

Motherway v Cartisano
2014 NY Slip Op 31215(U)
April 2, 2014
Supreme Court, Suffolk County
Docket Number: 25543-09
Judge: Elizabeth H. Emerson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Elizabeth Hazlitt Emerson

NICHOLAS R. MOTHERWAY, Individually, and 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,

-against-

JAMES CARTISANO, and NATIONAL BEST
SECURITY, INC., THE NBS GROUP, INC., DIAMOND
STAR MANAGEMENT, INC., and FIRST NATIONAL
BEST SECURITY, INC.,

Defendants.

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

HOWARD M. BERGSON, ESQ.
Attorney for Defendant James Cartisano
194 Main Street
East Setauket, New York 11733

DECISION AFTER TRIAL

This matter involves a series of business disputes arising between the shareholders of the NBS Group, Inc. (“NBS”)¹ and claims of NBS against a former officer, director and employee, the defendant James Cartisano. The facts of this litigation have been set forth in great detail in the record. In or around September 2009, Nicholas R. Motherway, as a 50% shareholder

¹ As set forth on the record, the parties have agreed that, notwithstanding reference to additional companies in the captions, the court’s decision should reference only NBS because such other companies have ceased to operate and their claims and liabilities, if any, have been abandoned by the respective parties.

and as an officer and director of NBS brought a myriad of claims in his individual capacity and derivatively on behalf of NBS against Mr. Cartisano. Initially, Mr. Motherway sought relief on 12 causes of action. At the conclusion of the trial, Mr. Motherway narrowed these causes of action to one individual cause of action (the 2nd cause of action for breach of fiduciary duty) and three derivative causes of action (the 9th cause of action for breach of fiduciary duty; the 11th cause of action for misappropriation of trade secrets, confidential and proprietary information; and the 12th cause of action for unfair competition). Mr. Motherway also requested an award of attorney's fees pursuant to Business Corporation Law § 626(e) and that such award be made directly to him on the theory that he had paid attorney fees on behalf of NBS.

The parties appeared for trial before the court on July 30, 2013; July 31, 2013; August 1, 2013; September 9, 2013; September 10, 2013; January 7, 2014; and January 8, 2014.² Mr. Motherway and Mr. Cartisano testified at trial and each produced at least one former employee as a witness. Mr. Nathan who served as NBS's accountant and both parties' personal accountant also testified. Although Mr. Cartisano attended the trial on the dates in 2013, he did not appear for the January 2014 dates. In addition, his wife, Joanne Cuccio, an employee of NBS and the owner of Retail Unlimited Maintenance and Remodel, Inc. ("Retail Unlimited"), a significant entity for purposes of this proceeding, did not appear and testify despite being subject to a continuing subpoena. Her unexcused absence, as well as the information Mr. Cartisano directed his attorney to provide to the court as the reason for their failure to appear, was discussed at length on the record.

As previously mentioned, the record contains substantial details regarding the development and conduct of the business and the events that support this litigation. Essentially, Mr. Motherway and Mr. Cartisano were childhood friends who, in 1995, decided to form NBS. Each owned 50% of NBS and each was an officer, director and employee of NBS. As set forth in the record, NBS began as a company supplying overhead rolling security gates, but grew into a highly specialized company that provided unique services to national retailers and large commercial customers. In particular, NBS provided security maintenance and construction services based on proprietary information obtained directly from its customers. This information, which was entrusted to NBS by its customers, was input into a sophisticated and unique data base created primarily by Mr. Motherway for exclusive use by NBS.

The parties were each involved in the business in a significant way. The parties agreed that, although each shared certain management functions from the beginning, each would handle a distinct aspect of business. Mr. Cartisano was primarily responsible for sales and service, meeting with customers and negotiating all aspects of each job. Mr. Motherway, as stated, developed and maintained the computer programs that formed the basis of NBS's business and handled all accounting functions. Each of the principals was assisted by a team of employees who worked either on the sales side or the accounting side of the business. Mr. Cartisano was assisted by Michael True, a senior NBS employee who helped him develop business and oversee and manage NBS jobs.

² At the request of the parties the court conducted a joint trial of this matter and Index No.: 34757-09.

For a time, NBS's business grew and provided its owners with a very good living. At some point, however, this upward trend reversed itself, and NBS began to experience a significant decline in its business. It was at that point that the plaintiff, Mr. Motherway, allegedly first became aware of the company known as Retail Unlimited. Mr. Motherway testified that he became aware of Retail Unlimited's existence when he received an inquiry from one of NBS's clients. Mr. Motherway testified that, upon learning of Retail Unlimited and forming the belief that it was competing with NBS, he attempted on numerous occasions to discuss the matter with Mr. Cartisano, who refused to do so. In fact, Mr. Motherway testified that Mr. Cartisano failed or refused to provide him with any information about Retail Unlimited or to address Mr. Motherway's concern that it was competing with NBS for business. Mr. Motherway was not able to obtain any information from other employees either. His review of company records, which contained many anomalies, only heightened his concerns. Mr. Motherway subsequently commenced this litigation and the companion litigation against Retail Unlimited; Joanne Cuccio, Mr. Cartisano's wife; Michael True; Tammy True and Sandra True, Mr. True's wife and mother, respectively.

Mr. Motherway testified that, during the course of discovery, he learned that Retail Unlimited was a company organized in October 2004 and that it was owned by Joanne Cuccio, Tammy True, and/or Sandra True. It used Mr. Cartisano's home address as its business address and Mr. Cartisano's cell phone and fax numbers as the contact numbers for its business. Most importantly, 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 fact, Mr. Motherway demonstrated that, in certain cases, jobs that had originally been awarded to NBS were cancelled by Mr. Cartisano and rerouted to Retail Unlimited. Finally, 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 testified that Mr. Cartisano continued these practices, either through Retail Unlimited or other companies that were formed by him and others to directly compete with NBS, even after this litigation had been commenced. Mr. Motherway also testified that Mr. Cartisano used NBS funds to pay personal expenses or to pay down debt to its suppliers, who continued to work with Retail Unlimited after NBS's business came to a virtual halt.

Mr. Cartisano acknowledged the formation and ownership of Retail Unlimited. He also acknowledged that Retail Unlimited conducted business with certain clients of NBS and received payment therefor. However, he disputed the amount and the 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's existence and that he implicitly consented to Retail Unlimited's activities. Mr. Cartisano testified that he proposed to Mr. Motherway that Retail Unlimited be incorporated and owned by their wives as a way to take advantage of opportunities for women-owned businesses. Mr. Cartisano further testified that he discussed the idea with Mr. Motherway, but that Mr. Motherway did not want to become involved because he and his wife were having marital difficulties. In support thereof, Mr. Cartisano produced the deposition testimony of Mr. True, which was introduced into evidence, in which Mr. True stated that he was present on one occasion at an *Applebees* restaurant when the subject was discussed. Mr. Motherway, in his testimony, denied having any such conversation or consenting in anyway 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 court 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.

It is well settled that the directors and officers of a corporation have a fiduciary duty to the corporation (**Yu Han Young v. Chiu**, 49 AD3d 535, 536) and that corporate directors owe a fiduciary duty to the shareholders (**Schwartz v Marien**, 37 NY2d 487, 491). Additionally, the shareholders of a closely held corporation owe fiduciary duties to each other (**Brunetti v Musallam**, 11 AD3d 280, 281). The strict standard of good faith imposed upon a fiduciary may not be easily circumvented (**Id.**). It is elemental that a fiduciary owes a duty of undivided loyalty to those whose interests the fiduciary is to protect (**Birnbaum v Birnbaum**, 73 NY2d 461, 466). This is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring the avoidance of situations in which the fiduciary's personal interest possibly conflicts with the interests of those owed a fiduciary duty (**Id.**).

Because of the power to manage the affairs of a corporation, directors and officers are guardians of the corporate welfare (see **Alpert v 28 Williams Street Corp.**, 63 NY2d 557, 568). As such, they owe the corporation their undivided loyalty and may not, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation (**Morales v Galeazzi**, 72 AD3d 765, 766). Although participation in a business similar to that of the corporation is not precluded by an officer or director, conduct that cripples or injures the corporation is impermissible (**Howard v Carr**, 222 AD2d 843, 845).

Similar to the fiduciary duty of an officer or director, but more stringent, is the faithless servant doctrine, which 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. Not only is the principal deprived of the services for which he has contracted, but he finds such services turned against himself (**Id.** at 88). Thus, an employee is not free to take business for himself or direct it to a competitor for his profit without the express consent and approval of his employer (**Id.** at 89). It is not enough that the employee merely refrains from harming his employer. He has an affirmative duty to act at all times in his employer's best interests (**Id.** at 89).

Turning first to the derivative claims, the court finds that Mr. Cartisano had a fiduciary duty to NBS as an officer, director, and employee. The court also finds that a preponderance of the credible evidence establishes that Mr. Cartisano breached his fiduciary duty to

NBS by setting up and participating in a business that directly competed with NBS; by soliciting NBS's customers; by siphoning off business from NBS; and by using NBS's proprietary information, assets, and employees to conduct business for or on behalf of Retail Unlimited or other businesses controlled by him. Such evidence also establishes that Mr. Cartesano misappropriated NBS's proprietary information and unfairly competed with NBS. Moreover, the court credits the testimony of Mr. Motherway that he did not in any way consent to the activities of Retail Unlimited. Accordingly, the court awards damages to NBS in the amount of \$857,539: \$141,000 for the business of NBS that was diverted by Mr. Cartisano to Retail Unlimited and \$716,539 for the salary received by Mr. Cartisano during the period when he was a key employee of NBS and behaved as a "faithless servant."

As for Mr. Motherway's individual claims, the court finds that, as a director and shareholder of a closely held corporation, Mr. Cartisano owed a fiduciary duty to Mr. Motherway. The court also finds that a preponderance of the credible evidence establishes that Mr. Cartisano breached his fiduciary duty to Mr. Motherway, which resulted in the destruction of NBS's business and the destruction of the value of Mr. Motherway's stock in NBS. Accordingly, the court awards damages to Mr. Motherway in the amount of \$250,000 which represents the value of Mr. Motherway's equity interest in NBS that was destroyed by Mr. Cartisano's actions.

Mr. Motherway seeks an award of attorney's fees pursuant to § 626 (e) of the Business Corporation Law in the amount of \$250,000 in addition to the other damages awarded by the court. The general rule regarding attorney's fees under New York law is that the prevailing party may not collect them from the loser unless such an award is authorized by an agreement between the parties or by a statute or court rule (**Glenn v Hoteltron Sys.**, 74 NY2d 386, 393). Business Corporation Law § 626 (e) provides as follows:

If the action on behalf of the corporation was successful, in whole or in part, or if anything was received by the plaintiff or plaintiffs or a claimant or claimants as the result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorney's fees, and shall direct him or them to account to the corporation for the remainder of the proceeds so received by him or them. This paragraph shall not apply to any judgment rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage sustained by them.

Although Business Corporation Law § 626 (e) provides 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 (**Id.**). The basis for an award of attorney's fees in a shareholder derivative suit is to reimburse the plaintiff for expenses incurred on behalf of the corporation (**Id.**) Those costs should be paid by the corporation, which has benefitted from the plaintiff's efforts and which would have borne the costs had it sued in its own right (**Id.**). Thus, an award of legal expenses and attorney's fees to the innocent shareholder who brought the action is payable out of the award to the corporation (**Id.** at 390). Accordingly, the court declines to make an additional award for attorney's 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.

Finally, the court notes that Mr. Cartisano asserted a number of counterclaims alleging, among other things, that Mr. Motherway engaged in behavior that damaged the business of NBS and that breached his fiduciary duties. To the extent these counterclaims remain before the court, the court finds that they are without merit.

DATED: April 2, 2014

HON. ELIZABETH HAZLITT EMERSON

J. S.C.