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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**RONALD KOENIGSBERG and AMERICAN
INVESTMENT PROPERTIES, INC.,**

**Motion Sequence #1
Submitted December 5, 2008**

Plaintiffs,

-against-

INDEX NO: 20127/08

**SILBER INVESTMENT PROPERTIES LTD.,
ADAM SILBER, GENNARO MANCINI, a/k/a
JERRY MANCINI and STUART FRANKEL,**

Defendants.

The following papers were read on this motion:

Notice of Motion/Order to Show Cause.....	1
Plaintiffs' Memorandum of Law.....	2
SILBER Affidavit in Opposition.....	3
FRANKEL Affidavit in Opposition.....	4
Defendants Memorandum of Law.....	5
Reply Affidavit.....	6

Plaintiffs', RONALD KOENIGSBERG and AMERICAN INVESTMENT PROPERTIES, INC. (hereinafter referred to as "AIP"), move by order to show cause for an order granting a preliminary injunction, *inter alia*, enjoining defendants from committing wrongful acts intended to damage plaintiffs, from tortiously interfering with plaintiffs business relations, from interfering or contacting plaintiffs' clients, and from using or exploiting AIP's confidential information or trade secrets. Defendants, SILBER INVESTMENT PROPERTIES LTD. and ADAM SILBER (hereinafter collectively referred

to as "SILBER"), GENNARO MANCINI a/k/a JERRY MANCINI and STUART FRANKEL, oppose the motion, which is determined as follows:

Plaintiff, RONALD KOENIGSBERG (hereinafter referred to as "KOENIGSBERG"), is the owner and sole shareholder of plaintiff AIP, a real estate investment firm. Plaintiffs seek to enjoin the defendants from tortiously interfering with plaintiffs' business relations and for misappropriating plaintiffs' alleged proprietary information and trade secrets.

Plaintiffs allege that defendant, SILBER, hired defendants, JERRY MANCINI (hereinafter referred to as "MANCINI") and STUART FRANKEL (hereinafter referred to as "FRANKEL") away from AIP. Plaintiffs allege that FRANKEL and MANCINI took trade secrets and proprietary information with them from AIP to SILBER. Plaintiffs also allege defendants interfered with AIP's business by making bogus offers to AIP clients and, *inter alia*, sending out faxes to AIP clients.

Defendants deny all accusations of plaintiffs. They contend that they did nothing wrong, and that plaintiffs alleged "trade secrets" are available as public information. The individual defendants, FRANKEL and MANCINI, contend that they are independent contractors, that they never signed a non-competition clause with AIP, and that they left AIP due to its poor management and its poor treatment of its sales force, i.e., persons like FRANKEL and MANCINI. They assert that they were independent contractors and not employees of AIP and that the "client lists" were considered their individual property and not the property of the firm for which they worked, i.e., AIP.

Unless there is an agreement to the contrary, solicitation of an employer's customers by a former employee by the use of a customer list is not actionable unless the customer list is considered a trade secret or there was wrongful conduct by the employee

such as physically taking/copying the employer's files or using the employer's confidential information (see, *APA Security, Inc. v HPA*, 37 AD3d 502, 831 NYS2d 201 [2nd Dept. 2007]). Although an employer's act of terminating employees frees them to solicit an employer's clients, the employees were not free to use a former employer's trade secrets to gain an unfair business advantage (*Easton Business Systems v Specialty Business Solutions, LLC*, 292 AD2d 336, 739 NYS2d 177 [2nd Dept. 2002]; *Royal Carbo Corporation v Flameguard, Inc.*, 229 AD2d 430, 645 NYS2d 18 [2nd Dept. 1996]).

A trade secret must, first of all, be a secret (*Ashland Management, Inc. v Janien*, 82 NY2d 395, 604 NYS2d 912, 624 NE2d 1007 [C.A. 1993]). Plaintiffs' allegations notwithstanding, there was no indication that AIP employees were prohibited from soliciting their own customers if they left. There was no indication that sales representatives such as MANCINI and FRANKEL were prevented from keeping their own list of customers. Also, there was no express non-competition agreement found in the record before the court as to ex-AIP sales persons. If AIP did not require that its salespeople guard the secrecy of the customer list during their service with AIP or attempt to prevent the AIP salesmen from using the information on the list once they left AIP's service, this is an indication that the customer list was not a "trade secret" (see *Starlight Limousine Service, Inc. v Cucinella*, 275 AD2d 704, 713 NYS2d 195 [2nd Dept. 2000]).

Plaintiffs must do more than merely allege that its customer list is "confidential and a trade secret" and that it took years to compile. In the case at bar, plaintiffs did not set forth what "considerable efforts" were expended in developing the purported secrets (see *Three Dots, Inc. v Lonny's Wardrobe, Inc.*, 292 AD2d 309, 739 NYS2d 701 [1st Dept.

2002]). Moreover, even expenditures of time and money in compiling a customer list does not make the list entitled to trade secret protection where the information can be acquired with no extraordinary effort from non-confidential sources (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 328 NYS2d 423, 278 NE2d 636 [C.A. 1972]). How the list was obtained is not clear to the Court. Thus, there are issues of fact as to whether the customer list is indeed a “trade secret” and whether defendants obtained any information improperly.

Under New York Law, a complaint or cause of action alleging tortious interference with economic relations must allege 1) a valid contact or prospective contractual relationship; 2) defendant’s knowledge of such a relationship; 3) intent to interfere; and 4) damages (*Wrenn v New York City Health and Hospitals Corp.*, 104 F.R.D. 553 [US Dists. 1985]; see also, *Israel v Wood Dolson Co.*, 1 NY2d 116, 151 NYS2d 1, 134 NE2d 97 [C.A. 1956]). Here, the existence of a customer list only raises the issue of fact as to whether a “prospective contractual relationship” existed. There does not appear to be any valid contracts that exist between AIP and any customers that dealt with defendants.

The elements of a cause of action for tortious interference with prospective economic advantage are: 1) the existence of a profitable business relationship; 2) the tortfeasor’s interference with that relationship; 3) the tortfeasor’s use of dishonest, unfair, improper or wrongful means; and 4) damage to the business relationship (*Waste Service, Inc. v Jamaica Ash and Rubbish Removal Co.*, 262 AD2d 401, 691 NYS2d 150 [2nd Dept. 1999]). A party must demonstrate that an adversary’s interference with its prospective relations was accomplished by “wrongful means” or that the adversary acted for the sole purpose of harming the plaintiff. Wrongful means include physical violence, fraud,

misrepresentation, civil suits, criminal prosecutions and economic pressure (*Guard-Life Corp. v S. Parkers Hardware Mfg. Corp.*, 50 NY2d 183, 428 NYS2d 628, 406 NE2d 445 [C.A. 1980]).

Here, at best, there is an issue of fact as to whether any “wrongful means” were utilized by defendants to stifle the existence of a profitable business relationship between AIP and the persons on the customer list. As to plaintiffs’ claim of defendants’ alleged breach of good faith and fidelity or fair dealing, no such obligations exist in an employment at will such as there apparently existed between AIP and FRANKEL and MANCINI. See *Ingle v Glamore Motor Sales, Inc.*, 73 NY2d 183, 583 NYS2d 771, 535 NE2d 1311 (C.A. 1989).

In order to obtain a preliminary injunction, a plaintiff has the burden of demonstrating a likelihood of ultimate relief on the merits, irreparable injury if provisional relief is withheld, and a balancing of the equities in plaintiff’s favor (*Aetna Insurance Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918, 552 NE2d 166 [C.A. 1990]; *Quinones v Board of Managers of Regalwalk Condominium I*, 242 AD2d 52, 673 NYS2d 450 [2nd Dept. 1998]). Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law and upon undisputed facts found in the moving papers. The burden of showing an undisputed right rests with the movant (*Anatasi v Majopon Realty Corporation*, 181 AD2d 706, 581 NYS2d 223 [2nd Dept. 1992]). Bare conclusory allegations are insufficient to support a motion for preliminary injunction (*Kaufman v International Business Machines, Inc.*, 97 AD2d 925, 470 NYS2d 720 [3rd Dept. 1983], *aff’d*. 61 NY2d 930, 474 NYS2d 721, 463 NE2d 37 [C.A. 1984]).

After a careful reading of the submissions herein, it is the judgment of the Court that plaintiffs invocation of the naked conclusory allegation that they will suffer irreparable harm without the preliminary injunction is insufficient. Plaintiffs do not, in any finite terms, discuss their irreparable harm. Moreover, there has been no showing that plaintiffs would not be adequately compensated by money damages (*Mr. Dees Stores v A.J. Parker, Inc.*, 159 AD2d 389, 553 NYS2d 16 [1st Dept. 1990]). Plaintiffs have not set forth a reason why a pecuniary standard might not be applied to measure plaintiffs' damages, if plaintiffs are ultimately successful. Based on the foregoing, the Court finds that plaintiffs have not demonstrated that they are entitled to a preliminary injunction. It is therefore


ORDERED, that plaintiffs' motion for a preliminary injunction enjoining defendants from various activities and conduct with respect to AIP is denied; and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on April 8, 2009, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 9, 2009



WILLIAM R. LaMARCA, J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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