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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~Justice~~ WP Debra A. James PART 59

Justice

Hagedorn & Co.

- v -

William M. Steen

INDEX NO. 600193/02

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED
FEB 08 2002

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is determined as stated in the accompanying Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: FEB 01 2002

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

At IAS Part 59 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 111 Centre Street, New York, New York on the 25th of January, 2002.

PRESENT: HON: Debra A. James
JUSTICE

HAGEDORN & COMPANY,

Petitioner,

-against-

WILLIAM M. STEERS,

Respondent.

Index No. 600193/02
Motion Date 1/25/02
Motion Seq.No. 001
Motion Cal.No. 1

The following papers, numbered 1 to 15 were read on this motion for an order granting a preliminary injunction pending arbitration.

Order to Show Cause-Affidavits-Exhibits	1-7
Petition	9-13
Answering Affidavits-Exhibits	14
Replying Affidavits	
Memoranda	8,15

Cross-Motion: ☐ Yes ☐ No

This is a special proceeding pursuant to CPLR § 7502(a), seeking a preliminary injunction enjoining and restraining respondent and "any person acting under his direction or control, or in concert with him" from using and/or disclosing petitioner's confidential and/or proprietary information and the solicitation and/or acceptance of business from petitioner's clients pending arbitration of the parties' dispute.

By Order to Show Cause dated January 16, 2002, this court granted petitioner's application for an order temporarily

restraining respondent from such actions pending the hearing on petitioner's motion for a preliminary injunction. After oral argument on January 25, 2002, the court reserved decision and extended the temporary restraining order pending an expedited review of the parties' submissions.

Petitioner Hagedorn & Company is a New York corporation existing since the 1860's with its principal office located in Manhattan. Petitioner is engaged in business as a licensed insurance broker.

Respondent William M. Steers began working as an insurance broker for Hagedorn in August of 1984 when he was twenty-seven years old, where he continued to be employed for seventeen years.

Though their employment agreement is dated August 13, 1984 ("the Contract"), Steers and Hagedorn did not execute such agreement until September 3, 1985. Steers was not represented by counsel. The employment agreement contained the following covenant not-to-compete:

> Employee agrees that he/she will not, without written consent of Employer, use or divulge...the following confidential information: (a) persons, firms and corporations which are customers of the Employer. (b) any information which includes...policy expiration dates, policy terms, conditions and rates, familiarity with customer's risk characteristics, and information concerning the insurance markets for large and unusual commercial risks. (c) Employee files.
>
> Upon termination of employment hereunder, Employee agrees that for a period of three (3) years following such termination, he/she will neither directly hire Employees of Employer without the written consent of Employer, nor solicit or accept any form of insurance, bond, consulting, self-insurance or other service provided by

> Employer, from any client of Employer.
>
> If, during the period of three years following the termination of employment hereunder, any commission or fee becomes payable to Employee or to any person, firm or corporation by whom Employee is then employed or associated...Employee agrees to pay, or cause his new employer or associate to pay, promptly to Employer, an amount equal to 100 % of the fully earned commission or fee annually for a period of three (3) years from the date the business is transferred.
>
> ARBITRATION CLAUSE. In the event any controversy or claim arising out of this Agreement cannot be settled by the parties, such controversy or claim shall be settled by arbitration....
>
> The intent of this Agreement is not to preclude Employee from earning his living at his profession but is only to protect Employer's business relationship with its clients and to prevent solicitation of business by a former employee.

From the period of August 1984 until he resigned on January 4, 2002, Steers serviced and maintained approximately 100 accounts. He secured coverage for clients in the property and casualty, commercial, personal and employee benefits lines of insurance. His tenure at Hagedorn culminated in his appointment in 2001 as Managing Director of Hagedorn, during which he earned compensation in excess of $196,000, plus pension and other benefits. Hagedorn states that in reliance on the "non-compete" provisions of the Contract, it disclosed to Steers confidential and proprietary information, introduced him to its clients, trained him in Hagedorn's operational procedures and methods and supported Steers in developing relationships with its clients and developing new

clients.

At the time of his resignation on January 4, 2002, Steers was one of four salespersons. On January 7, 2002, Steers began working for Gunn & Co., a direct competitor of Hagedorn. Hagedorn claims that Steers disclosed to Gunn Hagedorn's client lists and other confidential and proprietary information and solicited Hagedorn's clients, specifically Lexent Inc.

Steers states that he never contacted Hagedorn's clients about his departure. Nor, upon separation from Hagedorn, did he take or attempt to memorize Hagedorn's files, list of clients, customer risk characteristics, commission rates or information related to large and unusual commercial risks. Steers states that he only took his own pay stubs and commission statements.

On January 15, 2002, Hagedorn served a Demand for Arbitration, in which it seeks injunctive relief and damages to its business including loss of clients and loss of business reputation and good will. Although seeking money damages, the Demand for Arbitration alleges that Hagedorn has no remedy at law since the total and long term effects of its damages would not be measurable.

CPLR § 7502(c) provides that Supreme Court in the county in which an arbitration is pending may entertain an application for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. It makes the provision of articles 63, which authorizes the provisional remedy of an injunction in actions for

equitable relief, applicable in the arbitration context.

To obtain a preliminary injunction in the arbitration context, in addition to the ultimate ineffectuality of any arbitration award, petitioner must establish the traditional criteria, which are: 1) the likelihood of its ultimate success on the merits, 2) its irreparable injury absent the granting of the preliminary injunction, and 3) a balancing of the equities that favors its position. CPLR § 6312(a); Cullman Ventures, Inc. v. Conk, 252 AD2d 222 (1st Dept 1998).

CPLR 6312(c) states:

> Issues of fact. Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be ground for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.

Based on that section of the CPLR, this court will determine whether petitioner's papers demonstrate each of the three required elements. Unless the papers demonstrate the elements, that is, unless they contain some evidence of each element, there is no need for a hearing and the court will deny petitioner's motion for such provisional relief. Should petitioner's papers contain some evidence of each element and respondent's papers not raise an issue of fact as to the existence of any element, the court will grant the motion for a preliminary injunction. Finally, should defendant's papers raise an issue of fact as to the existence of an element, the court will make a determination by hearing "or

otherwise" as to the existence of each element.

This court considers as the first prong, whether petitioner would suffer irreparable injury or an ineffectual arbitration award were the preliminary injunction denied.

A review of the papers shows that petitioner's potential damages are capable of calculation and, thus, that any injuries suffered by petitioner are compensable in money damages. Credit Index, LLC v. Riskwise International LLC, 282 AD2d 246 (1st Dept 2001). Petitioner's injury is pecuniary in nature. New York City Off-Track Betting Corporation v. New York Racing Association, Inc., 250 AD2d 437 (1st Dept 1998). Specifically, paragraph 7 of the Contract provides a formula for calculating damages, to wit: "an amount equal to 100% of the fully earned commission or fee annually for a period of three (3) years from the date the business is transferred." These facts are distinguishable from Ticor Title Insurance Co. v. Cohen, 173 F3rd 63 (Second Circuit 1999). In Ticor, the employment contract's post-employment competition provision entitled Ticor to injunctive relief. The court reasoned that such provision arguably constituted an admission by the defendant that Ticor would suffer irreparable harm were defendant to breach the contract, supra, at p. 69. Here, paragraph 7 provides for liquidated damages, and such provision is arguably an admission by petitioner that it would not suffer irreparable harm were respondent to breach the contract at bar but that a monetary award would be effectual.

This court agrees with petitioner that were respondent's acts

to injure its goodwill, such injury would constitute irreparable harm. Ecolab v K.P.Laundry Machinery, Inc. 656 F. Supp. 8994, 899 (SDNY 1987). However, petitioner's claims in this regard are conclusory and without evidentiary support. For example, even the assumption that respondent kept or memorized the loss histories of Lexent Inc., which respondent denies, does not translate into the loss of Lexent Inc.'s business, much less the loss of goodwill. This absence of evidence of loss of goodwill is in marked contrast to the dismantling of detergent dispensing equipment, the supplying of invoices to the former employer's customers showing discounts other accounts had received, the sending of solicitation letters with price comparisons to the clients of the former employer, which took place in Ecolab Inc. v. Paolo, 753 F. Supp 1100 (NDNY 1991). There is not one scintilla of evidence in petitioner's papers that Hagedorn's goodwill has declined or is threatened by respondent's departure and purported violation of the non-compete provision.

Petitioner has not satisfied the second prong of the criteria, which is fatal to its application for a preliminary injunction.

Nor does this court find that the balance of equities militate in petitioner's favor. Unlike the employees in Ticor and Ecolab, supra, and Maltby v Harlow Meyer Savage, Inc., 223 AD2d 516 (1st Dept 1996), Steers was not represented by counsel on his employment contract and there is no claim that Hagedorn gave him an opportunity to consult an attorney about the contract. Finally, respondent is a custodial parent and single head of household so

the court finds that threats to his livelihood weigh heavier than the yet to be determined effect of respondent's new employment on petitioner's commissions.

As to the last prong-- the likelihood of petitioner's success on the merits-- the court would hold a hearing if the other prongs were met, as the papers contain evidence of this element. The pivotal question is whether the anti-competition provision is reasonable, temporally and geographically, inter alia, and therefore enforceable. Reed, Roberts Associates, Inc. v Strauman, 40 NY2d 3030 (1976). On this record, it is arguable that the geographical limitation in the Contract is reasonable, as Steers is free to compete in any geographic area as long as he does not solicit petitioner's customers for three years. *Cf.* Quandt's Wholesale Distributors, Inc. v Giardino, 87 AD2d 684 (3d Dept. 1983). The court is not unaware of the contrary argument that such worldwide restriction, though exempting accounts not held by petitioner, is overbroad. Nonetheless, the issue of reasonableness must be resolved after a hearing. 197 Norton Garfinkle v Pfizer, Inc., 162 AD2d 197 (1st Dept 1999). Nor is the three year limitation unenforceable as a matter of law. Bender Insurance Agency, Inc. v. Treiber Insurance Agency, Inc., 283 AD2d 448 (2nd Dept 2001).

The court finds the inquiry whether respondent qualified as a unique broker not especially pertinent here, since the Contract does not bar the respondent from working for any competitor. In fact respondent is currently employed by Gunn & Co. and petitioner does not claim that such employment breaches the Contract.

Finally, though the court disagrees that the court must hold any items set forth in the Contract as confidential per se (see Cool Insurance Agency, Inc. v. Rogers, 125 AD2d 758 [3rd Dept 1986), petitioner's statement that respondent received loss histories from Lexent, Inc.'s insurance carrier prior to his resignation, which he is now using to solicit business as an employee of Gunn & Company, is some evidence that plaintiff used confidential or proprietary information that would otherwise be unavailable to him. Such issue also must be determined in arbitration.

For the foregoing reasons, it is

ORDERED that the motion is denied, and it is further

ORDERED that the temporary restraining order extended to the determination of the petition at bar is vacated, and it is further

ORDERED that the petition for a preliminary injunction is dismissed, with prejudice.

Dated: February 1, 2002

ENTER:

J.S.C.

[hagedorn2.01.02)