Eva Scrivo Fifth Ave., Inc. v Rush
2017 NY Slip Op 31699(U)
August 9, 2017
Supreme Court, New York County
Docket Number: 656723/2016
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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EVA SCRIVO FIFTH AVENUE, INC.,

Plaintiff,

Index No.: 656723/2016

-against-

ANNIE RUSH and COSETTE FIFTH AVENUE, LLC,

Defendants.

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Gerald Lebovits, J.:

Plaintiff Eva Scrivo Fifth Avenue, Inc. (Scrivo), commenced an action against its former employee, defendant Annie Rush, and Rush's current employer, defendant Cosette Fifth Avenue, LLC, d/b/a Marie Robinson Salon (Marie Robinson), alleging, among other things, breach of employment contract and unfair competition. In motion sequence 002, Scrivo seeks, by order to show cause, a preliminary injunction enforcing a restrictive covenant against Rush. In motion sequence 003, Scrivo moves under CPLR 3211 (a) (7) for an order dismissing defendants' first counterclaim alleging abuse of process. Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

BACKGROUND AND FACTUAL ALLEGATIONS

Scrivo, a beauty salon, is a domestic business corporation with a principal place of business in New York, New York. On March 20, 2010, Rush started working for Scrivo as a stylist's assistant. Rush received and signed the employee handbook on November 20, 2010. The employee handbook advised her that she may be required to sign a non-disclosure form agreeing not to ask clients for their personal contact information or to give out her personal contact information.

Nonetheless, the employee handbook also states that the "provisions of this Employee Handbook are not intended to create contractual obligations with respect to any matters it covers." (Defendants' exhibit A at 1.) In addition, the employee handbook states, in capital letters, that Scrivo is an at-will employer and that either the employee or the employer may terminate the employment relationship at any time.

In June 2011, Rush was promoted to the position of Junior Stylist, whereby she earned a 25% commission on all services she performed for Scrivo's clients, in addition to her salary and tips. Rush signed an Employment Agreement as a condition of receiving the promotion. The Employment Agreement contained several non-disclosure and non-compete provisions and set forth, in relevant part:

- Rush's acknowledgment that Scrivo's clients' personal contact information and their hair formulas are valuable assets that are not to be used for any purpose except for her job at Scrivo. This information, and other confidential information, such as Scrivo's business plans, is valuable and unique and is deemed to be a "trade secret." (Scrivo's exhibit B, employment agreement at 1.)

- Rush's acknowledgment that, while she is employed by Scrivo, she would not provide or offer to provide services to clients outside of Scrivo's premises absent Scrivo's prior consent, unless the services are booked through Scrivo.

- Upon termination, for a period of one year, Rush would not directly or indirectly solicit clients who had been serviced at Scrivo while Rush was employed there. However, the Employment Agreement indicated that Rush was not prohibited from providing services to Scrivo clients who, independently, seek out Rush at her new place of business and ask that she provide salon-related services to them.

The Employment Agreement also provided that, in the event of a breach of the Employment Agreement, Scrivo "shall be entitled to an injunction," without the need for a bond, to restrain the employee from breaching its provisions. (*Id.* at 2.) By signing the Employment Agreement, Rush acknowledged that she had "been advised of [her] respective right to engage independent legal counsel . . . in connection with the negotiation, review and execution" of the Employment Agreement. (*Id.* at 4.)

Rush was terminated from Scrivo on October 25, 2016. According to Scrivo, on that day, its operations manager found Rush's "bio" and picture on Marie Robinson's website. Marie Robinson allegedly is a direct competitor of Scrivo, and is located a short distance from Scrivo. After seeing Rush's picture, Arik Efros, a co-owner of the salon, confronted Rush about it. Rush claimed that she was unaware that it had been posted, but that she was intending to leave Scrivo to work for Marie Robinson in the near future. Efros terminated Rush and asked her to leave the salon immediately.

Scrivo claims that, before leaving the salon, Rush spoke to two clients. While speaking to one client, Rush allegedly told the client that she would get in touch with the client and that she had the client's phone number. Rush spoke to the other client, who then left the salon and did not want to be serviced by any other Scrivo employee.

The same night that Rush was terminated, she posted a note on her personal Instagram account about her pending employment with Marie Robinson. The note included Marie Robinson's contact information as well as Rush's phone number and contact information. It stated the following, in relevant part:

> "HI ALL MY BEAUTIFUL PEOPLE! I'm proud to announce that I am officially opening my book at Marie Robinson this Tuesday NOV 1st! I'm so excited to be joining such a wonderful team and couldn't be happier. I hope you will all join me at the new spot for a step up in luxury and al [sic] around cooler vibes! Thank you for all the support! Inbox me or email . . . or call and book apt today with info in bio! CAN'T WAIT!"

(Scrivo's exhibit I at 1.)

Two days after she was terminated, Rush posted an online version of an advertisement from New York Magazine's wedding issue. The issue had just been released, and Rush had been touted as a celebrity stylist for Scrivo.

On December 23, 2016, plaintiff commenced an action against Rush and Marie Robinson, alleging nine causes of action: breach of employment contract, breach of fiduciary duty and duty of loyalty, aiding and abetting breach of fiduciary duty and duty of loyalty, misappropriation of trade secrets, common-law unfair competition, intentional interference with prospective economic advantage, unjust enrichment, civil conspiracy and preliminary and permanent injunction. The complaint alleges that Rush breached the restrictive covenant contained within the Employment Agreement by actively soliciting Scrivo's clients, by working for a competitor while still employed by plaintiff, by disclosing confidential information and trade secrets, and by failing to return this information to Scrivo when she was terminated. The proposed injunction states that, for a period of one year, Rush shall not solicit, communicate with, or provide services to any client or customer that she serviced while working for Scrivo.

Defendants filed an answer alleging two counterclaims against plaintiff. The first counterclaim, for abuse of process, alleges that Scrivo filed the complaint with the intent to harm defendants, without justification, and solely due to a personal grudge against Rush.[1] On Rush's last day, Efros allegedly threatened that he would "drag" Rush through a lawsuit that would "ruin her career." (Defendants' exhibit C, verified answer with affirmatives defenses and counterclaims, ¶ 143.) Defendants maintain that Scrivo has failed to identify any purported breach of the restrictive covenant.

More than three months after Rush was terminated, on February 2, 2017, Scrivo filed the order to show cause "for injunctive relief." Scrivo does not request a preliminary injunction per se, and is seeking not only to enforce the non-solicitation and non-disclosure provisions in Rush's Employment Agreement, but is requesting the following additional relief:

- that Rush be ordered to return to Scrivo all documents in her possession relating to Scrivo's confidential information, including customer lists, hair color formulas, pricing plans and business

[1] The second counterclaim is for tortious and intentional inference with business relations.

plans. If Rush cannot physically return the information to Scrivo, that she be ordered to delete it and then provide Scrivo with a summary of this information.

- that for one year, from the date of the order, Rush be ordered not to "solicit or otherwise communicate with any client or customer that she serviced while in the employ of Plaintiff . . . [and] not [to] provide any services to any client or customer that she serviced while in the employ of Plaintiff." (Order to show cause at 2.)

- that Rush be further ordered to provide a summary of all solicitation to clients she previously serviced while working for Scrivo and also provide an accounting from the date of her termination to the date of the order, of all services provided to clients that she previously serviced while working for Scrivo.

Motion Sequence 002

Scrivo argues that it is entitled to injunctive relief because it can demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor.

Scrivo maintains that Rush misappropriated Scrivo's client information by violating the restrictive covenant in the Employment Agreement. According to Scrivo, its client lists and information are protectable interests because they are trade secrets. Efros states that Scrivo goes to enormous lengths to safeguard client information, and that the salon focuses on client retention. (Efros aff, ¶ 34.) He contends that he is the only person with full authority to manage and view client information. (*Id.*, ¶ 35.) Without an injunction, Scrivo claims that it will suffer irreparable harm through the loss of its clients' confidential information.

Scrivo believes that Rush contacted its clients directly, that Rush told its clients about her move to Marie Robinson, and that Rush had been planning her departure for months. Among other things, Efros claims that, following Rush's departure, clients have cancelled, not shown up for appointments, and not called to schedule new appointments. Efros provides a list of clients that Rush serviced while working at Scrivo, who, after Rush was terminated, did not reschedule their appointments. In addition, Scrivo's employees allegedly told Efros that Rush collected client information, that Rush handed out business cards that did not belong to Scrivo, and that Rush did freelance work outside of the salon without permission.

On the night she was terminated, Rush posted to her Instagram account about her new future employment. Scrivo claims that Rush contacted its clients, as evidenced by the Instagram posts. Efros claims that Rush has 94 Scrivo clients as followers of her Instagram account. These clients also saw her Instagram post of the bridal advertisement, that Scrivo had secured for Rush in New York Magazine.

Scrivo argues that it has a high likelihood of success on the merits because Rush signed an enforceable restrictive covenant.[2] The restrictive covenant is enforceable because, as explained above, it is protecting Scrivo's interests in trade secrets, confidential information, Rush's unique services and its goodwill. Scrivo argues that the restrictive covenant is reasonable because Rush is only limited for one year and is not limited to any geographic location. According to Scrivo, it will need at least a year to transition clients formerly serviced by Rush to another stylist.

Scrivo further argues that, without an injunction, it will suffer irreparable harm through the loss of its customer goodwill. Scrivo alleges that Rush brought Scrivo's client lists and pricing to Marie Robinson, and, by underbidding, defendants can lure away Scrivo's clients and destroy the goodwill that Scrivo established with its customers. Scrivo maintains that, while normal pricing information may be available to the public, "Scrivo's confidential system of discounts and deviations for repeat customers is not." (Scrivo's mem of law at 36.)

In addition, Scrivo claims that it will suffer irreparable harm due to the uniqueness of Rush's services. Rush's services are allegedly unique in that, due to Scrivo's efforts in building a client base for Rush, Rush has developed close relationships with these clients. It maintains that it spends years training its stylists and fostering a bond between the stylist and the client. Efros maintains that when Rush commenced her employment with Scrivo, she had no clients of her own. But before she was terminated on October 25, 2016, Rush had serviced nearly 900 clients. Scrivo states that Rush was servicing around 300 of the salon's regular and repeat clients a year.

Scrivo maintains that it "built Rush up to be its lead bridal stylist, and a well-known commodity in the industry." (*Id.*, ¶ 23.) Efros states that, during Rush's employment, her total sales were about $700,000, with only $20,000 of those sales from clients that originated from Rush. Specifically, Scrivo claims that, without an injunction, Rush will attempt to divert Scrivo's bridal clients to Marie Robinson and that they will be able to take advantage of the substantial investment Scrivo made in Rush.

Scrivo further believes that the balance of equities weighs in its favor. According to Scrivo, it acted in good faith at all times toward Rush, and used its resources to help build her career and reputation. But Scrivo argues that Rush acted in bad faith when, before and after leaving Scrivo, she actively solicited clients. Scrivo contends that the injunction is not overly burdensome because Rush is employed and can seek new clients.

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[2] While several causes of action in the complaint are premised on the allegation that Rush misappropriated trade secrets by disclosing Scrivo's confidential information to Marie Robinson, in support of its motion for an injunction, Scrivo primarily addresses the enforceability of its restrictive covenant and the ability to establish its cause of action for breach of an employment contract.

While the Employment Agreement prohibits Rush from soliciting Scrivo's clients for one year after her departure date, the proposed order to show cause seeks to have Rush enjoined from either soliciting or servicing any client that she serviced while working for Scrivo. Both of these restrictions would commence from the date of the proposed order. Scrivo contends that the court needs to provide this additional relief, because a solicitation order, on its own, would not remedy Rush's alleged breach. According to Scrivo, only the addition of a non-servicing order would allow Scrivo a chance to transition its customers to a new stylist.

Finally, Scrivo believes that it is entitled to reasonable attorney fees and costs of this suit. Scrivo points to the Employment Agreement signed by Rush, which provides that if Scrivo commences any legal proceedings to enforce its rights under the Employment Agreement, the employee is required to reimburse Scrivo for reasonable attorney fees, costs, and disbursements.

In opposition to the order to show cause, defendants submit the affidavits of Rush and Abell Oujaddou, a principal and co-owner of Marie Robinson.

Rush states that she started her employment with Scrivo when she was 19 years old. She claims that, among other things, she was not given any information about what the Employment Agreement contained, and was not advised, or given time, to consult with an attorney.

According to Rush, Scrivo did not make a substantial investment in her, and that anything that Scrivo did for Rush, such as advertisements, was done for the benefit of the salon's business. The stylists were required to undergo training so that they could learn the owner's preferred method of cutting hair. Rush argues that she was "primarily self-taught," and that Scrivo "greatly benefitted from [her] services and made significant profits through [her] bridal work." (Rush aff, ¶ 12.) Rush claims that she was required to pay for all her equipment at the salon, including scissors, a hairbrush, and a hair dryer.

Rush denies that she kept any book or list of client information. She alleges that she is "unaware of any unique or confidential 'pricing patterns' or client 'ordering preferences' . . . ." (*Id.*, ¶ 21.) Rush contends that many of the clients that she serviced, while working for Scrivo, were referred directly to her through her own networking and that the clients sought out her styling services.

In September 2016, Rush decided to leave Scrivo and thought that Marie Robinson would be a better fit. Rush claims that she advised Marie Robinson that she could not start until November 15, 2016, because she had booked weddings through Scrivo and needed to honor those obligations. Although Rush had a picture taken for the Marie Robinson website, she states that she was unaware that it had been posted earlier than her proposed start date.

On October 25, 2016, Rush alleges that she was confronted by Efros and asked to leave the salon in the middle of performing a haircut. Rush denies telling the client that she would get in touch with her later, and denies contacting the other client that had showed up during that time.

After she was fired, Rush announced her new employment on Instagram, as is the "industry standard." (*Id.*, ¶ 36.) She claims that Scrivo was aware of her Instagram account while she worked there, and that she uses her account as a platform to show her work. Rush alleges that her page is public, and that if clients, friends or strangers want to follow her page, they are able to do so. Anyone can "like" her posts, and she states that she "did not, and do[es] not solicit Eva Scrivo clients to follow or like [her] Instagram account." (*Id.*, ¶ 35.) Rush believes that Scrivo initiated this lawsuit out of personal animosity.

Oujaddou maintains that, in September 2016, Rush contacted him about working for Marie Robinson. After meeting with Rush, he offered her a job. Rush advised him that she could not start working until November 15, 2016, because she had prior client obligations with Scrivo. According to Oujaddou, a preexisting client base was not a prerequisite for a job, and he never asked Rush to "poach, steal, take, solicit or bring any clients or confidential documents or information with her . . . ." (Oujaddou aff, ¶ 5.) Oujaddou further states that the "information technology contact mistakenly posted Ms. Rush's bio to Marie Robinson's website prior to November 15." (*Id.*, ¶ 9.) After Rush was terminated, Oujaddou told her that she could start her employment on November 1, 2016.

Defendants argue that Scrivo's request for injunctive relief is an improper attempt to restrict trade and competition. Defendants preliminarily note that Scrivo's delay in bringing this motion, in and of itself, should preclude injunctive relief, as this is indicative of the lack of urgency.

Defendants argue that Scrivo cannot prove any of the necessary elements for injunctive relief. With respect to prevailing on the merits, among other arguments, defendants maintain that customer lists or information gathered from a hair salon are not confidential trade secrets. They claim that trade secret protection does not attach to this information because, for example, Scrivo's online presence itself openly identifies many of its clients. Defendants point to Scrivo's Twitter, Facebook and Instagram pages, where Scrivo identifies and discusses several customers and the services that they received. Also, customers identify themselves on those websites, and also on others, such as Yelp, where they post praise or criticism for the salon.

For example, defendants submit print-outs of pages from Scrivo's Twitter account, where customers' names and pictures are posted in the hundreds of public tweets sent out to whoever is following the site. (Defendants' exhibit D.) Similarly, when reviewing the salon on Yelp, customers leave their names and identify which stylist provided services to them. (Defendants' exhibit G.)

Defendants argue that Scrivo has made no effort to prevent their clients' information from being released publicly. In addition, defendants contend that Scrivo's pricing information is not a protectable trade secret as, among other reasons, this information can be recalled by the customers themselves.

Among other arguments, defendants claim that Scrivo's requests are broader than the restrictions contained in the Employment Agreement and are improper. Defendants allege that these requests were made for punitive reasons, and not to protect any legitimate business interests. Thus, defendants argue that, if the injunction is granted, Rush will suffer an undue hardship.

According to defendants, Scrivo cannot demonstrate that it will suffer irreparable harm due to the loss of client lists or information, because Scrivo has only presented vague and speculative allegations that Rush took such information. They maintain that Scrivo "has failed to identify and proffer evidence of a single customer who it claims Ms. Rush improperly contacted or solicited, or of any specific trade secret document or piece of confidential information Ms. Rush allegedly took from the salon." (Defendants mem of law at 8.) In addition, Rush denies the allegations. As a result, defendants claim that factual disputes preclude injunctive relief.

With respect to irreparable harm and the alleged loss of client goodwill, defendants argue that Scrivo has not provided any evidence that Rush brought client lists and information with her to Marie Robinson. Moreover, loss of goodwill does not apply in Scrivo's situation, as Scrivo is not in danger of going out of business.

Defendants maintain that Rush's services are not unique and that although Scrivo claims to have spent thousands of dollars on developing her client relationships, Rush had to expend her own money for her hair cutting supplies and equipment. Also, the training provided was for the salon's business, not for Rush's benefit, as she was primarily self-taught.

Further, defendants argue that there is no irreparable harm because Scrivo will be able to recover money damages if it is successful after a full adjudication.

Finally, defendants state that, for the reasons presented in Rush's affidavit, the balance of the equities weighs against Scrivo. For example, Rush was only 21 at the time she signed the Employment Agreement and had uneven bargaining power. Defendants claim that Scrivo has shown bad faith in initiating this litigation, as it is motivated by personal animosity and seeks to unreasonably restrain fair competition and trade.

Motion Sequence 003

Scrivo argues that defendants have failed to plead a cause of action for abuse of process, because the commencement of this action by summons and complaint cannot be the basis of an abuse-of-process claim. Further, Scrivo's purported malicious motive, alone, cannot establish an abuse-of-process claim.

In defendants' reply, they argue that by filing its order to show cause, Scrivo has taken additional steps beyond the initial complaint to harm defendants due to personal animosity. As evidenced by Efros's alleged comments, defendants urge that Scrivo is using the guise of legal process to ruin Rush's career.

In the event that the court grants Scrivo's motion to dismiss the counterclaim for abuse of process, defendants have requested leave to amend this counterclaim.

DISCUSSION

Motion Sequence 002: Preliminary Injunction

To obtain a preliminary injunction, the movant "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005], citing CPLR 6301; *accord Rick J. Jarvis Assoc. v Stotler*, 216 AD2d 649, 650 [3d Dept 1995] [internal citation omitted] ["before granting a preliminary injunction the party seeking the relief must demonstrate a strong probability of ultimate success and thus a clear right to the relief sought, particularly in a proceeding to enforce a restrictive covenant against a former employee"].)

Employment Agreement

As set forth below, Scrivo's motion for injunctive relief is denied because Scrivo fails to demonstrate a likelihood of success on the merits in enforcing the restrictive covenant. Restrictive covenants that "tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored in the law." (*Skaggs-Walsh, Inc. v Chmiel*, 224 AD2d 680, 681 [2d Dept 1996].) In New York, "an employee's noncompetition agreement is reasonable and, therefore, enforceable 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." (*TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 [1st Dept 2014] [internal quotation marks and citation omitted] [emphasis in original].) All three prongs must be satisfied for the covenant to be valid. (*BDO Seidman v Hirshberg*, 93 NY2d 382, 389 [1999].)

Courts have recognized trade secrets and confidential customer information as legitimate business interests. (*Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 308 [1976].) Further, "injunctive relief may be available where an employee's services are unique or extraordinary and the covenant is reasonable." (*Id.*)

Scrivo argues that it has multiple legitimate interests worthy of protection, including its customer lists, customer preferences and prices, Rush's unique services and goodwill.

Customers Lists and Prices

Even if Rush misappropriated its customer information, Scrivo has failed to demonstrate how its customer lists are confidential or constitute a trade secret. In general, "customer lists are . . . not considered confidential information." (*H. Meer Dental Supply Co. v Commisso*, 269 AD2d

662, 664 [3d Dept 2000].) Defendants submit evidence that many of Scrivo's customers' identities and pictures are posted publicly online, either by Scrivo or by the customers themselves. Scrivo did not make any attempt to hide this information, which usually depicted the client's face, hairstyle and stylist who provided the service. As a result, Scrivo "has failed to prove that such information is not readily discoverable through public sources." (*Id.* at 664.)

In addition, trade secret protection is not available because "the names and addresses of potential customers or their representatives are readily ascertainable." (*Atmospherics, Ltd. v Hansen*, 269 AD2d 343, 343 [2d Dept 2000]]; *accord Amana Express Intl. v Pier-Air Intl.*, 211 AD2d 606, 607 [2d Dept 1995] [finding that trade secret protection did not attach to customer lists where customers were on publicly circulated directories].)

Further, Scrivo fails to establish that its pricing or customer preferences are confidential and not available to the public, including the customers themselves: "[P]ricing data and market strategies . . . would not constitute trade secrets." (*Marietta Corp. v Fairhurst*, 301 AD2d 734, 738 [3d Dept 2003].) Even if these were confidential, "there is no evidence that [Rush] misappropriated any pricing information to solicit the plaintiff's customers . . . ." (*Amana Express Intl.*, 211 AD2d at 607.)

Uniqueness

Scrivo has failed to demonstrate that Rush's services were unique or extraordinary. Injunctive relief is available in the following circumstances: "[I]f the employee's services are truly special, unique or extraordinary and not merely of high value to his employer, injunctive relief may be available though trade secrets are not involved." (*Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [1977] [internal quotation marks and citation omitted].) Scrivo's argument — that Rush's services are unique because Scrivo fostered close client relationships with its stylists — is unavailing. While Rush may have been of high value to Scrivo, Scrivo has failed to establish that Rush's services were unique or extraordinary, or that she was irreplaceable. (*See Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC*, 813 F Supp 2d 489, 510 [SD NY 2011] ["In order to demonstrate that a former employee performed unique or extraordinary services, the employer must show that the employee was irreplaceable and that the employee's departure caused some special harm to the employer."].) Moreover, courts have found that "a hairdresser's services are not unique or extraordinary per se." (*Family Affair Haircutters v Detling*, 110 AD2d 745, 748 [2d Dept 1985].)

Goodwill

Scrivo has failed to meet show that Rush misappropriated goodwill: "The employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment." (*BDO Seidman*, 93 NY2d at 392.) Courts have found that "whether client goodwill developed as a result of the [employee's] own independent efforts, rather than being generated and maintained primarily at the employer's expense is a triable issue

of fact." (*Marsh USA Inc. v Doerfler*, 46 Misc 3d 1208 [A], *5, 2015 NY Slip Op 50020 [U], *5 [Sup Ct, NY County 2015] [internal quotation marks and citation omitted].)

In seeking injunctive relief, Scrivo has failed to meet its burden that Rush misappropriated goodwill that was created at Scrivo's expense. Rush states that many of clients that she serviced at Scrivo sought her out directly as a result of her skills, and that she was primarily self-taught. Rush further denies taking any client lists or pricing information in order to steal clients by underbidding.

Reasonableness of Covenant

Scrivo fails to establish that the restrictive covenant is required to protect its legitimate business interests and that it is not over broad and burdensome: "A covenant will be rejected as overly broad . . . if it . . . extends to personal clients recruited through the employee's independent efforts." (*Scott, Stackrow & Co., C.P.A's, P.C. v Skavina*, 9 AD3d 805, 806 [3d Dept 2004].) Scrivo states that plaintiff serviced 900 clients over the six years that she worked at the salon. As proposed, the restrictive covenant would require Rush to investigate every future client to determine whether they had ever received salon services from her at Scrivo. For one year from the date of this order, Rush would have to turn away even clients who independently decide that they want to receive salon services from Rush. This relief is contrary to the restrictive covenant contained in the initial Employment Agreement, which provided that for one year from the date of termination, Rush could not solicit Scrivo clients, but could still service them if they sought her out independently.

Undisputed facts

Factual disputes exist: "While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits . . . to such a degree that it cannot be said that the plaintiff established a clear right to relief." (*Matter of Advanced Digital Sec. Solutions, Inc., v Samsung Techwin Co., Ltd.,* 53 AD3d 612, 613 [2d Dept 2008] [internal quotation marks and citations omitted].) Here, due to factual disputes, Scrivo does not establish that it has established a clear right to injunctive relief. In the order to show cause, Scrivo is requesting that Rush return any documents, including confidential customer information, and that she provide a summary of any solicitation and an accounting of certain services. But Scrivo fails to provide any evidentiary support for its contention that Rush misappropriated confidential information, or that she used this information to compete with Scrivo. (*See Merrell Benco Agency v Safrin*, 231 AD2d 614, 615 [2d Dept 1996] [denying plaintiff's motion for preliminary injunction where issue of fact remained about whether defendant made use of confidential client information, and where there were no more than "conclusory allegations concerning their claim that the defendant was actively soliciting their clients.].")

Further, Scrivo has not indicated what specific information Rush used or misappropriated while working at Marie Robinson. While non-solicitation provisions may be violated when the

employee actively solicits former clients and "touts" the merits of the new employment (*Bessemer Trust Co., N.A. v Branin*, 16 NY3d 549, 558 [2011]), questions remain about whether Rush engaged in any active solicitation. Rush advertised, in her personal public Instagram posting, without any reference to Scrivo, that she was now working for Marie Robinson. The only persons who would have received the information on Instagram are those who pro-actively and voluntarily follow Rush's personal Instagram site, some of whom may be Scrivo clients. Rush has submitted an affidavit denying that she took client lists, and Scrivo has not provided the name of any customers who were allegedly improperly solicited. Accordingly, "[i]f the right [to a preliminary injunction barring competition by a former employee] depends upon an issue which can only be decided upon a trial, the injunction cannot be granted." (*Cool Insuring Agency v Rogers,* 125 AD2d 758, 759 [3d Dept 1986] [internal quotation marks and citations omitted].)

Irreparable Harm

Scrivo's arguments, that without injunctive relief it will suffer irreparable harm in lost goodwill, lost confidential customer information and on account of Rush's uniqueness, are without merit. As set forth below, even if Scrivo could establish a likelihood of success of the merits, it fails to demonstrate that it will suffer irreparable injury in the absence of injunctive relief because, "on the record made, the injuries alleged would be compensable by money damages." (*White Bay Enters. v Newsday, Inc.*, 258 AD2d 520, 521 [2d Dept 1999].)

Scrivo has the names and contact information of the Scrivo clients who were formerly serviced by Rush. Damages can be calculated by determining the value of the services provided to any former Scrivo client who had been improperly solicited. (*See U.S. Re Cos., Inc. v Scheerer,* 41 AD3d 152, 155 [1st Dept 2007] [citation omitted] [finding no irreparable harm where "former employer could have brought an action for money damages equal to the value of the transactions lost as a result of the alleged breach [because there is a] quantifiable remedy . . . ."]; *accord Modern Telecom. v Zimmerman,* 140 AD2d 217, 221 [1st Dept 1988] [internal citations omitted] ["[T]he respondent has failed to show that it would sustain irreparable damage if a temporary injunction is denied. If, in fact, respondent does prove that the defendants engaged in unfair trade practices, monetary damages could be calculated without great difficulty.]."]

Accordingly, if Scrivo ultimately prevails on its claim for breach of the Employment Agreement, including the restrictive covenant, Scrivo can be compensated by monetary damages.

Balance of Equities

Finally, Scrivo "failed to establish that a balancing of the equities favors provisional relief because it has not shown that the absence of a preliminary injunction would cause it greater injury than the imposition of the injunction would inflict upon the defendant." (*Copart of Conn., Inc. v Long Is. Auto Realty, LLC*, 42 AD3d 420, 421 [2d Dept 2007].) While Rush is a solo hairstylist, Scrivo is a salon with multiple stylists. Under the circumstances, based on the injunctive relief requested, Rush would be prevented from working on any former Scrivo client that sought her out independently. In contrast, the court cannot compel these clients to return to

Scrivo and work with a different stylist. Also, the injunction would be contrary to public policy as it would essentially prohibit customers from being able to choose where they want to get their hair styled.

Motion Sequence 003: Dismissal

Scrivo's motion under CPLR 3211 (a) (7) for an order dismissing defendants' first counterclaim for abuse of process is granted. On a motion to dismiss under CPLR 3211, "the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." (*Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007].) But "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." (*Silverman v Nicholson*, 110 AD3d 1054, 1055 [2d Dept 2013] [internal quotation marks and citation omitted].) For a court to "assess[] a motion under 3211 (a) (7), . . . [it must decide] whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [internal quotation marks and citations omitted].)

Abuse of Process

Defendants' first counterclaim is dismissed.

To plead a claim for abuse of process, defendants must allege "(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." (*Matthews v New York City Dept. of Social Servs., Child Welfare Admin.*, 217 AD2d 413, 415 [1st Dept 1995] [internal quotation marks and citation omitted].) In general, neither commencing a civil action nor seeking provisional remedies give rise to a claim for abuse of process. (*See Muro-Light v Farley*, 95 AD3d 846, 847 [2d Dept 2012]; *accord Daniel J. Edelman, Inc. v Korn*, 231 AD2d 405, 406 [1st Dept 1996] [internal quotation marks and citation omitted] ["[M]ere commencement of the underlying civil action, and the issuance, via proper judicial process, of provisional orders of attachment enjoining claimants from transferring or secreting assets, are insufficient to form the basis for an abuse of process claim."].)

As set forth below, even accepting the allegations as true, defendants fail to allege in their first counterclaim that either the complaint, or the order to show cause, were used "in a manner inconsistent with the purpose for which it was designed." (*Place v Ciccotelli*, 121 AD3d 1378, 1380 [3d Dept 2014] [internal quotation marks and citations omitted].) Scrivo sought injunctive relief for a legitimate purpose — to enforce a restrictive covenant — and the complaint is a proper method of process to adjudicate an alleged breach of an employment contract. "With respect to the abuse of process claim, [defendants] ha[ve] failed to allege any actual misuse of the process to obtain an end outside its proper scope." (*Hornstein v Wolf*, 67 NY2d 721, 723 [1986].)

Although defendants contend that Scrivo initiated this action to exact retribution, an improper motive in bringing an action does not, on its own, give rise to a cause of action to recover damages for abuse of process: "A malicious motive does not alone give rise to a cause of action for abuse of process." (*Matthews*, 217 AD2d at 415 [citation omitted].)

Leave to Amend

In the event that the counterclaim is dismissed, defendants have requested leave to amend its counterclaim for abuse of process pursuant to CPLR 3025 (b). In general, "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay." (*Murray v City of New York*, 51 AD3d 502, 503 [1st Dept 2008] [internal quotation marks and citation omitted].). But "leave should be denied where the proposed claim is palpably insufficient." (*Pasalic v O'Sullivan*, 294 AD2d 103, 104 [1st Dept 2002].)

CPLR 3025 (b) provides, in relevant part, that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Given that defendants requested leave to amend, but did not attach a copy of the proposed amending pleading, the court cannot address the merits of any proposed changes. (*See Mallory Factor v Schwartz*, 146 AD2d 465, 467 [1st Dept 1989] ["A formal defect will not defeat an otherwise meritorious motion, provided that the motion is timely made and the merits of the case are adequately presented in the supporting documents."].) Accordingly, defendants' request for leave to amend the first counterclaim is denied.

Legal Fees

Scrivo's request for costs and legal fees incurred as a result of seeking injunctive relief is denied. At this time, it is inappropriate for the court to address the merit of Scrivo's claim that, pursuant to the language in the Employment Agreement, it is entitled to all legal fees incurred for any legal action it commences against Rush. The legal-fee issue will be resolved after the ultimate adjudication of the action.

Accordingly, it is

ORDERED that plaintiff Eva Scrivo Fifth Avenue, Inc.'s order to show cause seeking injunctive relief (mot. seq. 002) is denied in its entirety; and it is further

ORDERED that plaintiff's motion to dismiss defendants Annie Rush and Cosette Fifth Avenue, LLC's first counterclaim (mot. seq. 003) is granted; and it is further

ORDERED that defendants' request for leave to amend their first counterclaim is denied; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on

all parties; and it is further

ORDERED that the action shall continue; and it is further

ORDERED that the parties appear for a preliminary conference on October 4, 2017, at 11:00 a.m. in Part 7, at 60 Centre Street, room 345.

Dated: August 9, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.