

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE RIVERSTONE COMPANY, INC.)	CASE NO. CV 08 666675
)	
Plaintiff)	JUDGE JOHN P. O'DONNELL
)	
vs)	
)	
RICHARD J. BLASZAK, et al.)	<u>JOURNAL ENTRY</u>
)	
Defendants)	

I. STATEMENT OF THE CASE

The Riverstone Company, Inc. has filed this lawsuit against defendant Richard J. Blaszak and others claiming various causes of action including: conversion, theft, telecommunications fraud, tortious interference with business relationships, tortious interference with contractual relationships, unfair competition and deceptive trade practice, wrongful use of trade name and trademark, misappropriation of trade secrets, unjust enrichment, breach of fiduciary and loyalty obligations, and civil racketeering.

When the complaint was filed on August 1, 2008, the plaintiff also filed a motion for preliminary injunction. A hearing on that motion was held on October 16 and 17.

II. STATEMENT OF FACTS

Testimony at the hearing was given by Edward B. Dudley and Mary Svirsky. Other evidence admitted at the hearing included plaintiff's exhibits 1 through 5, defendant Blaszak's exhibits A through F, K, and L, and defendant Exacta's exhibit A.

In 1981, Edward B. Dudley obtained his professional surveyor's license. In 2001, he and defendant Richard J. Blaszak became owners of a corporation known as The Riverstone

Company, Inc. The business of The Riverstone Company, Inc. was doing commercial and residential real estate surveys. Dudley was the president and Blaszak was the vice president. Each principal owned 49½ shares of the corporation and an engineer owned the final share.

This arrangement came about because before that time Dudley's business, Northcoast Engineering and Survey, did commercial surveys and he decided to "join forces" with Blaszak, who operated a residential survey company but was not a licensed surveyor. However, Blaszak was qualified to perform surveys which Dudley, as a licensed professional, would then review, approve and stamp.

During the early part of this decade The Riverstone Company, Inc. was apparently successful. Dudley was primarily responsible for commercial surveys. Blaszak was primarily responsible for residential surveys. Both kinds of surveys were prepared with the assistance of software known as "Filemaker Pro."

In late 2005, The Riverstone Company, Inc. began using an internet-based application known as "STARS" to handle and prepare all aspects of residential surveying. STARS is an abbreviation for Survey Tracking and Retrieving System. It is a computer application developed by Blaszak around 2005. Blaszak developed the system not as an agent of The Riverstone Company, Inc., but in connection with a separate relationship he had with defendants Paul Passarelli and Exacta Land Services of Ohio, Inc.

STARS has been described as a program similar to Filemaker Pro except that it is based on the internet and, therefore, allows customers 24-hour access to order residential surveys on-line, retrieve and print completed surveys from any location, view completed surveys on-line, track surveys in real time, edit completed surveys for recertification, access past survey orders,

and view statements and invoicing on-line.¹ Eventually, all of The Riverstone Company, Inc.'s residential survey business was done through STARS. Meanwhile, STARS was not used for commercial surveys. The Riverstone Company, Inc.'s use of the STARS system was granted under a licensing agreement with Exacta Land Services of Ohio, Inc. entered into on January 1, 2006 and introduced at the hearing as plaintiff's exhibit 1.

The Riverstone Company, Inc. assigned STARS user names and passwords to its residential survey clients. Those clients were able to access the system for the various purposes outlined in the marketing brochure. Before STARS was implemented, residential survey orders were placed and serviced by fax or e-mail. After STARS, residential survey services were provided only through the new system.

On September 8, 2006, Blaszak resigned from The Riverstone Company, Inc. and redeemed his shares. After Blaszak left the company, he formed defendant Residential Survey Company, LLC. That company, by agreement with The Riverstone Company, Inc., was allowed to call itself "Riverstone Residential." Also around the same time, Dudley formed Dudley Consulting, LLC. Blaszak, working through Residential Survey Company, LLC dba Riverstone Residential and located in the same offices as The Riverstone Company, Inc., did residential surveys through STARS that were stamped by Dudley, who did the work as an agent of Dudley Consulting, LLC under a consulting contract with Residential Survey Company, LLC.

Once the consulting agreement between Residential Survey Co., LLC and Dudley Consulting, LLC, began, The Riverstone Company, Inc. never used STARS again. The Riverstone Company, Inc. made no payments to Exacta Land Services of Ohio, Inc. under its license for STARS and it made only one payment to Invisible Streams, the web server host for

¹ See Exhibit 3, Riverstone Marketing Brochure.

STARS. Blaszak, as an agent of Residential Survey Company, LLC, dba Riverstone Residential, continued to use STARS at The Riverstone Company, Inc.'s office.

At the end of March, 2008, the consulting agreement between Residential Survey Company, LLC and Dudley Consulting, LLC was terminated by Blaszak. During the time the agreement was in effect, Dudley logged into STARS at most twice while Blaszak was using the system 500 to 600 times per month.

About the middle of June, 2008, The Riverstone Company, Inc. was unable to access STARS at all. Thereafter, this lawsuit was filed.

III. LAW

The plaintiff's motion for preliminary injunction argues that the defendants should be restrained from "falsely representing and continuing to represent to the public"² and others that The Riverstone Company, Inc. is out of the residential survey business and seeks various items of injunctive relief.³ The evidence and argument at the hearing focused on the plaintiff's insistence that its ability to use STARS be immediately restored and that the defendant Residential Survey Company, LLC be prevented from using STARS.

A party requesting a preliminary injunction must show that: (1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction.⁴ Each element

² Motion for temporary restraining order and/or preliminary injunction, p. 1.

³ *Id.*, p. 3-4.

⁴ **Mike McGarry & Sons, Inc. v. Gross**, Cuyahoga App. No. 86603, 2006 Ohio 1759, ¶10.

must be established by clear and convincing evidence.⁵ In determining whether to grant injunctive relief, no one factor is dispositive.⁶

The plaintiff's complaint asserts twelve causes of action. Omitted from those twelve is a breach of contract claim against defendant Exacta Land Services Ohio, Inc.⁷ premised on the STARS software licensing agreement.⁸ However, its enforceability must be considered as an initial matter since this is the agreement that affords the plaintiff the right to use STARS, and if there is not a substantial likelihood that it is enforceable then the plaintiff cannot be said to be substantially likely to prevail on any of its STARS-related claims.

Although the contract requires a monthly payment of \$500 on the first of each month, the plaintiff has not made any payments to Exacta Land Services Ohio, Inc. since September, 2006, with the exception of a check for \$1,261.71 sent on the date this lawsuit was filed. The contract provides that Exacta may terminate the licensing agreement upon a breach by the plaintiff if the plaintiff fails to cure a breach within ten days of notice by Exacta of a breach.⁹ No evidence that Exacta has terminated the license was offered at the hearing, hence the court assumes that the licensing agreement is still in effect and enforceable. Putting aside legitimate questions about whether the contract can be canceled at any time based upon the plaintiff's non-payment or its apparent sub-licensing to Residential Survey Company, LLC in violation of the contract,¹⁰ the court will address the question of irreparable harm.

⁵ *Id.*, ¶11.

⁶ *Id.*

⁷ Although the first paragraph of the plaintiff's software licensing agreement names the other party to the contract as "Exacta Land Serices Ohio, Inc.," all parties agree that reference includes a typographical error and that the correct name is "Exacta Land Services Ohio, Inc."

⁸ Plaintiff's hearing exhibit 1.

⁹ *Id.*, p. 5. It is also worth noting that the contract does not prescribe unilateral revocation of access to STARS, without notice, as an acceptable method of termination by Exacta in the event of a breach.

¹⁰ See *Id.* at p. 1, ¶1(f): Licensee may not loan, rent, lease, sublicense. . .software to third parties.

The plaintiff has not used STARS since November 2006. Between then and March, 2008, STARS was used only by Residential Survey Company, LLC and part of the benefit of that use inured to Dudley Consulting, LLC but not to plaintiff The Riverstone Company, Inc. Therefore, while the licensing agreement may still be in effect until Exacta complies with the termination provisions, it cannot be said that the plaintiff has produced clear and convincing evidence that it will be irreparably harmed if it is not immediately given access to computer software it had not used for almost two full years as of the time this lawsuit was filed.

The remaining preliminary issues are whether defendants Blaszak and Residential Survey Company, LLC should be enjoined from “use of the word Riverstone in any form or manner” and from “passing off or otherwise representing to the public and plaintiff’s customers that they are in any way related to or a successor of The Riverstone Company.”¹¹ The plaintiff also wants these defendants to be ordered to “post a corrective legend prominently on the first page of all their websites” that The Riverstone Company, Inc. can be located at a separate website.¹² Minimal evidence and argument pertaining to these claims was advanced at the hearing, but the thrust of the requested relief appears to be the cause of action for deceptive trade practice.

When Blaszak formed Residential Survey Company, LLC his new company and The Riverstone Company, Inc. executed, among other documents, an agreement covering the “Use of Riverstone Name.”¹³ This agreement allows Blaszak and his new firm to use the name “Riverstone Residential,” but requires that the name not be used “directly.” Blaszak and Residential Survey Company, LLC are also obligated by the agreement to make it clear that “Riverstone Residential” is a separate entity from, and not affiliated in any way with, The Riverstone Company, Inc. Finally, the agreement allows The Riverstone Company, Inc. to

¹¹ Motion for preliminary injunction, p. 3-4.

¹² *Id.*

¹³ Defendant Blaszak’s hearing exhibit F.

terminate the use of the Riverstone name upon notice to the defendants after a determination by The Riverstone Company, Inc.'s directors that the agreement has been violated.

Section 4165.02 of the Ohio Revised Code provides that a person engages in a deceptive trade practice when that person does, among other things, any of the following:

- (1) Passes off goods or services as those of another;
- (2) Causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) Causes likelihood of confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) Uses deceptive representations or designations of geographic origin in connection with goods or services;

* * *

- (7) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have.

In the event a person commits a deceptive trade practice that person is subject to an action for injunctive relief under section 4165.03.

Plaintiff's hearing exhibit 2 is a written communication¹⁴ sent in mid-2008 by Blaszak to Resource Title, a residential survey client. The letter notes that "the residential land surveying arm of Riverstone" is changing its address and will be known as Exacta Land Surveying. The letter goes on to assure the recipient that "no other changes have been made to our operation." This letter can be said to cause the likelihood of confusion or misunderstanding as to the source of services and the affiliation with another. Blaszak's reference to the "residential land surveying arm" of Riverstone can easily be taken to mean The Riverstone Company, Inc. since it implies that the "residential" division of "Riverstone" is ending an affiliation with, presumably, the other "arm(s)" of Riverstone. Such an implication is misleading since the evidence is

¹⁴ Dudley testified that this is a fax.

undisputed that Blaszak's business, Residential Survey Company, LLC was never an "arm" (as that term is likely to be understood) of The Riverstone Company, Inc.

It therefore appears substantially likely that the plaintiff will prevail on a claim that the particular conduct in evidence – the June, 2008, notice to Resource Title – constitutes a deceptive trade practice. Moreover, the suggestion in the letter that The Riverstone Company, Inc. and its "residential land surveying arm" were splitting up affects the reputation of The Riverstone Company, Inc. Matters concerning reputation can constitute irreparable harm for which there is no adequate remedy at law.¹⁵ Injunctive relief is thus appropriate on this particular claim, but only as to Resource Title. Although a reasonable inference can be made that exhibit 2 is an example of a mass notice that was sent to many title companies and other potential customers, the plaintiff did not provide clear and convincing evidence at the hearing that anybody other than Resource Title was sent the notice.

The plaintiff's additional claims that Blaszak and Residential Survey Company, LLC should be enjoined from "passing off or otherwise representing to the public and plaintiff's customers that they are in any way related to or a successor of The Riverstone Company" and that they should "post a corrective legend prominently on the first page of all their websites" that The Riverstone Company can be located at a separate website fail for a lack of evidence. Mary Svirsky testified that after June 18, 2008, the "order online" button on The Riverstone Company, Inc.'s website was reprogrammed to take a user to an Exacta website instead of directly to STARS, but she conceded that this has since been changed and a user is now directed from the "order online" button to The Riverstone Company, Inc.'s e-mail, so there is no evidence of continuing misconduct for this court to enjoin. Svirsky also testified that a client, Professional

¹⁵ *Robert W. Clark, M.D., Inc. v. Mt. Carmel Health* (1997), 124 Ohio App. 3d 308.

Land Title, once expressed confusion because a request it made for information from Riverstone was answered by Exacta. However, the plaintiff provided no additional evidence about how and by whom the confusion was created and whether the conduct is ongoing. The same dearth of evidence exists with respect to the plaintiff's claims that the defendants' websites are misleading. Plaintiff's hearing exhibits 3 and 4 are the only evidence of the content of the defendants' websites. Unlike the notice to Resource Title, the content of those exhibits does not violate the agreement concerning the use of the name. Additionally, there is no evidence that the defendants' current websites use the Riverstone name or an implied affiliation at all, given that Residential Survey Company, LLC is apparently now known to potential clients as Exacta Land Surveying. The court is unable to fashion an injunction in the absence of evidence of current offending conduct the order is expected to enjoin.

Finally, the plaintiff asks that the defendants be restrained from "use of the word Riverstone in any form or manner." The court declines to grant this relief because the plaintiff itself has the power to stop the defendants from using the Riverstone name. The agreement pertaining to Residential Survey Company, LLC's use of the Riverstone name gives The Riverstone Company, Inc. sole discretion to "terminate the use of its name if at any time" it decides the terms of the agreement have been violated. The plaintiff should take advantage of this contractual right to relief before demanding it from the court.

IV. CONCLUSION

Defendants Richard Blaszak and Residential Survey Company, LLC are ordered to forthwith notify Resource Title, in the same manner as the June, 2008, communication, that they are not, and never were, “affiliated with” The Riverstone Company, Inc. and that The Riverstone Company, Inc. remains engaged in the business of residential land surveying. The exact verbiage of the notice may be agreed upon among the parties, otherwise it will be dictated by the court.

All other requests for preliminary injunctive relief are denied.

IT IS SO ORDERED:

DATE: _____

JOHN P. O’DONNELL, JUDGE