Majority Opinion >

Superior Court of New Jersey, Chancery Division, Bergen County

NOT TO BE PUBLISHED WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

Felix E. Ferrer Plaintiff,

v.

Stahlwerk Annahutte Max Aicher GMBH & Co. KG, SAS Stressteel Inc., Peter Meyer, Matthias Scheibe, and Florian Hude Defendants.

FNA Associates, Inc., Stressbar Systems International, LLC, & Kevin Dowling Third-Party Defendants.

DOCKET No. BER-C-323-13

Argued: May 7, 2014

Decided: May 9, 2014

Michael J. Plata, Esq. and Michelle Ferrer, Esq. appearing on behalf of the plaintiff, Felix E. Ferrer (Plata Ferrer & Gutierrez LLC).

David Marck, Esq. (Sills Cummis & Gross) and Michael Roberts, Esq. of the Ohio bar, admitted pro hac vice (Graydon Head) appearing on behalf of the defendants, Stahlwerk Annahutte Max Aicher GmbH Co. KG, SAS Stressteel Inc., Peter Meyer, Matthias Scheibe and Florian Hude.

Karol Corbin Walker, Esq., appearing on behalf of third-party defendants, FNA Associates, Inc. and Stressbar Systems International, LLC (LeClairRyan).

Benjamin Curcio, Esq. appearing on behalf of third-party defendant, Kevin Dowling (Curcio Law Group).

CIVIL ACTION

OPINION

Honorable Peter E. Doyne, A.J.S.C.

Introduction

On April 4, 2014, Stahlwerk Annahutte Max Aicher GmbH & Company KG ("SAH"), SAS Stressteel ("SAS"), Peter Meyer ("Meyer"), Florian Hude ("Hude") and Matthias Scheibe (the "defendants" when referenced collectively) had filed an order to show cause seeking preliminary injunctive relief enjoining Felix E. Ferrer ("plaintiff" or Ferrer") and Stressbar Systems International, LLC ("Stressbar") from competing with SAS, soliciting its customers, or utilizing any confidential, proprietary or trade secret information.

Facts/Procedural History

On March 21, 2014, this court authored a lengthy opinion outlining the history of this matter. This previous opinion is incorporated herewith as if set forth at length. However, a brief summary of the relevant facts is provided.

SAH is a German corporation which is the leading manufacturer worldwide of special thread bars and steel accessories used in construction. SAH established SAS to distribute these products throughout the Americas. SAH retained eighty-five (85) percent ownership of SAS. SAS is a New Jersey corporation with its principal place of business in Essex County, New Jersey. Ferrer is a civil engineer with over thirty-five (35) years of experience in the construction industry. From 1970 until 2001, Ferrer had been employed with DYWIDAG-Systems International ("DSI") in various positions including Sales Manager of the Northeast Region. During this time, Ferrer also established an engineering consulting firm, FNA, Associates, Inc. ("FNA") where he designed support of excavation systems ("SOE") and acted as an SOE consultant.

In 2001, while still employed at DSI, Ferrer was approached by a Georgia corporation, SAS Stressbar ("SAS Stressbar"), formed by SAH and Bradford Raffensperger ("Raffensperger"). SAS Stressbar had unsuccessfully attempted to sell SAH products for the prior two years. SAS Stressbar offered Ferrer a ten (10) percent interest in the corporation and a sales contract was executed. Within days **[*2]** Ferrer secured two major orders from foundation contractors in New York City, allegedly due to his relationships and ownership of FNA. Soon thereafter, SAH approached Ferrer about a new business venture. Ferrer brought in John Bowe ("Bowe") and they agreed to partner with SAH. Raffensperger refused to allow use of the name Stressbar so Ferrer created a new name, Stressteel. SAS Stressteel was incorporated by Bowe on February 8, 2002.

In June 2002, SAS entered into an Employment Agreement ("Agreement") with Ferrer to have him become its President. The Agreement provided Ferrer 1) a ten (10) year contract; 2) a salary of not less than $150,000; 3) a ten (10) percent interest in SAS with the authority to purchase up to a twenty-five (25) percent interest; 4) other benefits including an automobile, phone, expense account, full insurance, and four weeks of paid vacation. The Agreement established Ferrer would report to the Chief Executive Officer ("CEO") as determined by the Board of Directors ("Board"). Due to Ferrer's relationship with FNA, the Agreement also discussed outside interests stating:

> It is expressively understood by the parties that the employee has other and different business interests and obligations than as set forth herein. Specifically, the employee is involved in an engineering consulting firm known as FNA Associated and a rebar detailing business. The employee is specifically entitled herewith to attend to such other business interests and specifically to continue the business of FNA Associated, the rebar detailing business and any other related business enterprise. Employer understands that in the operation by the employee of these other businesses, he will be providing services and/or soliciting for engineering, consulting, detailing, or other services from former, current and future customers of employer and such business operations shall not be considered a breach of the employee's obligations to the employer and are hereby expressly permitted. Employee shall devote such time, energy,

> and effort to the employer as is necessary to perform his obligations under this agreement and shall be free to pursue his other business interests simultaneously therewith.

The agreement also addressed customer lists and confidentiality; in the event of termination of the employer and employee relationship, "each party may solicit for any business purposes any and all potential customers [sic] information regardless of whether said customers had a relationship with either party". However, these conditions were subject to subparagraph (a) which stated for a period of three (3) years the employee would not solicit customers of the employer which he was first introduced to by the employer or customers of the employer he first met during the terms of the Agreement. The Agreement only contained this non-solicitation clause, not a restrictive covenant. Furthermore, "no knowledge gained from either party from the other shall be considered confidential, a trade secret, or proprietary information subsequent **[*3]** to a termination" of the employee/employer relationship.

SAS contends Ferrer represented his association with FNA would be a "secondary activity" which he operated outside of normal working hours in a small office next to his garage. SAS asserts due to Ferrer's representations FNA would not interfere with his responsibilities to SAS pursuant to the Agreement, SAS allowed for his continued involvement with FNA.

Initially, SAH provided SAS with threaded bars, nuts, and couplers and Ferrer advised of what additional accessories SAH should manufacture and provide. Ferrer contends the threaded bar system was created by DSI and he had designed these systems for many years prior to his joining SAS. Ferrer asserts his experiences at DSI and FNA permitted him to provide technical knowledge SAS lacked.

During Ferrer's employment, SAS obtained approvals for the use of Grade 97 threaded bar reinforcement steel which provided SAS with a competitive edge as it was not then manufactured domestically and allowed for slimmer walls. One SAS threaded bar provides the strength of five bars typically used. SAS was also the first company to develop 3 inch diameter grade 150 threaded bar anchors. SAS uses multi-bar mini caissons which allow for the construction of taller buildings in Manhattan where the bedrock was previously too deep to secure footing. SAS contends their bars are created in such a fashion that they allow large quantities of reinforcement steel to be installed more quickly and are made in a way that gives the bars a coarser pattern which provides technical advantages. SAS asserts the fabrication methods and enhanced efficiencies constitute trade secrets.

Ferrer contends SAH was aware of FNA prior to his employment, it was addressed in the Agreement and SAH consented to his continuing activities with regard to the enterprise. Ferrer also asserts he used FNA to promote and showcase SAS products including Grade 97 steel. Ferrer contends FNA engineers created, evaluated, and optimized designs by recommending and utilizing SAS products which he asserts were not priced competitively and would not have sold otherwise. Ferrer alleges he invented and patented a pre-fabricated modular reinforcement cage system ("cage system") for the construction of concrete structures. In 2003, Ferrer housed FNA within SAS's new facilities in Fairfield, New Jersey but avers FNA still purchased its own equipment and supplies. Ferrer asserts FNA's presence was visible to all employees and visitors. Ferrer contends certain employees of FNA also worked with SAS as project managers but these employees received separate compensation from each company. Ferrer contends SAS's CEO, Meyer even insisted one FNA engineer be put on SAS's payroll so he could be covered by SAS's worker's compensation insurance.

However, SAS asserts Ferrer misused SAS's employees and allegedly, without the knowledge of Meyer, allowed FNA and other businesses to use SAS facilities rent free, used SAS money to pay personal expenses, permitted **[*4]** SAS employees to perform work for FNA, Retech and other enterprises, and usurped opportunities by using FNA not SAS to market Grade 97 Steel.

On January 24, 2004, pursuant to the Agreement, Ferrer exercised his option to purchase an additional five (5) percent interest in SAS, bringing his total interest in the company to fifteen (15) percent. Ferrer asserts between 2002 and 2013, he assisted SAS in achieving substantial growth as revenues went from under $2 million to over $14 million and the work force grew from four (4) employees to over twenty-five (25) employees. Ferrer also asserts he personally

generated over eighty (80) percent of SAS's sales.

At meetings held in January 2007, the SAS Board decided to create a new company, Stressteel CA ("Stressteel CA"), headquartered in Fremont, California to provide for territories in the western United States and Canada.

Meyer and other SAS board members repeatedly felt the need to inquire about the relationship between Ferrer and FNA due to the alleged lack of transparency surrounding it. At the January 2008 Board meeting, the minutes reflect Meyer requested a letter from Ferrer further "defining and describing the inner working relationship between SAS and FNA." (Meyer Cert. Ex. 3). On June 1, 2008, Ferrer authored the response letter basically summarizing the Agreement. At the June 10, 2008 board meeting, Meyer and Mr. Wlodkowski "voiced their displeasure with this document and requested additional information from Mr. Ferrer." (Meyer Cert Ex. 5). At Board meetings held on March 2-3, 2009, the minutes indicate Ferrer and SAS's CFO, Kevin Dowling ("Dowling"), would contact the owner of the Fairfield warehouse to see about expanding the facility because in "order to expand the business profile of SAS and FNA, additional space is needed and SAS need[ed] to prepare for that." (Ferrer's Cert. Ex. G).

In 2009, SAH purportedly required SAS to borrow $300,000 to pay money owed to SAH. Ferrer contends SAH also imposed a $100,000 management fee on SAS even though he managed the day-to-day operations. Ferrer also alleges SAH unilaterally decided to have SAS alter Ferrer's bonus structure as set forth in the Agreement. Ferrer asserts he has not been paid approximately $172,653 in commissions earned nor has he received salary increases set forth in the Agreement since 2008. Ferrer further asserts SAH denied his request to purchase an additional ten (10) percent of SAS as permitted in the Agreement and SAH has prevented SAS from issuing dividends.

During the October 10-12, 2011 board meetings, SAH made an offer to purchase a twenty-five (25) percent share of FNA and Ferrer was to consider the offer and advise the board. Meyer asserts SAS proposed this purchase so "SAS could have better understanding of [FNA] and have input in protecting SAS, to the extent it relied on FNA." (Meyer Cert. ¶ 13). At the February 28, 2012 board meeting, an extensive discussion regarding combining FNA and SAS was held. Meyer asserted the combination was "critical" to the future of SAS and Ferrer was to prepare a proposal for the May 2012 meeting. Meyer contends Ferrer **[*5]** presented his role in the future as a consultant to FNA and SAS. Meyer asserts premised upon the discussion, Ferrer's employment contract was extended until 2017.

At the December 4-5, 2012 board meetings, there was a general discussion about FNA. As Ferrer's counsel was not present, the discussion about the possible sale of FNA to SAS and corresponding employment agreement for Ferrer to act as a consultant was tabled until the late December meetings in Miami. Meyer asserts Retech was SAS's largest customer at the time, but it was unknown to the board members that Ferrer owned 40% of Retech.

SAS contends while Ferrer was outwardly receptive to the merger, in December 2012, two weeks prior to merger talks scheduled in Miami, he purportedly conspired with Dowling for the raiding of SAS's employees to FNA. At the December 29, 2012 meeting, for the first time, Ferrer purportedly revealed: FNA's profits for the year were $1.2 million and profits for the prior three years were in excess of $2.2 million; SAS employees were working for FNA; FNA was using SAS facilities and resources; and FNA received benefits from SAS's business with Retech at a rate of $60-80/ton of steel. Meyer alleges he informed Ferrer not to use SAS's staff and equipment for FNA purposes absent Meyer's consent. Ferrer contends he advised Meyer if FNA was not specifying SAS products in their designs, he would rarely sell SAS products due to their higher prices caused by an increase in value of the euro and higher freight train rates. Meyer also presented Ferrer with a proposed agreement regarding the relationship between SAS/SAH and FNA. Ferrer alleges SAH offered to purchase back Ferrer's fifteen (15) percent interest in SAS for $200,000, purchase ten (10) percent of FNA shares for $100,000, cancel the Agreement, and have SAS assume employment contracts for the employees who worked as project managers. In return, SAS would pay FNA $400,000 annually and commissions between one (1) and five (5) percent of SAS's gross profit.

On or about December 30, 2012, Ferrer rejected Meyer's proposal and allegedly offered to sell his fifteen (15) percent interest and purportedly invited SAS to look for his replacement. On December 31, 2012, after returning from Miami, Ferrer moved FNA out of the space it had been occupying at SAS and SAS's entire engineering team allegedly

resigned to join FNA.

In January 2013, Meyer asserts he was informed Ferrer allegedly caused four (4) of SAS's engineering professionals to resign their employment and join FNA. On January 20, 2013, a meeting was held to discuss FNA and SAS. The meeting was attended by Max Aicher ("Aicher"), majority owner of SAH, Angela Aicher, Ferrer, and Michelle Ferrer, Esq. ("Attorney Ferrer"). Following the meeting, Attorney Ferrer sent Aicher a draft of the proposed service agreement, a copy of the SAS and FNA budget prepared by Dowling, and a list of personnel expenses. Attorney Ferrer and Steffen Lutz, on behalf of SAS/SAH, corresponded throughout February and March 2013 concerning a prospective Memorandum of Understanding ("MOU") and/or Service Agreement **[*6]** between FNA and SAS. At the February 26, 2013 board meeting, Ferrer requested more time to review the potential Service Agreement. On March 5, 2013, Attorney Ferrer, on behalf of Ferrer, rejected the proposed MOU and Service Agreement and attached a copy of the Service Agreement with the proposed revisions acceptable to Ferrer. Ferrer asserts he consistently attempted to finalize the Service Agreement and was clear he did not wish to sell FNA.

On July 31, 2013, Ferrer advised Meyer his position continued to be it would not be in his best interest to sell shares of FNA to SAS at this time, nor would FNA consider merging with any other company. Ferrer advised if terms of the Service Agreement could not be finalized, FNA would cease working for and/or with SAS.

On September 25, 2013, a shareholders meeting followed by a board meeting was scheduled. At the shareholders meeting, Meyer announced the appointment of Hude as a new director. Ferrer objected as he believed Hude had not acted in the best interest of SAS in the past and the purpose of the appointment was solely to secure the assent of three (3) directors in the subsequent board meeting. No vote was taken on Hude's appointment but he was later added to the board by SAH's written consent utilizing its eighty-five (85) percent interest.

At the following board meeting, Meyer announced the appointment of John Hritz, Esq. ("Hritz") as the new CEO of SAS. Ferrer asserts he was not aware SAH was seeking to hire a new CEO or add a fourth director. Ferrer objected to Hritz's appointment as Hritz would be located in New Jersey and would assume many of Ferrer's responsibilities.

A subsequent board meeting was held on October 22, 2013 at which time Meyer officially resigned as CEO and Hritz was appointed. At this meeting, the board proposed an executive board and new rules of procedure for SAS although discussion of these matters was tabled until the November 15, 2013 meeting in Germany. Meyer also announced he had hired Jaime Silva ("Silva") as SAS's COO to be responsible for day to day operations and purportedly as Ferrer's replacement. Ferrer objected as he was not consulted in the matter and his contract did not expire until 2017. Ferrer asserts the appointment of Silva was a violation of the Agreement and the appointments of both Hritz and Silva constituted his constructive discharge. SAS contends the Agreement does not provide Ferrer any hiring or human resources responsibilities. Furthermore, the Agreement stated Ferrer would have "all sales, marketing, financial and administrative responsibilities of SAS and any operational responsibilities as determined by the Board of Directors of SAS." A meeting was scheduled for October 21, 2013 to discuss the situation between FNA and SAS. FNA provided services to SAS from January 8, 2013 through October 2013.

On November 12, 2013, Ferrer was to fly to Germany for a board meeting but SAS asserts it was notified through Attorney Ferrer that Ferrer had terminated his employment, resigned his board seat, and had filed a lawsuit. SAS contends when Ferrer **[*7]** severed his employment, he had knowledge of the alleged trade secrets of SAS and knew of strategies relating to at least fifteen (15) major construction projects. Less than one week later, on November 20, 2014, SAS contends Attorney Ferrer assisted Ferrer in allegedly founding a competing enterprise, Stressbar. Ferrer contends after his constructive discharge he obtained permission from Raffensperger to utilize the Stressbar name. SAS alleges Ferrer now competes with SAS and solicits customers he met while employed at SAS. Stressbar has three (3) employees and is currently contracted to supply several major construction projects. Unlike SAS, Stressbar is a third-party vendor which places orders with competitors and then resells products to the end user.

The defendants assert there are twenty-five companies that Ferrer came to know while working at SAS. The defendants allege Ferrer has solicited and submitted bids with two customers, Clients #7 and #19, which he came to

know through his employment with SAS and Stressbar was ultimately was awarded the projects. Nicholas J. Mauro, Sr. ("Mauro"), Senior Projects Manager for SAS, asserts Ferrer has bid on many other projects as well from customers Ferrer came to know while employed at SAS. Ferrer contends this is incorrect as Mauro was not privy to his client list while at DSI as he worked in the purchasing department and was not involved in sales. Additionally, Ferrer contends Mauro left DSI in 1989 while Ferrer continued his employment there until 2001. Ferrer alleges at least thirteen of the clients the defendants wish to assert he met while at SAS had previously worked with him at DSI. Ferrer alleges Stressbar and Client #9 have an existing contract and Client #9 has been Ferrer's client since he was with DSI. Ferrer also asserts Client #7 requested a bid from Stressbar on January 10, 2014 and Client #19 requested a proposal from Stressbar multiple times but was never provided one. Ferrer asserts Mauro has been utilizing the FNA logo and altering FNA drawings without consent. He certifies there are no "trade secrets" he utilizes as all information is publicly known either by patents or recitations in company catalogues.

Pleadings

Ferrer had a six-count verified complaint filed on his behalf in Bergen County on November 12, 2013 alleging oppression of a minority shareholder, breach of fiduciary duty, breach of the Agreement, breach of the covenant of good faith and fair dealing, violation of the New Jersey Wage Payment Law, and intentional wrongdoing (the "Bergen matter"). Defendants had an answer and a twelve-count counterclaim filed on December 27, 2013. Ferrer had an answer to the counterclaims filed on his behalf on January 28, 2014.

Thereafter, on March 7, 2014, defendants had filed a motion on short notice to amend their counterclaim and to file a third-party complaint joining additional parties. The plaintiff also had filed a motion on short notice to amend his verified complaint filed on the same date.

On March 13, 2014, Dowling had a complaint filed on his behalf **[*8]** in Essex County against SAS, SAH, and Hritz alleging breach of contract, defamation, intentional infliction of emotional distress and common law wrongful termination (the "Essex matter"). On March 21, 2014, oral argument was entertained and the defendants were permitted amend their counterclaim to include the two additional claims and to add third-party defendants, FNA, Stressbar, and Dowling. Their amended pleadings were filed on April 4, 2014. Ferrer was permitted to amend his complaint and had a verified amended complaint filed on April 8, 2014.

The defendants had an order to show cause seeking preliminary injunctive relief to prevent the misuse of trade secrets, propriety information and unlawful competition filed on April 4, 2014. Included was a brief in support of the requested relief and certifications from Meyer, Mauro and Hude. The defendants also submitted the certification of Jeffrey Greenbaum, Esq. ("Greenbaum") under seal as it contained a confidential list of SAS's customers. SAS also requested expedited discovery but as there was no consent to this provision and counsel advised they did not wish to have that request proceed by way of a request for temporary restraints, such request was stricken. Ferrer had opposition filed on his behalf on April 16, 2014. Included was a brief in opposition to the defendant's application, and certifications of Ferrer, Bowe, Joseph Farmarco and Joseph Pastore. Also included was a certification of Eric Reid, President of Client #17, and affidavits from Adam Wall, Vice President of Client #24 and Kristine Crevani, owner of Client #9; customers on SAS's purported confidential customer list. Opposition was filed on behalf of third-party defendant, Stressbar on April 22, 2014.

On May 1, 2014, counsel for the defendants authored a letter informing they only wished to pursue the application with respect to the request to enjoin Ferrer "from doing business with the 13 customers he does not dispute that he learned of while at SAS."1 Due to the confusion regarding the customers, on May 5, 2014, counsel for the defendants submitted an additional letter clarifying they wished their application to proceed with respect to the customers Ferrer admits he learned of while at SAS and claims he did not solicit but allegedly is doing business with. Oral argument was entertained on May 7, 2014.

Law

a. ***Injunctive relief***

Injunctive relief is an extraordinary equitable remedy that should be entered only with the exercise of great care and only upon a showing, by clear and convincing evidence, of entitlement to the relief. *Dolan v. DeCapua*, 16 N.J. 599, 614 (1954) ("Injunctive judgments are not granted in the absence of clear and convincing proof"); *Waste Mgmt. of N.J., Inc. v. Union County Utils. Auth.*, 399 N.J. Super. 508, 519 (App. Div. 2008); *Mays v. Penza*, 179 N.J. Super. 175, 179-80 (Law Div. 1980) (Injunction should be granted "only where the proven equities establish a clear need" and "only in the clearest of factual circumstances and for the most compelling of equities.").

The seminal case in determining whether injunctive relief should be granted remains *Crowe v. De Gioia*, 90 N.J. 126 (1982). Under Crowe, the movant bears the burden of demonstrating that: 1) irreparable harm is likely if the relief is denied; 2) the applicable underlying **[*9]** law is well settled; 3) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and 4) the balance of the hardship to the parties favors the issuance of the requested relief. Id. at 132-34 . Each of these factors must be clearly and convincingly demonstrated. *Waste Mgmt.*, supra , 399 N.J. Super. at 520 .2 A preliminary injunction should not be entered except when necessary to prevent substantial, immediate and irreparable harm. *Subcarrier Commc'n, Inc. v. Day*, 299 N.J. Super. 634, 638 (App. Div. 1997).

As to the irreparable harm element, harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. *Crowe*, supra , 90 N.J. at 132-33 . Pecuniary damages may be inadequate due to the nature of the injury or the right affected. Id. at 133 . Injunctive relief, and accordingly irreparable harm, require proof by clear and convincing evidence. *Dolan v. DeCapua*, 16 N.J. 599, 614 (1954); see also *Subcarrier*, supra , 299 N.J. Super. at 638 (noting that generally, "preliminary injunctions should not be entered except when necessary to prevent substantial, immediate and irreparable harm").

To prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. *Crowe*, supra , 90 N.J. at 133 . That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. Id. Indeed, the point of temporary relief is to maintain the parties in substantially the same condition when the final decree is entered as they were when the litigation began. Id. at 134 .

Although all four factors must weigh in favor of injunctive relief, courts may take a less rigid view in consideration of the factors where the interlocutory relief sought is designed to preserve the status quo. *McKenzie v. Corzine*, 396 N.J. Super. 405, 414 (App. Div. 2007); see also *Rinaldo v. RLR Inv., LLC*, 387 N.J. Super. 387, 396 (App. Div. 2006) ("a party who seeks mandatory preliminary injunctive relief must satisfy a 'particularly heavy' burden"). Again, the primary purpose of interlocutory injunction is to maintain the parties in substantially the same condition when the final decree is entered as they were when the litigation began. *Crowe*, supra , 90 N.J. at 134 . The issuance of an interlocutory injunction must be squarely based on an appropriate exercise of sound judicial discretion, which, when limited to preserving the status quo during the suit's pendency, may permit the court to place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy. *Waste Mgmt.*, supra , 399 N.J. Super. at 520 . By the same token, in some cases, such as when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant. Id.

b. ***Breach of Contract***

Under New Jersey law, the plaintiff must prove the following elements to demonstrate a breach of contract claim: (1) a contract; (2) a breach of that contract; (3) damages flowing therefrom; and (4) plaintiff performed its own contractual duties. *Nat'l Reprographics, Inc. v. Strom*, 621 F. Supp. 2d 204, 222 (D.N.J. 2008); *Murphy v. Implicito*, 392 N.J. Super. 245, 265 (App. Div. 2007).

c. ***Breach of Good Faith***

The obligation to perform in good faith exists in every contract. *Sons of Thunder v. Borden, Inc.*, 148 N.J. 396, 421

(1997). Good faith is defined as "honesty in fact in the conduct or transaction concerned." N.J.S.A. 12A:1-201(19) . In essence, all contracts have an implied covenant providing "neither party shall do anything which will have the effect of destroying or injuring **[*10]** the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing." *Palisades Properties, Inc. v. Brunetti*, 44 N.J. 117, 130 (1965) (citations omitted). "The party claiming a breach of the covenant of good faith and fair dealing 'must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.'" *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 182 N.J. 210, 225 (2005) (internal citations omitted). Proofs demonstrating either bad motives or intentions are essential to a breach of covenant action. Id.

d. *Misappropriation of Trade Secrets*

N.J.S.A. 56:15-1 to -9 , commonly known as the "New Jersey Trade Secrets Act" ("NJTSA") became effective on January 5, 2012. Pursuant to N.J.S.A. 56:15-2 , a "trade secret" is broadly defined as:

> information, held by one or more people, without regard to form, including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

NJTSA provides actual or threatened misappropriation of trade secrets may be enjoined. Misappropriation is defined as:

> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (2) Disclosure or use of a trade secret of another without express or implied consent of the trade secret owner by a person who:
>
> (a) used improper means to acquire knowledge of the trade secret; or
>
> (b) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was derived or acquired through improper means; or
>
> (c) before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired through improper means.

An injunction shall only last as long as necessary to eliminate the commercial advantage which the misappropriating party receives from use of the trade secret. To prevail in New Jersey upon a claim for misappropriation of a trade secret, a trade secret owner must establish that:

> (1) a trade secret exists; (2) the information comprising the trade secret was communicated in confidence by plaintiff to the employee; (3) the secret information was disclosed by that employee and in breach of that confidence; (4) the secret information was acquired by a competitor with knowledge of the employee's breach of confidence; (5) the secret information was used by the competitor to the detriment of plaintiff; and (6) the plaintiff took precautions to maintain the secrecy of the trade secret.

[*Rycoline Products, Inc. v. Walsh*, 334 N.J. Super. 62, 71 (App. Div. 2000).]

Analysis

The arrangement between FNA and SAS, at the heart of this matter, is unclear premised upon the contrasting evidence presented. What is apparent is the arrangement **[*11]** between FNA and SAS was inherently conflicting. There are multiple questions which must be answered revolving around the corporate structure and interrelationship which was countenanced by the parties. It may be revealed the plaintiff was not dealing in good faith and purposely withheld information about FNA. It may also be that SAS was fully aware of the plaintiff's role in FNA. However, at this present time there is not sufficient factual clarity in the record to come to any factual determinations in this regard. The defendants only wish to have the court consider their request Ferrer be enjoined from doing business with clients he came to know while employed at SAS. As such, the court will only consider this aspect of their application.

The defendants cannot be granted preliminary injunctive relief as the Crowe factors clearly have not been met.3 The factors that must be considered include: 1) irreparable harm is likely if the relief is denied; 2) the applicable underlying law is well settled; 3) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and 4) the balance of the hardship to the parties favors the issuance of the requested relief.

First, the defendants are unable to demonstrate irreparable harm. SAS asserts an injunction is necessary because Ferrer and Stressbar are using SAS's information and clients to compete directly with SAS. The complaint in this matter was filed on November 12, 2013 and on that same day, Attorney Ferrer notified Meyer that Ferrer's employment was terminated. Less than one week later, Ferrer created Stressbar. However, SAS waited until April 4, 2014 to seek injunctive relief. A panoply of equitable remedies could be afforded to the defendants if the plaintiff is found to be in breach the Agreement and to have improperly solicited SAS's clients including disgorging of the profits. It is well established monetary damages do not constitute irreparable harm. The plaintiff correctly asserts damages could be quantified through an audit of Stressbar's sales to provide compensation to the defendants should they ultimately prevail in this action. Accordingly, the court concludes the defendants have failed to establish irreparable harm should the preliminary injunctive relief not be granted. Further, any showing of immediacy has long since passed.

The defendants' application is based on settled law and, as such, complies with the second prong of Crowe.

The defendants are unable to demonstrate the third element, reasonable probability of success on the merits. It is initially noted Ferrer alleges he was constructively discharged by SAS's actions. If Ferrer is able to support a claim for constructive discharge, SAS cannot prosecute him for breach of the Agreement. Ferrer was running SAS for over ten years and purportedly unbeknownst to him, Hritz, Hude and Silva were hired and usurped his established role in violation of his reasonable expectations. At this time, the court cannot determine whether **[*12]** or not this was pretextual.

The defendants assert Ferrer breached the non-solicitation clause of the Agreement by soliciting entities which he came to meet while at SAS. The defendants submitted, under seal, a list of twenty-five (25) clients which they allege Ferrer met during his employment with SAS and seek to have him enjoined from soliciting thirteen (13) of those clients.4 Ferrer contends he has not solicited any customers he learned about solely during his employment with SAS. Ferrer asserts thirteen (13) of those clients were serviced by him when he was employed with DSI and the remaining twelve (12) companies he has not solicited. In support of this position, three of Ferrer's clients from his employment with DSI submitted affidavits or certifications stating they began working with Ferrer while he was an employee of DSI. Ferrer also alleges he did not solicit Client #7; instead, the entity approached him to request he submit a proposal. The plaintiff asserts he did not breach the non-solicitation clause as a client's a request for information is not sufficient to demonstrate solicitation. Additionally, Ferrer asserts he did not submit a bid to Client #19 despite the client's repeated requests.

As the Agreement does not provide clarity regarding what would constitute "solicitation", it is unclear if the plaintiff

violated the Agreement.5 The plaintiff also alleges the non-solicitation clause is unenforceable. There is a three-pronged test for determining whether a restrictive covenant is reasonable: "(1) it must be necessary to protect the parties legitimate interests; (2) it must cause no undue hardship on the former employee, and (3) it must not impair the public interest." *A.T. Hudson & Co. v. Donovan*, 216 N.J. Super. 426, 432 (App. Div. 1987) (applying the Solari test for restrictive covenants to a non-solicitation clause). The plaintiff contends the length three years and the unlimited geographic scope are broader than necessary to protect the employer's interests. The plaintiff asserts the public interest is greatly restricted by the non-solicitation clause. There are significant factual issues in dispute that prevent the finding the defendants have a reasonable probability of success with regard to a violation of the non-solicitation clause of the Agreement. It is significant to note the Agreement did not provide for a restrictive covenant.

Although the defendants withdrew their other claims for injunctive relief, it is worth nothing the relationship between FNA and SAS was clearly problematic from the beginning as it constituted a conflict of interest; however, the defendants allowed it. FNA was clearly recognized in the Agreement signed in 2002 and was discussed at board meetings numerous times over the years. While it may later be revealed the plaintiff misrepresented his role, no such clear and convincing evidence has been presented today. Furthermore, Ferrer's role of President of SAS required he report to the board. If the board wanted to know more information about FNA, they could and should have demanded it and required its production. It is troubling **[*13]** SAS asserts it wished to purchase FNA "so that SAS could have a better understanding of it and have input in protecting SAS". (Meyer Cert. ¶ 13). It may be SAS allowed FNA to co-exist as long as it remained profitable for SAS; once Ferrer refused to surrender FNA to SAS, then the issues were more urgently addressed. Clear and convincing evidence is not presented that Ferrer breached the Agreement. This is not to say evidence may be presented later to the contrary; the issue of whether or not Ferrer misrepresented his relationship with FNA is not being decided today. The disputed material facts surrounding this situation prevent a finding the defendants have a reasonable probability of success on the merits.

Finally, the court must consider the balance of the hardship to the parties in granting or denying the relief. The hardship to the defendants, if established, is monetary and the defendants could seek various equitable remedies if they ultimately prevail. The defendants cannot now seek a restrictive covenant to disallow competition from Ferrer; if the defendants believed one was necessary, it should have been provided for in the Agreement. There are insufficient proofs in the presented record to suggest Ferrer solicited clients he met while employed with SAS, to which he did not have a previous relationship. The hardship to the plaintiff if the injunction is granted might well cause irreparable harm to the corporation's reputation. Stressbar has multiple pending agreements with suppliers and customers. An injunction would harm Stressbar's reputation and thereafter, its ability to continue, while the benefit to the defendants is at best obscure as insufficient proofs have been presented Ferrer solicited clients he met while at SAS. The balance of hardships weighs in favor of denying the request for injunctive relief.

An injunction may be permitted if necessary to preserve the status quo "may permit the court to place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy." *Waste Mgmt. of N.J., Inc. v. Union County Utils. Auth.*, 399 N.J. Super. 508, 519 (App. Div. 2008) (internal citations omitted). In this matter, an injunction is not required to preserve the status quo; the delay of several months in seeking the requested relief demonstrates an injunction is not necessary in order to maintain the status quo.

Conclusion

"[A] preliminary injunction should not issue where all material facts are controverted." *Crowe v. De Gioia*, 90 N.J. 126, 133 (1982). It is apparent the material facts underlying the claims are significantly disputed and do not satisfy the Crowe factors as the defendants are unable to show irreparable harm, reasonable probability of success on the merits, and the balance of hardships weighing in favor of injunctive relief by clear and convincing evidence. The delay of several months between the defendants' awareness of Stressbar and the filing of this motion demonstrate injunctive relief is not necessary to maintain the status quo. Therefore, the defendants' application for injunctive relief is denied.

Plaintiff's counsel shall prepare an order in conformity with **[*14]** this decision to be submitted under the five-day rule.

fn 1 Ferrer asserts he only met twelve, not thirteen, of the twenty-five entities while employed at SAS.

fn 2 For purposes of this decision, the court need not consider *Waste Mgmt. of N.J., Inc. v. Morris Cnty. Mun. Utils. Auth.*, 433 N.J. Super. 445 (App. Div. 2013) and its apparent significant modification of the law surrounding injunctive relief for the reasons which shall be set forth hereinafter.

fn 3 At oral argument, counsel for the defendants asserted the linchpin to their argument was *Scholastic Funding Grp. v. Kimble*, [2007 BL 213438], 2007 U.S. Dist. LEXIS 30333 (D.N.J. Apr. 24, 2007), an unpublished federal case which was referenced once, in a string citation, in their brief. See R. 1:36-3 .

fn 4 There is an apparent lack of clarity whether or not Ferrer agrees he is "doing business" with the twenty-five companies on the list.

fn 5 At oral argument, counsel for the defendants conceded he was unaware of any case in New Jersey standing for the proposition that a request from a customer constituted a solicitation.

General Information

Result(s)	Injunction Denied
Judge(s)	Peter E. Doyne
Related Docket(s)	C-000323-13 (NJ Sup.)
Topic(s)	Civil Procedure; Contracts; Trade Secrets
Industries	Steel