

**Motherway v Retail Unlimited Maintenance or
Remodel, Inc.**

2014 NY Slip Op 32673(U)

October 2, 2014

Supreme Court, Suffolk County

Docket Number: 34757-09

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

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**NICHOLAS R. MOTHERWAY, as Shareholder, Officer,
and Director of NATIONAL BEST SECURITY INC. and
THE NBS GROUP, INC. and DIAMOND STAR
MANAGEMENT, INC. and FIRST NATIONAL BEST
SECURITY, INC.,**

Plaintiffs,

**FARLEY & KESSLER, P.C.
Attorneys for Plaintiffs
55 Jericho Turnpike, Suite 204
Jericho, New York 11753**

-against-

**RETAIL UNLIMITED MAINTENANCE OR REMODEL,
INC., JOANNE CUCCIO, MICHAEL TRUE, TAMMY
TRUE, SANDRA TRUE, SJT ENTERPRISES, INC. all
d/b/a RETAIL UNLIMITED,**

Defendants.

**HOWARD M. BERGSON, ESQ.
Attorney for Defendants Joanne Cuccio and Retail
Unlimited
194 Main Street
East Setauket, New York 11733**

x

DECISION AFTER TRIAL

In this action, the plaintiff Nicholas Motherway seeks damages for the defendants' alleged use of proprietary information belonging to National Best Security, Inc., the NBS Group, Inc., Diamond Star Management, Inc. and First National Best Security, Inc. (collectively referred to as "Plaintiff Corporations"), and the diversion of the Plaintiff Corporations' assets to two defendant-owned corporations. The record reveals that the plaintiff and non-party James Cartisano each own 50% of common stock of the Plaintiff Corporations and are the sole officers and directors of such Corporations. The plaintiff alleges that the defendants Joanne Cuccio and Michael True, who were former employees of the plaintiff corporations and Tammy True and Sandra True who were owners of Retail Unlimited (as defined below), assisted Cartisano by usurping business opportunities belonging to the Plaintiff Corporations for their benefit, and stealing corporate employees, vendor lists, customer lists and other purported confidential information. The plaintiff also alleges that the defendants Joanne Cuccio and Michael True breached their employment contracts. The defendants allegedly participated in a fraudulent scheme and conspiracy with Cartisano, wherein they allegedly created a shadow company to compete with the Plaintiff Corporations, and misappropriated trade secrets of the Plaintiff Corporations.

The defendants' corporations were Retail Unlimited or Remodel, Inc. ("Retail Unlimited") and SJT Enterprises, Inc. ("SJT"). Retail Unlimited was and is a domestic corporation organized on October 19, 2004 by the defendant Joanne Cuccio. SJT is a domestic corporation organized on May 16, 2002 and is owned by the defendants Michael True, Tammy True and Sandra True. Michael True commenced employment with NBS in 2002 as the service manager, who supervised NBS employees handling customer requests for vendor services. In 2003, he became the service director for NBS and was considered as part of the executive team. Michael True executed an employment agreement which contained a two-year non-compete clause and also promised not to disclose proprietary secrets. In June 2009, the plaintiffs terminated Michael True when they learned that he and SJT competed with and continued to compete with the Plaintiff Corporations. The defendant Joanne Cuccio was employed at NBS from 1996. Unbeknownst to the plaintiff, the individual defendants and Cartisano bid on projects with the Plaintiff Corporation's clients. Cartisano and the defendants never disclosed the existence of Retail Unlimited to the plaintiffs. The plaintiffs allege that although the Plaintiff Corporations successfully bid and began work on certain projects, the projects were later cancelled by Cartisano and completed by the defendants and the defendants' corporations and employees. In an effort to stop the competing defendants, the instant action was commenced by filing on September 3, 2009.

The complaint contains 14 causes of action. The first cause of action alleges unjust enrichment by all the defendants. The second cause of action alleges that Michael True, SJT, and Joanne Cuccio were unjustly enriched because they hijacked the Plaintiff Corporations' vendors, customers and the Plaintiff Corporations' business to SJT or Retail Unlimited, causing severe financial losses to the Plaintiff Corporations. The third cause of action alleges that the defendants tortiously interfered with the Plaintiff Corporations' prospective economic advantage. The fourth cause of action seeks a permanent injunction against the defendants. The fifth cause of action alleges that all defendants converted trade secrets and confidential proprietary information. The sixth cause of action seeks an accounting. The seventh cause of action seeks to impose a constructive trust. The eighth cause of action alleges that the defendants induced and/or participated with Cartisano in diversion of corporate opportunities away from the Plaintiff Corporations resulting in the loss of profits and business. The ninth cause of action alleges that the defendants aided and abetted Cartisano's breach of fiduciary duty. The tenth cause of action seeks attorney fees pursuant to New York Business Corporation Law ("BCL") § 626 (e). The eleventh cause of action alleges that the defendants misappropriated trade secrets, confidential information and proprietary information belonging to the Plaintiff Corporations. The twelfth cause of action alleges that the defendants unfairly competed with the Plaintiff Corporations. The thirteenth cause of action alleges that the defendant SJT operated as a shell intended to insulate the defendants from the consequences of their actions. The fourteenth cause of action alleges that the individual defendants breached an employment agreement with NBS which provided that they agreed not to compete, not to solicit customers, and not to disclose confidential information.

By order dated March 6, 2012 (Emerson, J.), the court granted the plaintiffs' motion to strike the answer of the defendants Michael True, Tammy True, Sandra True, and SJT Enterprises. The assessment of damages was reserved until the time of trial or other disposition of the action against the remaining defendants. By order dated June 3, 2013 (Emerson, J.), the court denied the plaintiff's motion for partial summary judgment. A joint trial of this action and the related action, **Motherway v Cartisano** (Index No. 25543-09), was held on July 30 and 31, 2013; August 1, 2013; September 9 and 10, 2013; and January 7 and 8, 2014. In a decision after trial dated April 2,

2014 (the “ Cartisano Trial Decision”), the court found in favor of the plaintiff in the related action. The findings of fact in the Cartisano Trial Decision are incorporated herein by reference.

At the conclusion of the trial, Mr. Motherway narrowed the 14 causes of action to 6, which are derivative on behalf of the Plaintiff Corporations (3rd cause of action for tortious interference with economic advantage; 8th cause of action for aiding and abetting diversion of corporate opportunities; 9th cause of action for aiding and abetting breach of fiduciary duty; 10th cause of action for attorneys fees pursuant to Business Corporation Law § 626 (e); 11th cause of action for misappropriation of trade secrets, confidential and proprietary information; and the 12th cause of action for unfair competition). The plaintiff seeks to recover damages as asserted against Retail Unlimited, Michael True, and Joanne Cuccio. Although a party to this action and subject to a continuing subpoena and an express direction from this Court to appear during the trial Joanne Cuccio failed to appear. In fact, as is set out in detail in the Trial Decision, Joanne Cuccio provided materially false statements to this court about her failure to appear. Consequently, Ms. Cuccio did not appear nor was her appearance excused by this Court.

As stated in the earlier determination, substantial details were provided at trial regarding the formation and ownership of Retail Unlimited. Mr. Cartisano acknowledged that Retail Unlimited conducted business with certain clients of NBS and received payment therefor. Testimony by Mr. Motherway established that he was unaware of its activities until NBS’s business declined significantly. Mr. Motherway produced evidence at trial which showed that Mr. Cartisano used NBS’s proprietary information and employees, as well as NBS’s assets and funds, to conduct business on behalf of Retail Unlimited. Mr. Motherway’s testimony demonstrated that Retail Unlimited was engaged in substantially the same business as NBS, that it bid for and received jobs from customers that were actual or potential customers of NBS, and that it received payment for such jobs. In certain cases, jobs that had originally been awarded to NBS were cancelled by Mr. Cartisano and rerouted to Retail Unlimited.

Mr. Cartisano, in his testimony, disputed the amount and extent of such business and denied that Retail Unlimited or companies controlled by him used assets belonging to NBS to conduct business. Mr. Cartisano testified that Mr. Motherway was aware of Retail Unlimited, however, he did not want to become involved for personal reasons. Mr. Motherway, in his testimony, denied having any conversation or consenting in any way to the activities of Retail Unlimited.

DECISION

In reaching its decision, the court has considered the record in its entirety. In addition, the court has assessed the credibility of each of the witnesses. In particular, the court has considered the testimony of both Mr. Motherway and Mr. Cartisano. The courts finds Mr. Motherway to be a credible witness and his version of key events to be believable. The court credits Mr. Motherway’s testimony and significant portions of the testimony of his employee witness. On the other hand, the court finds that Mr. Cartisano’s testimony conflicts in significant ways with the credible evidence produced by Mr. Motherway and that it is both unreliable and improbable. Applying the doctrine of *falsus in uno, falsus in omnibus*, which permits the fact finder to disregard in its entirety the testimony of a witness who has willfully given false testimony on a material matter (NY PJI 1:22), the court does not credit any of Mr. Cartisano’s testimony.

The elements of the tort of interference with prospective economic advantage are (1) the defendant knew of the proposed contract between the plaintiff and third parties; (2) intentional interference with the same; (3) the proposed contract would have been entered into but for the interference; (4) the defendants' interference was accomplished by wrongful means or with malicious intent; and (5) resulting damages (**Carvel Corp. v Noonan**, 3 NY3d 182). The court finds by a preponderance of the credible evidence that Retail Unlimited interfered with NBS's prospective economic advantage by diverting existing customers away from NBS and maliciously took all the profits from the work performed.

A cause of action for aiding and abetting breach of fiduciary duty requires a prima facie showing of 1) a fiduciary duty owed to plaintiff by another, 2) a breach of that duty, 3) defendant's substantial assistance in effecting the breach, and 4) resulting damages (**Keystone Int'l v. Suzuki**, 57 AD3d 205). The faithless servant doctrine prohibits an employee from acting in any manner inconsistent with his agency or trust and requires him, at all times, to exercise the utmost good faith and loyalty in the performance of his duties (**Maritime Fish Prods. v World-Wide Fish Prods.**, 100 AD2d 81, 88). When an employee engages in a business that, by its nature, competes with the employer's business, a double breach of duty occurs (**Id.** at 88). As the court notes in the related action, Mr. Cartisano had a fiduciary duty to NBS as an officer, director, and employee, and that he breached that duty. Moreover, the plaintiff showed by a preponderance of the evidence that defendants Joanne Cuccio and Michael True, as employees of NBS, in their individual capacities, failed to act in the best interest of NBS. In any event, by virtue of the order, dated March 6, 2012, striking the answer of Michael True, he is deemed to have admitted the allegations in the complaint.

A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (**Ashland Mgt. Inc. v Janien**, 82 NY2d 395). Restatement (Third) of Unfair Competition § 39 defines a trade secret as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." Unfair competition is achieved by the bad faith misappropriation of a commercial advantage belonging to another, by the exploitation of proprietary information or trade secrets (**Eagle Comtronics v Pico Prods.**, 256 AD2d 1202). Here, the plaintiff has demonstrated by a preponderance of the credible evidence that Retail Unlimited used NBS's trade secrets in the form of NBS's computerized customer system for its own gain.

The court finds that the plaintiff established by a preponderance of the credible evidence that Retail Unlimited unfairly competed with NBS. Retail Unlimited secretly contracted with NBS customers for the benefit of Retail Unlimited without the plaintiff's consent, used NBS's computerized system to exploit NBS's trade secrets to its advantage, causing NBS to suffer damages in the form of lost profits. The plaintiff also demonstrated by a preponderance of the credible evidence that defendants Cuccio and Michael True were faithless servants. However, the plaintiff failed to demonstrate by a preponderance of the credible evidence that SJT unfairly competed with NBS which caused damage to NBS, and also failed to demonstrate that Tammy True and Sandra True aided and abetted Cartisano.

Accordingly, the court awards damages to NBS in the amount of \$141,000 for the business of NBS that was diverted to Retail Unlimited, \$447,000 for the salary paid to the defendant

Michael True, and \$136,000 for the salary paid to Joanne Cuccio.

Finally, the plaintiff has requested that the court award attorneys fees in accordance with the provision of Business Corporation Law § 626 (e). As noted in the Cartisano Trial Decision, § 626 (e) provided that a successful plaintiff in a shareholder derivative action may recoup legal expenses and attorney's fees from the proceeds of any judgment, compromise, or settlement in favor of the corporation, it does not authorize the imposition of such expenses on the losing party. Accordingly, the court declines to make an additional award for attorneys fees as requested but awards Mr. Motherway \$200,000 from the award made to NBS, which the court finds is the reasonable value of the legal services provided to Mr. Motherway on behalf of NBS, less any amount collected in connection with the related action to be paid by NBS out of its damages for the reasons stated in the Cartisano Trial Decision.

HON. ELIZABETH HAZLITT EMERSON

DATED: October 2, 2014

J. S.C.