12-087-12

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2009-1084

ACE PRECISION, INC.,

v.

FHP ASSOCIATES INC. & others[1]

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT

INTRODUCTION

Plaintiff, Ace Precision Inc. ("Ace"), alleges that defendants, FHP Associates Inc. ("FHP"), formerly known as Sequel Systems, Inc. ("Sequel"), Roselyn Parkhurst , Leslie J. Farrell , Jennifer Farrell, Allison Farrell-Hannigan and Unlimited Manufacturing Service Inc. ("UMS") breached a contract to sell certain of Sequel's business assets to Ace and, in so doing, interfered with Ace's advantageous business relationships. Ace further alleges that the defendants violated a non-competition agreement by directly competing with Ace. Finally, Ace claims that the defendants' conduct was willful and constitutes an unfair and deceptive business practice within the meaning of G. L. c. 93A. The defendants respond in kind, counterclaiming that Ace: (1) breached the asset purchase agreement by failing to make payment as promised; (2) interfered with the defendants' advantageous business relationships; (3) converted certain of the defendants' assets to its own use; and (4) engaged in willful unfair and deceptive business practice within the meaning of G. L. c. 93A. A jury-waived trial commenced before me on

[1] The other defendants are Roselyn A. Parkhurst, Leslie J. Farrell, Jennifer M. Farrell, Allison J. Farrell-Hannigan and Unlimited Manufacturing Service, Inc.

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February 6, 2012. At the close of the plaintiff's case, the allegations of breach of the non-competition agreements were dismissed without opposition as to Leslie Farrell, Jennifer Farrell and Allison Farrell-Hannigan. The trial concluded on February 13, 2012. For the reasons that follow, judgment will enter for the defendants on Counts I and II of Ace's Complaint. As to the Counterclaims, judgment will enter for the defendants on Count I and for defendant UMS on Count III. Judgment will enter for Ace on the remaining Counterclaims.

FINDINGS OF FACT

Based on the relevant, credible evidence admitted at trial and the reasonable inferences drawn therefrom, I find the following facts:

A. The Parties

Prior to April 8, 2009, Sequel was a small, family-owned business located in Lowell, Massachusetts, engaged in the business of manufacturing and distributing various parts and goods for sale to commercial customers, the U. S. Department of Defense and its various agencies. Sisters Roselyn Parkhurst, Leslie Farrell, Jennifer Farrell, and Allison Farrell-Hanigan were all Sequel shareholders.

UMS is a small company in Lowell, Massachusetts operated by Roselyn Parkhurst and her husband James W. Parkhurst. UMS also sells parts to commercial customers and the U. S. Department of Defense. UMS has not operated as a machine shop. It has always functioned primarily as an assembly and packaging facility. UMS has no employees other than Roselyn and James Parkhurst

Prior to April 8, 2009, for approximately 20 years, UMS sold its products from the same physical space as Sequel. Some of these products had been previously manufactured and sold by Container Service, Inc., a company owned and operated by the sisters' father, Thomas Farrell.

When Container Service, Inc. went out of business in 1988, ownership of tooling for some of its product line, including coupling assemblies and fire handles, was transferred to UMS.

Ace, a Massachusetts corporation with a principal place of business in Agawam, Massachusetts, maintains a machine shop with approximately 20 employees. Ace manufactures and sells precision-machined, specially manufactured parts to the aerospace industry. Prior to April 8, 2009, Ace had limited experience in selling parts to government defense contracting purchasers.

B. The Asset Purchase Agreement

In March 2009, Ace and Sequel entered into negotiations for the sale of certain Sequel assets. Sequel had already begun winding down its business and effectively ceased doing business before the sale. On or about April 8, 2009, Sequel, as Seller, entered into an "Agreement for Purchase and Sale of Certain Assets" ("the Asset Purchase Agreement") with Ace, as Buyer, in which Ace purchased certain "tooling, inventory, assorted files and certain other assets" of Sequel. (Ex. 4- Tabs 1-13). A Bill of Sale executed by Sequel and made part of the Asset Purchase Agreement provided in relevant part that the "SELLER hereby sells the Inventory, Tooling and other physical assets described above in 'as is' and 'where is' condition." The "physical assets" included "the files located in Seller's office at the above address as of the date hereof." (Ex. 4 – Tab 1- last page).

The principals of both Sequel and Ace were experienced and sophisticated business people. They negotiated the Asset Purchase Agreement over time with both sides represented by counsel. Although Ace's principal, Antoine Elias ("Elias") testified that he believed that he was buying Sequel's "whole business," the plain language of the agreement stated otherwise. Not only were the assets limited to "tooling, inventory, assorted files and certain other assets," but the

Asset Purchase Agreement specifically stated that Ace was not buying the entire business and that certain business assets had already been sold to others.

The Asset Purchase Agreement provided in Section IX that Ace would pay the "Purchase Price" by paying a $10,000.00 deposit, which had already been paid on March 23, 2009, and an additional $40,000 at the time of closing, which Ace paid. The balance of the Purchase Price, "not to exceed $150,000", was to be paid monthly to Sequel in the form of "royalties consisting of 5% of gross sales," by Ace or its successors within 30 months after the closing. These royalties were applicable "to all government contracts and purchase orders (excluding only those which Ace had on March 18, 2009 and also excluding payments for work done by Ace for Sequel prior to the Closing) and also to all commercial purchase orders resulting from the use of Sequel's name, telephone number, fax number, email and addresses, technical data, tooling or efforts such as supplying of government solicitations to Ace to bid and training of Ace or its employees on aspects of contracting." (Ex. 4 – Tab 1). There is a dispute regarding whether this contract language limits revenue subject to royalties to all sales with a Sequel history or simply commercial sales with Sequel history. I conclude that the parenthetical phrase referenced above lists the only exclusions to government contracts that the parties contemplated. Therefore, but for those exclusions, all government contract sales are subject to royalty payments, regardless of whether or not Sequel had a business history with the government contract.

In the 30 month period from April 8, 2009, through October 8, 2011, Ace made gross sales of $852,387.13, which were subject to a 5% royalty under the Asset Purchase Agreement. Total royalties owed by Ace to FHP under the Asset Purchase Agreement are therefore

$42,619.36.[1] (Exs. 51, 52 and 53). It is undisputed that Ace has not paid FHP any royalties under the Asset Purchase Agreement.[2]

The Asset Purchase Agreement also provided that "The BUYER warrants that BUYER will use its best efforts to produce sales sufficient to provide SELLER with $150,000.00 in royalties as provided in § IX above as soon as feasible after the closing" and that "BUYER will make monthly royalty payments of such royalties not later than the end of the month after the gross sales are earned." (Ex. 4 – Tab 1). FHP claims that Ace has failed to use its best efforts to produce sales sufficient to provide SELLER with $150,000.00 in royalties by: (1) not actively bidding on government contracts that would generate royalties; (2) canceling government contracts; and (3) intentionally misclassifying jobs to avoid paying royalties to FHP. After consideration of all of the evidence and assessing the credibility of the principals, I am not persuaded that Ace, either by acts of commission or omission, acted in bad faith to reduce royalty generating sales. I therefore conclude that Ace used its best efforts to generate sales that were royalty eligible under the terms of the Asset Purchase Agreement.

The Asset Purchase Agreement required Leslie and Jennifer Farrell, as part of the purchase price, to provide training to Ace for 16 days. The Asset Purchase Agreement further provided that any additional training was to be negotiated and paid for separately. Elias acknowledged, and I find, that the 16 days of training were provided. In the months immediately following the sale of assets to Ace, Leslie and Jennifer Farrell agreed to provide additional training at Ace's request. Ace agreed to pay the Farrell's $20 per hour for the additional

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[1] On or about April 8, 2009, Sequel changed its name to FHP Associates, Inc. FHP is the successor in interest to Sequel under the Asset Purchase Agreement.

[2] There was evidence that Ace has placed certain funds in escrow pending resolution of this dispute.

training. I find that the additional training was provided and that the Farrell's properly invoiced Ace for these services in the amount of $1,600.00 (Ex. 48). Ace has not paid for these services.

There was a conflict in the evidence as to whether or not Sequel transferred all of its job files to Ace as required by the Asset Purchase Agreement. Ace employee Robert Rowe testified that after the dispute with Sequel arose, he performed an analysis of Sequel's job files by comparing the parts and jobs referenced in Sequel's computer data base with the physical job files transferred to Ace by Sequel. Based on that comparison he concluded that there were 150 files missing which he believed should have been transferred pursuant to the asset purchase agreement. Ace provided this list to Leslie Farrell, Sequel's accounting and finance director, who conducted her own analysis of the claimed missing files. She testified that none of Sequel's job files had been held back for any reason, that her own analysis of the physical files transferred revealed that there were only 19-20 files missing, or 4% of the total files transferred. By way of explanation, Leslie Farrell testified that separate job files were not created for every job. Historically, Leslie's father would direct her as to whether or not a physical job file should be created. In other instances, files for government contracts were not maintained if the contracts had been cancelled. Finally, she testified that some of the files Ace claimed as missing were in a black box of "open" files that had been transferred to Ace along with the approximately 30 file cabinets of historical Sequel job files. I found Leslie Farrell's testimony and the documentary evidence she presented to be more credible than the testimony and documents presented by Robert Rowe. Accordingly, I conclude that substantially all of Sequel's job files were transferred to Ace as set forth in the Asset Purchase Agreement.

In short, I find that Sequel, now known as FHP, fully performed its obligations under the Asset Purchase Agreement including the obligation to transfer to Ace all tooling, inventory and

contract files, history files and other files in "as is" and "where is" condition, as set forth in that Agreement.

C. **The Non-competition Agreements**

The Asset Purchase Agreement provided that "[t]he shareholders of the SELLER agree to enter into a non-compete agreement with the BUYER providing that *so long as BUYER is not in default of this Agreement*, the shareholders will not directly or indirectly own and operate a company that directly competes with the business being sold hereunder for 2 years from the date of closing" (emphasis added) Ex. (4 – Tab 1).

The Asset Purchase Agreement also provided that the non-compete agreement executed by shareholder Roselyn Parkhurst "shall not preclude [her] from continuing her ownership and operation of Unlimited Manufacturing Service, Inc. (or a successor or assign) as a business that engages in defense contracting so long as such company does not have more than twenty (20%) percent of its business as the same product line sold by SELLER to the BUYER hereunder." (Ex. 4 – Tab 1).

Pursuant to the Asset Purchase Agreement, Sequel's shareholders each entered into a Non-competition Agreement with Ace providing that, with certain exceptions, they were not to directly or indirectly own and operate a company that directly competes with the business being sold for 2 years from the date of closing. Roselyn Parkhurst's Non-Competition Agreement also provided that she would not be prohibited "from operating as a business that engages in defense contracting so long as such company does not have more than twenty (20%) percent of its business as the same product line sold by Sequel to the Ace." (Ex. 4 – Tab 5).

Although the Asset Purchase Agreement did not require UMS to enter into a Non-Compete Agreement, UMS entered into a Non-competition Agreement as part and parcel of the

Asset Purchase Agreement. UMS's Non-competition Agreement does not prohibit UMS "from operating as a business that engages in defense contracting so long as such company does not have more than twenty (20%) percent of its business as the same product line sold by Sequel to Ace." (Exh. 4 – Tab 5).

D. The Conversion Counterclaims

1. The Castings

On May 4, 2009, UMS requested that Ace machine 25 aluminum plug castings for a coupling assembly and return the machined castings upon completion. (Ex. 63). Elias acknowledged receipt of the castings. He stated that after the dispute with Sequel and UMS arose, the work was never done and the castings were never returned. UMS purchased the castings for $11.85 each or $296.25.

2. The Computer

To facilitate the training of Ace employees, Leslie and Jennifer Farrell took two desktop computers and a laptop computer to Ace's office. They intentionally left one of the desktop computers behind when the training ended. Approximately four months later, after the dispute with Ace arose, the Farrell's, through their attorney, demanded that the computer be returned. Ace refused and continued to use the computer for ten months. Ultimately, Ace returned the computer in May 2010. Before doing so, Ace copied and transferred all data files to Ace's computer. There was no evidence regarding the value of the computer or its contents.

CONCLUSIONS OF LAW

A. Claims Related to The Asset Purchase Agreement

In order to prevail on a breach of contract claim, a party must establish: (1) the existence of an enforceable contract; (2) breach of that contract; and (3) resulting damages. Singarella v.

City of Boston, 342 Mass. 385, 387 (1961). In my judgment, Ace has failed to establish a breach of the Asset Purchase Agreement. For the reasons set forth in greater detail in my findings of fact, I conclude that the defendants transferred Sequel's tooling, inventory and assorted files to Ace as required by the Asset Purchase Agreement. The job files Ace claims are missing were not improperly withheld by Sequel. Moreover, even if there was evidence that Sequel was responsible for some missing files, I conclude that the small number of files not transferred would not have amounted to a material breach of the Asset Purchase Agreement. I therefore, conclude that the defendants fully performed their obligations under the Asset Purchase Agreement. Judgment will enter for the defendants on Count I of Ace's Verified Complaint.

I further conclude that Ace breached the Asset Purchase Agreement by failing to make royalty payments as agreed in the amount of $42,619.36 and failing to pay the $1,600 invoice for training provided by Leslie and Jennifer Farrell. However, as set forth above, the defendants failed to prove that Ace breached the Asset Purchase Agreement by failing to use its best efforts to generate royalty sales and failed to prove that Ace diverted business from UMS to Ace. Accordingly, the defendants are entitled to judgment on Count I of their Counterclaim in the amount of $44,219.36.

B. Claims Related To The Non-Competition Agreement

Ace was "*in default*" of the Asset Purchase Agreement no later than June 1, 2009, when it failed and refused to pay FHP royalties owed under the Agreement on gross sales previously earned by Ace. Ace continued to be in default of the Agreement by refusing to pay FHP any royalties due and owing under the Agreement. Because the Non-Competition Agreements entered into by UMS and Roselyn Parkhurst only apply *so long as BUYER is not in default of* the Asset Purchase Agreement, I conclude it is unenforceable in this case. Accordingly, I need not

reach the questions of consideration for the Agreement, reasonableness of its time and scope, and the alleged breach of the agreement by UMS and Roselyn Parkhurst. To the extent that Ace's Verified Complaint alleges that UMS and Roselyn Parkhurst breached the Non-competition Agreements, judgment will enter for UMS and Parkhurst.

D. Claims Alleging Interference with Advantageous Business Relationships

In order to make out a claim for interference with advantageous business relationships, a plaintiff must prove that: (1) he had a business relationship for economic benefit with a third party; (2) the defendants knew of the relationship; (3) the defendants interfered with the relationship through improper motive or means, and (4) the plaintiff's loss of advantage resulted directly from the defendant's conduct. Adcom Prods., Inc. v. Konica Business Machines, USA, Inc., 41 Mass. App. Ct. 101, 104 (1996). After consideration of all the evidence, and for the reasons set forth above, I am not persuaded that any party has established by a preponderance of the evidence that their advantageous business relationships were interfered with through improper motive or means. Accordingly, to the extent that Count I alleges such interference, judgment will enter for the defendants. As to Count II of the Counterclaim, judgment will enter for Ace.

C. Conversion Claims

The elements of conversion may be established by a showing that one party exercised dominion and control over the property of another, without right, thereby depriving the owner of its use. In re Hilson, 448 Mass. 603, 611 (2007). I conclude that UMS has proven that Ace, by refusing to return the 25 castings which belonged to UMS, converted that property to its own use without right. UMS is therefore entitled to judgment against Ace on Count III of the Counterclaim in the amount of $296.25.

As to the desktop computer that Leslie and Jennifer Farrell left behind, I am not persuaded that Ace exercised dominion and control over it when it was left behind. I conclude from the evidence before me that Leslie Farrell, knowing that Sequel had effectively ceased operation, either gave Ace the desktop computer or abandoned it. Even assuming that a conversion occurred when Ace failed to immediately return Sequel's desktop computer when it was requested after the dispute arose, the defendants failed to prove damages for the loss of the computer. Accordingly, judgment will enter for Ace on Count VI of the Counterclaim.

D. Unfair and Deceptive Business Practices

Both sides allege that the other engaged in unfair and deceptive business practices in violation of G. L. c. 93A, Sections 2 and 11. Section 2 prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." An action is "unfair" if it is "(1) within the penumbra of a common law, statutory, or other established concept of unfairness; [or] (2) immoral, unethical, oppressive or unscrupulous." Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 563 (2004), quoting Morrison v. Toys "R" Us, Inc., 441 Mass. 451, 457 (2004). Businesses seeking relief under Section 11 are held to a stricter standard than consumers in terms of what constitutes unfair or deceptive conduct. Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451, 475-476 (1991). "In such circumstances, a claimant would have to show a greater 'rascality' than would a less sophisticated party." Id. at 475.

Considering these standards and the evidence before me, I am not persuaded that any party engaged in the kind of sharp practice actionable under c. 93A, especially of the type required in the rough and tumble world of commerce. Accordingly, judgment will enter for the defendants on Count II and for Ace on Counts IV and V of the Counterclaim.

ORDER.

1. As to Counts I and II of Ace's Verified Complaint, Judgment will enter for the defendants.

2. As to Count I of the Counterclaim, judgment will enter for FHP in the amount of $44,219.36.

3. As to Count II of the Counterclaim, judgment will enter for Ace.

4. As to Count III of the Counterclaim, judgment will enter for UMS in the amount of $296.25.

5. As to Counts IV, V and VI of the Counterclaim, judgment will enter for Ace.

As to statutory interest owed from the date of the breach, counsel for the defendants will serve his proposed calculation on Ace pursuant to Superior Court Rule 9A on or before March 16, 2012.

C. Jeffrey Kinder
Justice of the Superior Court

DATED: February 24, 2012

Commonwealth of Massachusetts
County of Hampden
The Superior Court

CIVIL DOCKET# **HDCV2009-01084**

HAMPDEN COUNTY
SUPERIOR COURT
FILED
MAR 30 2012
CLERK-MAGISTRATE

Ace Precision, Inc.,
Plaintiff

v.

FHP Associates, Inc., f/k/a, Roselyn A. Parkhurst, Leslie J. Farrell, Jennifer M. Farrell, Allison J. Farrell-Hannigan and Unlimited Manufacturing Service, Inc.,
Defendants

JUDGMENT ON FINDING OF THE COURT

This action came on for trial before the Court, C. Jeffrey Kinder, Justice presiding, and the issues having been duly tried, and findings having been rendered,

It is **ORDERED and ADJUDGED as follows:**

1. As to Counts I and II of Ace's Verified Complaint, Judgment will enter for the defendants.

2. As to Count I of the Counterclaim, Judgment will enter for FHP in the amount of $44, 219.36.

3. As to Count II of the Counterclaim, Judgment will enter for Ace.

4. As to Count III of the Counterclaim, Judgment will enter for UMS in the amount of $296.25

5. As to Counts IV, V and VI of the Counterclaim, Judgment will enter for Ace.

SO ORDERED.

Dated at Springfield, Massachusetts this 30th day of March, 2012

By: .....
Assistant Clerk

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