

SUPERIOR COURT OF JUSTICE

B E T W E E N :

GES (CANADA) GLOBE EXPRESS SERVICES LTD.

Applicant

- and -

IRINA TSYRLIN

and

SPARX LOGISTICS CANADA LIMITED

Respondent

M O T I O N O N N O T I C E

BEFORE THE HONOURABLE JUSTICE J.R. MCCARTHY

on July 3, 2015

at Newmarket, Ontario.

APPEARANCES:

B. Clancy

Counsel for the Applicant

N. Chsherbinin

Counsel for the Respondents

FRIDAY, JULY 3, 2015

R E A S O N S F O R R U L I N G

McCARTHY, J: (Orally)

The Plaintiff moving party seeks to obtain injunctive relief not specifically requested in either its notice of motion or its revised notice of motion. The relief sought (that an I.T. forensic team should be permitted to search the Defendants' respective I.T. systems or devices) was first set out in the Plaintiff's factum served on the Defendant on Tuesday, June the 23rd, 2015.

I am not prepared to exercise my discretion in favour of allowing the Plaintiff to seek that remedy at this stage for the following reasons:

- 1) It was not specifically sought in either of the notices of motion.
- 2) There was no request in the notice of motion for such further and other relief as the Court might deem just.
- 3) The relief sought is an extraordinary, intrusive remedy. The Defendants should have been afforded clear notice of the relief being sought so as to be in a position to better prepare responding materials and to conduct a

more focused cross-examination on the affidavits.

4) The relief sought does not naturally flow from the other injunctive relief sought.

5) The relief sought is premature. The Plaintiffs are seeking a form of discovery through an extraordinary remedy without having given notice of the remedy being sought. There is no basis for a finding that the information sought would not be disclosed in the ordinary course of discovery and litigation.

6) An interim preservation of property order could have been specifically sought under Rule 45. There is an entire body of case law that applies to that type of relief.

7) I would distinguish the cases put before me by the Plaintiff. Like my brother Grace, J, in MD Management Ltd. v. Campbell, 2010 ONSC 2315. I find it inappropriate, "...to grant the relief sought in the circumstances, particularly when that was not raised in the notice of motion but mentioned later, almost as an afterthought." See paragraph 39 of that decision.

The Plaintiff will have the option of proceeding with the motion for the balance of the relief sought or requesting an adjournment to amend the notice of motion and to have the matter dealt

Reasons for Ruling - McCarthy, J

with by a judge in its entirety.

THE COURT: So that is my preliminary ruling.

...SUBMISSIONS...

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R E C E S S

U P O N R E S U M I N G :

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R E A S O N S F O R R U L I N G

McCARTHY, J: (Orally)

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The Plaintiff seeks an injunction restraining the Defendants from directly or indirectly distributing or making use of certain information allegedly misappropriated from the Plaintiffs and/or from soliciting the Plaintiffs' customers.

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The Court is bound by the Supreme Court in the case of R.J.R. McDonald Inc. v. Canada (Attorney General), (1994), [1994] 1 SCR 311. In deciding whether to grant an interlocutory injunction the Court applies a three-factor test:

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1) Whether the Plaintiff has advanced a serious issue to be tried or, in restrictive covenant cases, a strong *prima facie* case.

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2) Whether the plaintiff would suffer irreparable harm if the remedies for the

Reasons for Ruling - McCarthy, J

Defendants' misconduct were left to be granted at trial, and;

3) Where does the balance of convenience or inconvenience lie in the granting or denial of such an interlocutory injunction?

The test is conjunctive.

I am satisfied that there are serious issues to be tried: liability under the employment contract, the applicability of the I.T. policy to the defendant, the entitlement to and quantum of damages, and mitigation. I am not satisfied at this point, however, that the case rises to the level of a strong *prima facie* one. Part of the basis for the Plaintiffs' assertion that there was a breach of the confidentiality agreement comes from word on the street, which, as hearsay, may require greater scrutiny and corroboration. As well, there remains the question of whether the Defendant in fact divulged to any third parties the confidential information in question. As well, the damages claim is still largely speculative since it is unclear what customers the Plaintiff has actually lost as a result of the alleged confidentiality breach. For example, it remains to be proven that Jaker's Treats, Bad Boy and Nitaly Product Inc. were actual customers at the time of the Defendant's departure from the Plaintiff and whether any breach of the employment contract on her part caused the

Reasons for Ruling - *McCarthy, J*

Plaintiff to lose that clientele. I agree with the Defendant that at this stage it is impossible for the Plaintiff to establish that any of its customers left due to unfair solicitation by the Defendant or that the Defendant used the confidential information to lure or attract those customers. Finally, the liability of the Defendant Sparx Logistics is problematic because it was not a party to the employment contract or the confidentiality agreement.

The Plaintiff has not satisfied me that it is facing irreparable harm if the injunctive relief sought is not granted. Irreparable harm is harm not readily compensable in damages. The Court was furnished with only a bald statement of what 2014 revenue was lost because of its customers moving their business over to the Defendant (\$3,075,983.20). The affiant for the Plaintiff stated that perhaps 10 percent of that figure would be considered profit. There is no evidence of what that revenue bears to the overall revenue for the period. There is no evidence that the revenue loss has continued into 2015, whether those customers were longstanding, loyal clients or one time clients, whether further income from those customers was projected for 2015 and beyond, or what efforts have been made to recover those customers or entice them to return. There is no evidence of what share of the market those customers

represented. There was no hard financial evidence of any temporary or permanent loss of market share, reputation, or good will. The evidence in the affidavit in support of the motion can best be described as stale. There were no financial statements to support it. There was only sketchy information about the nature of the business. There is nothing upon which to base a finding that the loss of one or more customers in this type of business is an event from which one cannot recover within a short period of time. There was no updated information before the Court that losses have continued to date or will continue into the future. This is not a case where the Defendants have seized a key piece of production technology, left the Plaintiff in a situation where it cannot fulfil the obligations of a fixed contract for a customer, or carry on business in the normal course. Finally, it appears to me that the Plaintiffs have managed to calculate the alleged damages suffered to the penny. There appears to be no reason why that same calculation of damages cannot be updated as the case progresses. In short, damages appear to be quantifiable. It remains to be seen whether they are provable. The discovery process will presumably permit the Plaintiff to determine whether, in fact, the Defendant has diverted business away from the Plaintiff to the Defendants' benefit. It will be up to the Plaintiff to establish that it has suffered the

Reasons for Ruling - *McCarthy, J*

5 damages and that the damages flow from a contract breach or some other wrongdoing by the Defendants. I am not satisfied that damages would be inadequate to repair the harm or be insufficient to do justice in this case. I conclude that the Plaintiffs have failed to establish that they will suffer irreparable harm if an injunction is not granted.

10 Finally, it is clear to me that the balance of convenience favours not granting the injunction. The period for non-competition has clearly passed. To prevent, restrain or inhibit the Defendants from carrying on their business in the normal course might greatly impair their ability to earn an income. On the contrary, there is nothing to suggest that the Plaintiff could not successfully compete for the customers it alleges it has lost or indeed to carry on business much as it has in the past. Both parties advise the Court, although there was no evidence on that point, that the business in question is fluid and that customers tend to be attracted to the best price per freight shipment rather than to long term or fixed term contracts. That being the case, the parties are free to engage in competitive business activity on a level playing field pending the outcome of the litigation.

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30 The Plaintiff has failed to meet the three part conjunctive test as established in the case of

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R.J.R. McDonald. For that reason, the motion is denied.

...SUBMISSIONS ON COSTS...

THE COURT: For oral reasons given the motion is dismissed. The Defendants were successful in resisting the motion. The Court acknowledges the Defendants' offer to settle the motion dated January the 16th, 2015. The Plaintiffs were not unreasonable in bringing the motion. They may ultimately prevail in the litigation. They have established that there are triable issues. Substantial indemnity costs at this stage would be excessive and out of proportion to the time spent on the matter. The Plaintiff shall pay the Defendants costs fixed and payable forthwith in the amount of \$15,000.

M A T T E R A D J O U R N E D

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

Evidence Act

I, **Tricia Rudy, C.C.R., A.C.T.** certify that this document is a true and accurate transcript of the recording of **Globe Express v. Tsyrlin et al** in the Superior Court of Justice, held at Newmarket, Ontario, on July 3, 2015 taken from Recording 4911-402-090655/15 which has been certified in Form 1.

aug 12/15

(Date)

Tricia Rudy

(Signature of authorized person)

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July 6, 2015

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for judicial review

Notified Ordering Party:

August 12, 2015

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