AQUALIFE INC. v. LEIBZON

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2016 NY Slip Op 50002(U)

AQUALIFE INC., Plaintiff, v. MICHAEL LEIBZON, VICTORIA LEEVSON, and VLADISLAV PUSTOV, and EDENS FLOW, LLC, Defendants.

Supreme Court, Kings County.

Decided January 5, 2016.

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CAROLYN E. DEMAREST, *J.*

In this action by plaintiff Aqualife Inc. (plaintiff) to recover damages for breach of contract, tortious interference with contract, and unjust enrichment, and to impose a constructive trust, defendants Michael Leibzon (Leibzon), Victoria Leevson (Leevson), and Vladislav Pustov (Pustov) (collectively, the individual defendants) move, under motion sequence number seven, for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's action against them in its entirety. Defendant Edens Flow, LLC (Edens) separately moves, under motion sequence number eight, for an order dismissing plaintiff's complaint as against it.

BACKGROUND

Plaintiff is a New York corporation which is engaged in the sale, installation, and maintenance of reverse osmosis water purification and filtration systems (RO Systems). Its principal office is in Brooklyn, New York. Alexander Gitelman (Gitelman), Vladimir Gorbach (Gorbach), and Yakov Sionov (Sionov) are plaintiff's three principals.

Pustov was hired in October 2005 as a salesperson for plaintiff. Leevson was initially hired by plaintiff to manage its telemarketing department in March 2009, and, in April 2009, she became a salesperson for plaintiff. Leibzon, who is married to Leevson, also became a salesperson for plaintiff in April 2009. As a rule, plaintiff requires all of its salespersons to sign an Independent Business Owner Contract (the IBO Agreement), which was drafted by plaintiff's attorney.

The IBO Agreement provided that the sales representatives, who were designated independent business owners ("IBO") therein, were required to purchase a demonstration set and water filtration system, and that such purchase and the signing of the IBO Agreement were necessary in order for them to pursue activities under such agreement. According to plaintiff, its salespersons, who were paid on a commission basis based upon their sales to customers, were required to sign the IBO Agreement as consideration for receiving commissions for such sales. Plaintiff also provided training and held classes in sales techniques for its salespersons to use in order to induce customers to purchase its products.

Pustov executed an IBO Agreement on October 10, 2005, which provided that Pustov, as an IBO, committed himself, during his work

under that agreement and, in case of termination of that agreement with plaintiff, for a period of three years after the date of termination, among other things, "not to use and disclose any commercial information received from [plaintiff]," "not to cause damage to [plaintiff]," and "not to distribute any similar products of any and all other companies which manufacture or sale[sic] competing products." The IBO Agreement further provided that Pustov "commit[ted] to pay [a] $300,000.00 ... fine in case of break[sic] of that commitment."

On April 29, 2009, Leibzon and Leevson each executed an IBO Agreement, as well as a Salesperson Agreement (the Salesperson Agreement), which were also both drafted by plaintiff's attorney. Paragraph 3 of each of these IBO Agreements contained a restrictive covenant, which provided as follows:

> *To the extent permitted by the laws of the State of New York, IBO shall not, during relationship with [plaintiff] and for a period of two (2) years following IBO's termination, directly or indirectly, of such relationship: participate or engage in production, distribution, sale or advertisement of products similar to products produced and distributed by [plaintiff] (i.e. water purification and filtration systems and equipment); solicit or treat any customers who have received services from [plaintiff] or purchased products from [plaintiff] prior to or during the term of this agreement; act in any way that could be harmful to the goodwill or business of [plaintiff].*

Paragraph 6 of the IBO Agreement contained a liquidated damages clause which provided that, in the event of the IBO's breach of paragraph 3, the IBO acknowledged that "the exact damages are difficult to calculate" and committed to pay $300,000 in damages to plaintiff. It also provided that plaintiff could obtain an injunction restraining the IBO from the conduct forbidden in the agreement.

The respective Salesperson Agreements, which were executed by both Leibzon and Leevson, provided that, as salespeople for plaintiff, they would "not at any time and for any reason whatsoever disclose to anyone or use any Confidential Information" as defined therein, and that this obligation would survive their termination from employment. It further contained a "Non-Competition" clause, which, similar to the clause contained in the IBO Agreement, provided as follows:

> *To the extent permitted by the laws of the State of New York, I shall not, during my employment (or other relationship with [plaintiff] as agreed) and for a period of two (2) years immediately following my termination, directly or indirectly, for myself or on behalf of any other person, partnership, corporation, or association, either as an employee, contractor, service provider, counselor or otherwise: (i) participate or engage in production, distribution, sale and/or advertisement of products similar to products produced and distributed by [plaintiff]; i.e. water purification and filtration systems and equipment; (ii) solicit or treat any customers who have received services from [plaintiff] or purchased products from [plaintiff] prior to or during the term of this agreement; (iii) act in any way that could be harmful to the goodwill or business of [plaintiff].*

Plaintiff alleges that after the individual defendants signed these agreements, it provided them with its customer information. It asserts that it considers its customer list to be a trade secret because it contains a record of each client's sales activity, particular sales requirements, and pricing information. It claims that it took painstaking efforts to compile this information, which is not generally known to the public or its competitors. The individual defendants, however, were free to sell plaintiff's RO Systems to the general public. According to Leevson, she contacted her friends and neighbors and sold many of them the RO Systems offered by plaintiff.

It is undisputed that during the period of time that the individual defendants were associated with plaintiff, plaintiff was in the business of selling RO Systems, and the individual defendants, as independent contractors, were paid commissions for their sales of the RO Systems made on behalf of plaintiff. According to plaintiff, its customers were predominantly Russian speaking and located in Brooklyn and New Jersey.

Between 2005 and 2009, plaintiff sold RO Systems manufactured by Aquathin. Thereafter, plaintiff changed manufacturers, and the bulk of plaintiff's current sales are now products manufactured by Kinetico Water Systems (Kinetico), for which it is an exclusive distributor in the New York City metropolitan area. According to plaintiff, in addition to the RO Systems produced by Kinetico, it sold Bicocera's ceramic balls, pH balancing modules, and Alkaline packages during the time that the individual defendants worked for it.

It is undisputed that Edens is a limited liability company organized under the laws of the State of New Jersey, formed on July 30, 2012, which sells, distributes, and installs water ionizers. As explained by the individual defendants, a water ionizer allows tap water in a home to pass through its system in order to make ionized anti-oxidant water. Edens, based in New Jersey, began its operations on December 10, 2012. It has its corporate office in New Jersey, and allegedly also has opened offices in the Brighton Beach area of Brooklyn. Leibzon and Leevson are members of Edens, and Pustov was a seller of Edens' water ionizers from approximately January 2013 through December 2013.

Since Eden's inception in July 2012, the products it sold were systems which ionize water, namely, the KYK Alkaline Water Ionizer. Plaintiff does not dispute that a water ionizer is not an RO System. As explained by the individual defendants, either independently or as an adjunct to an RO system, a water ionizer splits the water molecule into hydrogen and hydroxide components, after it has been purified by the RO System.

Plaintiff claims that in November 2012, it learned that the individual defendants, without notifying it, had formed Edens and began soliciting its customers to buy Edens' water purification systems. It alleges that the individual defendants also commenced an extensive advertising campaign on the radio station, Radio Davidzon — 620 AM, where plaintiff had been advertising for many

years. It asserts that after learning of this surreptitious competition, it terminated its business relationship with the individual defendants. Plaintiff states that Leevson and Leibzon both received their last commission checks on or about December 5, 2012, and that Pustov received his last commission check on or about November 26, 2012. According to Leibzon, however, he had ceased his employment with plaintiff in June 2012. Leevson claims that on July 21, 2012, she was terminated from her employment with plaintiff after returning from a vacation. Pustov does not dispute that he departed from plaintiff in November 2012.

Plaintiff claims that the individual defendants acted in violation of the restrictive covenants contained in the IBO Agreements and Salesperson Agreements by competing with it, through Edens, by selling products similar to products distributed by plaintiff. It further claims that the individual defendants solicited its customers, and acted in ways that were harmful to the goodwill of its business in violation of these agreements. Consequently, on February 5, 2013, plaintiff commenced this action against the individual defendants, by order to show cause, seeking, among other things, injunctive relief against the individual defendants based upon alleged violation of the restrictive covenant clauses contained in the IBO Agreements and the Salesperson Agreements. On April 18, 2013, Justice Ann T. Pfau granted a temporary restraining order and deemed the order to show cause to be plaintiff's complaint in this action. The individual defendants interposed an answer on May 17, 2013.

Plaintiff asserts that on October 3, 2013, after the commencement of this action, Leevson participated in a live radio program on Radio Davidzon 620 AM, where she made disparaging statements regarding it. Plaintiff claims that by doing so, Leevson acted in a way that was harmful to its goodwill and its business.

Plaintiff further asserts that, in violation of the restrictive covenants, the individual defendants have solicited and served customers who had received services or purchased products from plaintiff prior to and during the terms of their IBO Agreements. Plaintiff claims that on or about October 2013, a number of its former and current customers were contacted by the individual defendants after they ceased working for it. Plaintiff has submitted the affidavits of five of these customers, who assert that the individual defendants had told them to switch to Edens' water ionizer. Four of these customers stated that they tried Edens' water ionizer and did not like it, and that they had returned to plaintiff's RO System, and the fifth customer stated that she refused to switch from plaintiff's RO System to Edens' water ionizer. Plaintiff also states that on June 17, 2015, as part of the discovery proceedings in a closely related case that the individual defendants had commenced against plaintiff in 2014 in the Eastern District of New York, Leevson produced 318 sales invoices which she created when selling the RO Systems to customers during her employment with plaintiff, that she did not return to plaintiff following her termination from employment, and keeps in the basement of her home.

On October 31, 2013, plaintiff filed a motion to amend its complaint to add Edens as a defendant in this action. On December 6, 2013, Justice Pfau granted this motion. Plaintiff's amended complaint alleges four causes of action. Plaintiff's first cause of action for breach of contract alleges that the individual defendants breached the restrictive covenants in the IBO Agreements and the Salesperson Agreements by engaging in the same business as plaintiff thereby competing with it. Plaintiff's second cause of action for tortious interference with contract alleges that Edens had actual knowledge of the IBO Agreements and the Salesperson Agreements, since it was formed and is actively managed by Leibzon and Leevson, and that Edens intentionally and improperly interfered with those agreements by engaging Leibzon, Leevson, and Pustov to sell products similar to its products. It alleges that Edens had actual knowledge that such engagement would result in the breach of these agreements between it and Leibzon, Leevson, and Pustov. Plaintiff's third cause of action for unjust enrichment alleges that all of the defendants have been unjustly enriched by profiting from these breaches. Plaintiff's fourth cause of action for constructive trust alleges that a constructive trust should be imposed upon the profits which Edens allegedly acquired in violation of the restrictive covenants in the individual defendants' agreements. Eden served its answer on December 24, 2013, and the individual defendants served their answer to the amended complaint on January 13, 2014. Discovery in this action, including the taking of the depositions of the parties, has now been completed. On June 29, 2015, Leibzon, Leevson, and Pustov filed their instant motion, and on the same date, Edens filed its instant motion. Plaintiff opposes these motions.

DISCUSSION

Restrictive covenants not to compete "are justified by the employer's need to protect itself from unfair competition by former employees" (*Scott, Stackrow & Co., C.P.A's, P.C. v Skavina,* 9 A.D.3d 805, 806 [3d Dept 2004], *lv denied* 3 N.Y.3d 612 [2004]; *Zinter Handling, Inc. v Britton,* 46 A.D.3d 998, 1001 [3d Dept 2007]). However, "[g]enerally, negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness" (*Reed, Roberts Associates, Inc. v Strauman,* 40 N.Y.2d 303, 307 [1976]).

"The modern, prevailing common-law standard of reasonableness for employee agreements not to compete applies a three-pronged test" (*BDO Seidman v Hirshberg,* 93 N.Y.2d 382, 388 [1999]). Under this three-pronged test, "[a] restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public'" (*Brown & Brown, Inc. v Johnson,* 25 N.Y.3d 364, 369 [2015], quoting *BDO Seidman,* 93 NY2d at 388-389 [1999]; *see also Reed, Roberts Assoc.,* 40 NY2d at 307; *Natural Organics, Inc. v Kirkendall,* 52 A.D.3d 488, 489 [2d Dept 2008], *lv denied* 11 N.Y.3d 707 [2008]; *D & W Diesel v McIntosh,* 307 A.D.2d 750, 750-751 [4th Dept 2003]; *Scott, Stackrow & Co., C.P.A.'s, P.C.,* 9 AD3d at 806). "A violation of any prong renders the [restrictive] covenant invalid" (*BDO Seidman,* 93 NY2d at 389; *see also D & W Diesel,* 307 AD2d at 751).

"New York has adopted this prevailing standard of reasonableness in determining the validity of employee agreements not to

compete" (*BDO Seidman* 93 NY2d at 389; *see also Natural Organics, Inc.,* 52 AD3d at 489). "In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee'" (*BDO Seidman,* 93 NY2d at 389, quoting *Reed, Roberts Assoc.,* 40 NY2d at 307). This rule is "strictly applied ... to limit enforcement of broad restraints on competition" (*BDO Seidman,* 93 NY2d at 389).

With respect to these factors, a restrictive covenant "will be enforced only if reasonably limited temporally and geographically" (*Columbia Ribbon & Carbon Mfg. Co., Inc. v A-1-A Corp.,* 42 N.Y.2d 496, 499 [1977]; *see also BDO Seidman,* 93 NY2d at 388; *Reed, Roberts Assoc.,* 40 NY2d at 307; *Yedlin v Lieberman,* 102 A.D.3d 769, 770 [2d Dept 2013]; *Natural Organics, Inc.,* 52 AD3d at 489; *Scott, Stackrow & Co., C.P.A's, P.C.,* 9 AD3d at 807; *Elite Promotional Mktg., Inc. v Stumacher,* 8 A.D.3d 525, 526 [2d Dept 2004]). Here, while limited temporally to two or three years, the restrictive covenants contain no geographical limit whatsoever. Rather, the restrictive covenants apply to the entire country and even other countries in the world. As such, they are necessarily greater than required to protect any conceivable legitimate interest of plaintiff, and impose an undue hardship on the individual defendants since they are prohibited from selling any similar water products to anyone anywhere in the world. This is also injurious to the public since it unnecessarily restrains free competition. Such geographically unlimited provisions are overbroad, unreasonable, and unenforceable as a matter of law.

Moreover, restrictive covenants are disfavored by the courts and are enforceable "only to the extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of trade secrets or confidential customer lists" (*Columbia Ribbon & Carbon Mfg. Co., Inc.,* 42 NY2d at 499; *see also Gilman & Ciocia, Inc. v Randello,* 55 A.D.3d 871, 872 [2d Dept 2008]). Here, plaintiff has failed to establish that the individual defendants possessed a trade secret or confidential information. The RO Systems are produced and manufactured by Kinetico, a third party. While plaintiff attempts to characterize its sales techniques as trade secrets because the individual defendants attended training sessions on techniques in selling their products, they are not special, unique, or extraordinary, and do not qualify as trade secrets. No special, unique, or extraordinary services were performed by the individual defendants.

Plaintiff also contends that the restrictive covenants should be enforced because Leevson has retained possession of her sales invoices created during the time that she was working for it. However, with respect to customer information, it is well established that "where the employer's past or prospective customers' names are readily ascertainable from sources outside its business, trade secret protection will not attach and their solicitation by the employee will not be enjoined" (*Columbia Ribbon & Carbon Mfg. Co., Inc.,* 42 NY2d at 499; *see also 1 Model Mgt., LLC v Kavoussi,* 82 A.D.3d 502, 503 [1st Dept 2011]). Here, a list of customers who might be interested in purchasing plaintiff's products is readily ascertainable from many sources and is not entitled to trade secret protection (*see Buffalo Imprints v Scinta,* 144 A.D.2d 1025, 1027 [4th Dept 1988]). It is noted that none of the five affidavits of customers of plaintiff indicate that any of the individual defendants had contact with that customer during the period of their employment. Nor is there evidence that the names of these individuals were not readily ascertainable independent of plaintiff's records. Furthermore, plaintiff's customers included friends and neighbors of the individual defendants, which they, themselves, recruited as customers. A restrictive covenant will be rejected as overly broad where it extends to customers "recruited through the employee's independent efforts" (*Scott, Stackrow & Co., C.P.A's, P.C.,* 9 AD3d at 806).

In addition, the restrictive covenants are overly broad since they extend to all customers who received services from plaintiff or purchased products from plaintiff prior to or during the term of the individual defendants' IBO Agreements and Salesperson Agreements, even those defendants had never met, did not know about, and for whom they had done no work (*see Brown & Brown, Inc.,* 25 NY3d at 371). Such overly broad provisions are unreasonable and cannot be found to protect any legitimate business interest of plaintiff. Thus, the court finds that the restrictive covenants herein are unenforceable since they are overly broad insofar as they both seek to prevent the individual defendants from soliciting or performing work for any customer of plaintiff and contain no geographic limitations (*see Scott, Stackrow & Co., C.P.A.'s, P.C.,* 9 AD3d at 807).

Plaintiff argues, however, that even if the restrictive covenants are overbroad, they should nevertheless be enforced. It contends that the language "to the extent permitted by the laws of the State of New York" expressed its intention that the restrictive covenants be enforced to the maximum extent permitted by law, and that the court should, therefore, interpret the restrictive covenants consistent with this intent and partially enforce them.

"The determination of whether an overly broad restrictive covenant should be enforced to the extent necessary to protect an employer's legitimate interest involves a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement'" (*Scott, Stackrow & Co., C.P.A.'s, P.C.,* 9 AD3d at 807, quoting *BDO Seidman,* 93 NY2d at 394). "[P]artial enforcement may be justified" if the employer demonstrates, in addition to showing that it has, "in good faith, sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing," "an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct" (*Brown & Brown, Inc.,* 25 NY3d at 371 [internal quotation marks omitted]; *see also BDO Seidman,* 93 NY2d at 394; *Scott, Stackrow & Co., C.P.A.'s, P.C.,* 9 AD3d at 807). "Factors weighing against partial enforcement are the imposition of the covenant in connection with hiring or continued employment — as opposed to, for example, imposition in connection with a promotion to a position of responsibility and trust — the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant was overly broad" (*Scott, Stackrow & Co., C.P.A.'s, P.C.,* 9 AD3d at 807; *see also BDO Seidman,* 93 NY2d at 395).

Here, it is undisputed that plaintiff, who was in a superior bargaining position, required the individual defendants to sign the IBO Agreements and the Salesperson Agreements containing the restrictive covenants as a condition of their initial employment as

Agreements and the Salesperson Agreements containing the restrictive covenants as a condition of their initial employment as salespersons (*see BDO Seidman,* 93 NY2d at 395; *Scott, Stackrow & Co., C.P.A.'s, P.C.,* 9 AD3d at 807). Thus, after considering the relevant factors, the court finds that plaintiff has failed to demonstrate that partial enforcement of the restrictive covenants is warranted (*see Gilman & Ciocia, Inc.,* 55 AD3d at 872).

Moreover, the court further finds that the individual defendants and Edens are not engaging in the production, distribution, sale and/or advertisement of products similar to the products produced and distributed by plaintiff, specified in the restrictive covenant to be "water purification and filtration systems and equipment." Notably, "[a] covenant against competition must be construed strictly and should not be extended beyond the literal meaning of its terms" (*Elite Promotional Mktg., Inc.,* 8 AD3d at 526 [2d Dept 2004]; *see also Battenkill Veterinary Equine P.C. v Cangelosi,* 1 A.D.3d 856, 858 [3d Dept 2003]; *DeCapua v Dine-A-Mate, Inc.,* 292 A.D.2d 489, 492 [2d Dept 2002]). "Ambiguous terms will be resolved against the contract drafter" (*Battenkill Veterinary Equine P.C.,* 1 AD3d at 858; *see also Matter of Saranac Cent. School Dist. [Sweet Assoc.],* 253 A.D.2d 566, 567 [3d Dept 1998], *lv denied* 92 N.Y.2d 820 [1999]).

Leevson states that at the time that she signed the IBO Agreement and Salesperson Agreement with plaintiff, she understood the language of the restrictive covenants contained therein to mean that she could not work for a competing business that sold plaintiff's water purification and filtration equipment, but did not believe that these agreements meant that she would be unable to work in the entire water industry or to sell water ionizers. Leevson, in her sworn affidavit, attests that a water ionizer, including the one sold by Edens, is not a water purifier or a water filter, and is not sold as an alternative to an RO System like the systems sold by plaintiff. She states that, instead, it is a complement to the RO Systems offered by plaintiff, and that water ionizers can be sold either separately or as an adjunct to an RO System. She explains that the water ionizers sold by Edens are connected to the water source at the sink, and are either connected to a water purification system that has been previously installed, such as the water purification/filtration systems offered by plaintiff, or can be connected to the regular water line.

In further setting forth the difference between its products and plaintiff's products, Edens has submitted the expert affidavit and report of Joseph F. Harrison, a professional engineer formerly employed by the United States Public Health Service and the Environmental Protection Agency and Technical Director of the Water Quality Association (WQA), and author of texts on water processing and treatment. Mr. Harrison explains that an RO System and other similar filtration/purification systems are distinctly different devices from an electronic alkalizer or ionizer, and that each produces entirely different results. He explains that the U.S. Food and Drug Administration defines purified water as water that has been produced by reverse osmosis water treatment, and that people who are interested in water with practically all dissolved ions and other substances removed from it would be in the market for an RO System. He asserts that, on the other hand, alkaline water machines add things to the water, such as alkalinity or hydroxide ions that many people perceive as providing a health benefit or dietary supplement. He sets forth that the alkalizer does not purify the water and the RO System does not add any substances to the water. He opines that "the function and purpose for which each of these products conditions the water is so starkly different and diametrically opposite that the marketing and sales for one is clearly in a separate arena from that for the other."

Edens has also submitted the expert affidavit and report of Gregory Reyneke, a WQA certified water specialist. Mr. Reyneke sets forth, in detail, the difference between RO Systems and water ionizers. He explains that the RO Systems purify water, while the water ionizers make physical changes to the water itself and are not designed to remove contaminants. He opines that while plaintiff and Edens both sell water-related products, these products are not in the same category and are not competing or similar products. He states that the products work differently, are marketed differently, and are installed differently, and that Edens' water ionizers cannot be substituted for plaintiff's RO Systems or vice versa.

Plaintiff, in opposition, does not provide any expert testimony to refute the claims of Edens' experts [1], nor do they specifically respond to these experts' assertions, except through argument by their attorney. Indeed, plaintiff's principals have themselves acknowledged the difference between RO Systems and water ionizers. In plaintiff's radio advertisement on Radio Davidzon — 620 AM, on January 23, 2013, Gorbach stated "water ionization systems can only be installed after the fine water filtering systems, such as, for example, our systems. We call them reverse osmosis systems." Gorbach, in this advertisement, after explaining the alleged harmful effects of ionized water, stated that "these simple carbon filters, they are not capable of filtering, they don't have a reverse osmosis membrane that can remove heavy metals." Sionov then stated, in this advertisement, that "what you need specifically is only a reverse osmosis pre-filter," and "if you need an ionizer, you need to connect the ionizer after the water filtration system." In addition, in plaintiff's radio advertisement on October 22, 2013, Sionov, in comparing water ionizers to plaintiff's RO systems, stated that "this equipment (machine, system) [i.e., a water ionizer] does not appear to be water purification (water filtration) — these are two different thing[s]." Gorbach further stated, during this advertisement, that "[b]ecause systems that we use, all that they do, they purify water, they do not change it, they do not structure it, there's nothing they do with it, they just, there's filters standing that remove from the water, means, inorganic or not organic substances, salts of heavy metals," and Sionov then stated, "in other words, [RO Systems remove] all dangerous substances." Furthermore, Sionov testified, at his deposition, that "both systems have filters, but the end result of water purification is completely different" since "after water purification, the water is really purified," whereas "after deionization, there is no molecular purification" (Sionov's Dep. Transcript at 44). Gorbach also testified, at his deposition, that purification involves filtering the water (Gorbach's Dep. Transcript at 31-32).

In reply, plaintiff contends that the water ionizers sold by Edens contain filters, and that this makes them a similar product to the RO Systems. However, plaintiff has not demonstrated that having some type of filter is the equivalent of a water purification and filtration system. In fact, as discussed above, plaintiff has itself admitted that water ionizers do not filter and purify water. As noted, Gorbach, in plaintiff's January 23, 2013 advertisement, expressly pointed out that "these simple carbon filters ... are not capable of

Sorbech, in plaintiff's January 23, 2015 advertisement, expressly pointed out that "these simple carbon filters ... are not capable of filtering" the water to remove heavy metals. In addition, Edens' expert explains that while Edens' water ionizer contains filters, they are designed and utilized as "pre-filters" to protect the ionizing equipment. Specifically, Mr. Reyneke explained that "ionizers will sometimes include a pre-filter to protect the ionization chambers from sediment, iron, chlorine and other contaminants." Thus, the individual defendants and Edens have established that plaintiff's RO Systems are technically and functionally different from the water ionizers sold by them and no factual issue remains for trial.

Plaintiff also asserts that it has other products that are very similar to the KYK Alkaline Water Ionizers sold by Edens, and argues that this raises an issue of fact as to whether these water ionizers are competing with its products. While plaintiff has admitted that it is in the business of selling RO Systems, it claims that it also became interested in Biocera products in 2008, and that at least one of Biocera products, namely, a CA ball, makes alkaline water and increases pH, and, therefore, has a functionality that closely mirrors a water ionizer's function, albeit without the use of electricity. Plaintiff additionally states that it sells Mineralization Cartridges, which raise the pH of the water to an alkaline range and an Alkaline Package, which makes water alkaline and hydrogen rich with antioxidant properties. Plaintiff's argument, however, is unavailing since the restrictive covenants provided that they would only be violated if the individual defendants participated or engaged in the production, distribution, sale and/or advertisement of "water purification and filtration systems and equipment." Thus, merely because plaintiff may have some additional products, which have a functionality resembling water ionizers, does not violate the restrictive covenants.

Consequently, inasmuch as the court finds that the restrictive covenants at issue are unenforceable as a matter of law, and that, in any event, the restrictive covenants do not apply to water ionizers, and the terms of the IBO Agreements and Salesperson Agreements are not therefore violated by defendants' sales of ionization equipment, summary judgment dismissing plaintiff's first cause of action for breach of contract must be granted (*see* CPLR 3212 [b]). As to plaintiff's second cause of action against Edens for tortious interference with the non-compete provisions of the individual defendants' Agreement with plaintiff, it is noted that the elements of a cause of action for tortious interference of a contract are "the existence of a valid contract between the plaintiff and [a third party], [the defendant's] knowledge of that contract, and [defendant's] intentional procurement of [the third-party's] breach of the contract without justification, actual breach of the contract, and [plaintiff's] damages resulting from the breach" (*Oddo Asset Mgt. v Barclays Bank PLC,* 19 N.Y.3d 584, 594 [2012]; *see also White Plains Coat & Apron Co., Inc. v Cintas Corp.,* 8 N.Y.3d 422, 426 [2007]; *Lama Holding Co. v Smith Barney Inc.,* 88 N.Y.2d 413, 424, [1996]). Here, since the court finds that the individual defendants have not breached the restrictive covenants contained in the IBO Agreements and Salesperson Agreements, Edens cannot be liable for an alleged intentional procurement of a breach of these agreements. Thus, summary judgment dismissing plaintiff's second cause of action must also be granted (*see* CPLR 3212 [b]).

As to plaintiff's third cause of action for unjust enrichment, in order "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Comprehensive Mental Assessment & Med. Care, P.C. v Gusrae Kaplan Nusbaum, PLLC,* 130 A.D.3d 670, 671 [2d Dept 2015] [internal quotation marks omitted]; *Marini v Lombardo,* 79 A.D.3d 932, 934 [2d Dept 2010], *lv denied* 17 N.Y.3d 705, [2011]). With respect to the individual defendants, plaintiff may not assert a claim of unjust enrichment against them because "[t]he theory of unjust enrichment lies as a quasi-contract claim" and plaintiff's claim as against them is governed by the restrictive covenants contained in the IBO Agreements and the Salesperson Agreements, which, the court finds, have not been violated (*IDT Corp. v Morgan Stanley Dean Witter & Co.,* 12 N.Y.3d 132, 142 [2009], *rearg denied* 12 N.Y.3d 889 [2009]). Similarly, based upon the lack of any breach of the restrictive covenants, Edens cannot be found to have been unjustly enriched at plaintiff's expense. Dismissal of plaintiff's third cause of action is, therefore, mandated (*see* CPLR 3212 [b]). As there is no basis to impose a constructive trust upon Edens' profits, summary judgment dismissing plaintiff's fourth cause of action for the imposition of a constructive trust must also be granted (*see* CPLR 3212 [b]).

CONCLUSION

Accordingly, the individual defendants' motion and Edens' motion for summary judgment dismissing plaintiff's complaint against them are both granted.

This constitutes the decision, order, and judgment of the court.

FootNotes

1. Plaintiff apparently identified a Todd Simpson as an expert, but did not seek to proffer his report in opposition to defendants' motion, although it has been supplied in Edens Flow's moving papers. The LinkedIn page for Mr. Simpson, annexed to the motion, identifies him as "Development Manager and Performance Improvement Specialist" for Kinetico Incorporated, the present supplier of plaintiff's products.

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