

Strix, LLC v Buckley
2010 NY Slip Op 30927(U)
April 7, 2010
Sup Ct, Nassau County
Docket Number: 001244/2010
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

STRIX, LLC, BANNON HOLDINGS, LLC
and WILLIAM F. HARLEY,

Plaintiffs,

INDEX NO.: 001244/2010
MOTION DATE: 03/02/2010
MOTION SEQUENCE: 001

-against-

RICHARD E. BUCKLEY and CHRISTOPHER
LEVANO,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affirmation, Affidavit, and Exhibits Annexed 1
Affidavit of Richard Buckley in Opposition to Plaintiff's Motion 2

PRELIMINARY STATEMENT

Plaintiffs, by order to show cause, have moved for an order prohibiting defendants Richard Buckley and Christopher Levano from communicating any confidential or proprietary statements concerning plaintiff Strix, LLC ("Strix").

BACKGROUND

Strix is a Delaware limited liability company that operates four "Hooters" franchise restaurants in New York. Buckley, Levano and Northwood Ventures, LLC ("Northwood") founded Strix to serve as a vehicle to enter a franchise agreement with Hooters of America("HOA") as well as to operate and develop Hooters restaurants. Richard Buckley("Buckley") and Christopher Levano("Levano") own 12.55% and 10.05% of the equity of Strix respectively. The remaining approximately 77% Strix equity interest was owned by Northwood until about May 1, 2008 when Bannon Holdings, LLC("Bannon") purchased the stake. Bannon is wholly owned by William Harley("Harley").

In 2005, Strix began operating two Hooters restaurants located in East Meadow and Islandia. Buckley and Levano managed the two restaurants. Before Bannon acquired its interest, Strix entered financing and loan agreements with GE, and Buckley and Levano provided personal guarantees. Harley implicitly acknowledges this guarantee when he states that he offered to replace Buckley and Levano as a personal guarantor. (See Harley Affidavit, Paragraph 54, lines 3-5). Buckley and Levano continued managing the restaurants after Bannon acquired its interest. In 2008, when Bannon acquired its interest, an amended operating agreement was established, and Buckley was designated as chief executive officer ("CEO") and Levano was designated as chief operating officer ("COO"). At this time, Buckley and Levano signed employment contracts with Strix. (See Harley Affidavit, Exhibits A & B).

The amended operating agreement established a five person board of managers, and named Harley to act as three of the managers, and Buckley and Levano as the remaining managers. After Bannon acquired its interest, it was decided that one of the current restaurants would be renovated and two new restaurants would be constructed.

It is undisputed that the renovation and new construction projects all exceeded their original budgets. Harley contends that Buckley and Levano's mismanagement caused the project to exceed projections, which caused Harley to have to invest more money into Strix. Buckley and Levano dispute this, and claim that Harley signed and approved several changes at each project which had the effect of increasing the overall cost. Buckley and Levano also claim Harley's decision to hire several new employees reduced Strix's overall profitability and created cash flow problems. In sum, in the few years after Bannon acquired its majority share of Strix, Harley, Buckley and Levano disagreed about how Strix was being managed. On January 15, 2009, Buckley and Levano's were terminated for cause on the basis of various instances of alleged misconduct by each employee.

Plaintiffs (Harley, Bannon, and Strix) filed their complaint in this action on January 19, 2010 in Nassau County Supreme Court. (See Harley Affidavit, Exhibits H,I). Plaintiffs' complaint sets forth the following causes of action:

- 1) Breach of employment contract
- 2) Permanent injunction
- 3) Breach of fiduciary duty to Strix, Harley and Bannon
- 4) Libel Per Se (False Malicious communication to GE)
- 5) Abuse of Process

6) Tortious interference with a business relationship

On January 20, 2010, defendants(Buckley and Levano) filed a separate complaint in Suffolk County Supreme Court, naming Harley and Bannon as defendants in that action. This complaint sets forth the following causes of action:

- 1) Breach of contract
- 2) Breach of fiduciary duty
- 3) Injurious falsehood
- 4) Prima facie tort(fraudulent inducement)
- 5) Fraud

Article 14 of the employment contract pertains to “confidential information and non-competition.” Paragraph 14(c) states:

During and after the Employment Term, the Executive shall hold in a fiduciary capacity for the benefit of the Company all secret, confidential or competitively sensitive information, knowledge or data relating to the Company and its business, including any confidential information as to customers of the Company, (i) obtained by the Executive during his employment by the Company and (ii) not otherwise public knowledge or known within the Company’s industry. The Executive shall not, without prior written consent of the Company, unless compelled pursuant to the order of a court or other governmental or legal body having jurisdiction over such matter, communicate or divulge any such information, knowledge or data to anyone other than the Company or those designated by it.

Paragraph 14(g) states:

In the event of a breach or potential breach of this Section 14, the Executive acknowledges that the Company will be caused irreparable injury and that money damages may not be an adequate remedy and agree that the Company shall be entitled to injunctive relief(in addition to other remedies at law) to have the provisions of this Section 14 enforced.

Since defendants were terminated, defendants have contacted Strix’s franchisor (HOA), Strix’s lender (GE), and Strix’s State Liquor Authority (SLA) attorney. Defendants have also filed the complaint in Suffolk County Supreme Court which, although Strix is not a named defendant, contains claims of financial and mismanagement problems at Strix.(See Harley Affidavit, Exhibit J) This complaint goes so far as to claim the defendants(Harley and Bannon) “have discussed trying to swindle GE into providing 100% of the construction costs for the next

restaurant - - if there is one - - by submitting to GE bills that are inflated by 20%.”(Id at paragraph 67). Additionally, on page 12 of the complaint, it states “[Buckley and Levano] Are At Risk of Having to Perform Under their Personal Guarantees to GE Because the Company Is In Default of Both the HOA Franchise Agreement and The GE Loan and Financing Agreements.” (Id. between paragraph 71, 72).

Harley claims Strix is not in breach of the GE loan and this statement is designed only to harm Strix. Harley argues the allegations in the second complaint are based on Strix’s confidential, internal information learned through Buckley and Levano’s employment as well as incorrect assumptions of what would happen in the first quarter of 2010, since their termination January 15, 2010.

The contents contained in the second complaint are clear, but the communications of Buckley and Levano with GE, HOA, and Strix’s SLA attorney are less clear. It is undisputed that Buckley and Levano contacted all three after their employment at Strix was terminated. Buckley, in his affidavit, states the defendants provided GE with a copy of their second complaint to GE. The affidavit also states that, Buckley and Levano, in their capacities as Equity Members and personal guarantors on GE’s loans with Strix, notified GE of the termination as “operators” of Strix, per the terms of the GE loan agreement. Exhibit L(Harley Affidavit) contains a February 2, 2010 letter e-mailed from GE in which declares the GE loan in default. The specified reason for default is stated as failure to comply with a covenant that required consent of the lender prior to a “change of control.” Defendants claim they never requested GE to declare the loan in default. Defendants acknowledge that they contacted HOA to inform them that they had been terminated and also that they had filed the second complaint. There is no evidence to suggest defendants sent a copy of the complaint to HOA. Finally, defendants acknowledge they contacted Strix’s SLA attorney and claim the purpose of this communication was to have their names removed from the company’s liquor license as officers.(Buckley Affidavit, paragraph 25). Defendants claim that their worries about potential liability as equity members of Strix, led them to inquire of Strix’s SLA attorney whether Harley’s interest in a liquor distributor could create problems for Strix’s liquor license. Harley claims defendants intention was to harm Harley and Strix.

Plaintiffs have moved for a preliminary injunction prohibiting defendants Buckley and Levano from uttering, writing or otherwise communicating any confidential or proprietary statements concerning Strix LLC which violate paragraph 14(c) of the employment agreement.

DISCUSSION

In a motion for a preliminary injunction, the movant has the burden to demonstrate 1) a likelihood of success on the merits, 2) irreparable injury if the relief is withheld, and 3) the balance of the equities tips in the movant's favor. (see *Doe v. Axelrod*, 73 N.Y. 2d 748, [1988]). The moving party must show that the irreparable harm is imminent, not remote or speculative. (*Golden v. Steam Heat, Inc.*, 216 A.D.2d 440 [2d Dept 1995]). A preliminary injunction is a drastic remedy. (*William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423[2d Dept 2001]). The movant must establish a clear right to that relief under the law and the undisputed facts upon the moving papers. *Id.* Its purpose is "to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual." (*Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604 [2d Dept 2004]).

A cause of action for breach of contract must plead the terms of the contract, the consideration, performance by the plaintiff and breach by the defendant causing plaintiff to sustain damages. (*Furia v. Furia*, 116 A.D.2d 695 [2nd Dept 1986]). Restrictive covenants in employment contracts will be enforced when necessary to protect trade secrets or good will of the employer's business. (*U.S. Transp. Systems, Inc. v. Marc 1 of New York, Inc.*, 210 A.D.2d 316 [2d Dept 1994]).

Paragraph 14(g) states in pertinent part:

In the event of a breach or a potential breach of this Section 14, the Executive acknowledges that the Company will be caused irreparable injury and that money damages may not be an adequate remedy and agree that the Company shall be entitled to injunctive relief (in addition to other remedies at law) to have the provisions of this Section 14 enforced.

"Communications unconnected with the judicial proceeding are not cloaked with the absolute privilege." (*Seltzer v. Fields* 20 A.D.2d 60, 63 [1st Dept 1963]). The Court of Appeals has declined to extend the publication privilege contained in Civil Rights Law §74 to cover interested parties. (*Williams v. Williams* 23 N.Y.2d 592[1969]). In *Williams*, which involved libel, the

court stated “it was never the intention of the Legislature in enacting section 74 to allow “any person” to maliciously institute a judicial proceeding alleging false and defamatory charges, and to then circulate a press release or other communication based thereon and escape liability by invoking the statute.” *Id.* In *Williams*, the facts suggested that the defendant filed a summons and complaint with defamatory statements regarding the plaintiff, and then sent copies of the summons and complaint with a brief letter to members of the plaintiff’s trade. *Id.* at 595.

Plaintiffs have submitted copies of the employment contracts in Exhibit A and B of Harley’s affidavit. Paragraph 14(c) of the employment contracts contains language that restricts defendants from disclosing confidential knowledge or data relating to Strix. In pertinent part, paragraph 14(c) provides:

During and after the Employment Term, the Executive shall hold in a fiduciary capacity for the benefit of the Company all secret, confidential or competitively sensitive information, knowledge or data relating to the company and its business... (i) obtained by the Executive during his employment by the Company and (ii) not otherwise public knowledge or known within the Company’s industry.” “The Executive shall not... communicate or divulge any such information, knowledge or data to anyone other than the Company and those designated by it.

Here, plaintiffs’ motion seeks to enjoin defendants from communicating “confidential or proprietary statements” concerning Strix LLC which violate paragraph 14(c) of each defendant’s employment contracts speaks to plaintiffs’ breach of contract cause of action. Since this is the only relief requested, the Court will only examine whether a preliminary injunction should be granted based on the breach of contract cause of action.

Paragraph 14(g) of the employment contracts applies if paragraph 14(c) is breached or merely potentially breached. After defendants were terminated and after defendants filed the second action in Suffolk County, defendants contacted GE and “provided” a copy of the second action complaint to GE. (See Buckley Affidavit, Paragraph 19).

The contents of this second complaint(Harley Affidavit, exhibit J) contain confidential information about Strix, although Strix is not a party to that action. Of specific importance are descriptions of the financial health of Strix as well as internal strategic information of Strix. Confidential financial data is provided throughout the complaint. Employee salary data is listed

in paragraph 35 and the "Fixed Charge Coverage Ratio" is described as not meeting GE's required ratio of 1.2:1.0 in paragraph 38 of the complaint.(See also paragraph 82(a) of complaint) The complaint also alleges that the defendants(Harley and Bannon) "have discussed trying to swindle GE into providing 100% of the construction costs ... by submitting to GE bills that are inflated by 20%." (Buckley Affidavit, Paragraph 67) .

In sum, providing GE with a copy of the Suffolk complaint is a breach of paragraph 14(c) of the employment agreement. The contents of defendants' complaint breached paragraph 14(c) because it contained confidential information of Strix. Moreover, even if the contents would normally be privileged, *Williams* extends to this situation, and defendants' act of providing a copy of the complaint with confidential information breach 14(c).

Section 14(g) of the employment contracts apply. Applying section 14(g), defendants are deemed to acknowledge that Strix is "entitled to injunctive relief(in addition to other remedies at law) to have the provisions of section 14 enforced."

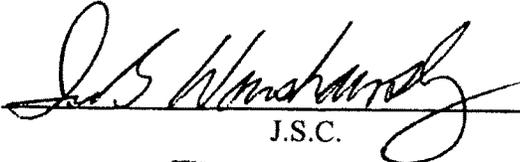
The Court thus finds that defendants Richard Buckley and Christopher Levano are enjoined and restrained from uttering, making, stating, writing or otherwise communicating any confidential or proprietary statements concerning Strix, LLC in violation of paragraph "14(c)" to any non-party other than litigation counsel. The Court further finds that it would be completely inappropriate to require the posting of a bond under these circumstances.

A Preliminary Conference (see NYCRR 202.12) shall be held on May 24, 2010, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

This constitutes the Decision and Order of the Court.

Dated: April 7, 2010


J.S.C.

ENTERED
APR 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE