.

The parties are reminded that this matter is scheduled for a preliminary conference on January 21, 2010 at the Courthouse located at One Court Street, Riverhead, New York, Room A362, at 9:30 a.m.

Dated: January 14, 2010

PAUL J. BAGLEY, JR.

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION