

Mueller v Mitchell Maxwell & Jackson, Inc.

2011 NY Slip Op 33143(U)

December 5, 2011

Supreme Court, New York County

Docket Number: 106119/2010

Judge: Doris Ling-Cohan

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

-----X
MARIANNE T. MUELLER,

Plaintiff,

-against-

Index: 106119/2010
Motion Seq. No.: 007

**DECISION/
ORDER**

MITCHELL MAXWELL & JACKSON, INC., STEVEN
KNOBEL AND JEFFREY JACKSON,

Defendants.
-----X

The following papers, numbered 1 to 10 were considered on this motion for a preliminary injunction:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1, 2, 3
Answering Affidavits - Exhibits (Memo)	3, 4
Replying Affidavits (Reply Memo)	5, 6, 7, 8, 9
Supplemental Affidavit	10

FILED

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Cross Motion: Yes No

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This case was commenced by plaintiff for the alleged breach of an agreement labeled "Individual Independent Contractor Agreement" ("the Agreement"), between plaintiff and defendant Mitchell, Maxwell & Jackson, Inc. ("Mitchell Maxwell"), dated November 4, 2004. [Exh. A, Knobel Affidavit]. Plaintiff is a New York State Certified Appraiser and defendant Mitchell Maxwell is a real estate appraisal firm.

The Agreement contained a non-compete provision, which defendants claim has been violated by plaintiff, since plaintiff's termination, on or about March 11, 2010. Plaintiff maintains that defendants breached the Agreement by not paying plaintiff for her services performed in January, February and March 2010, and thus, Mitchell Maxwell is precluded from enforcing the restrictive covenants in the Agreement, including the non-compete provision.

A request for judicial intervention was filed in this case on or about May 28, 2010, and discovery

has been completed , with a note of issue having been filed on September 1, 2011, beyond the court system's one (1) year standards and goals, with respect to the time period for completion of discovery. The parties will soon be scheduled by the Clerk's office for mediation and, thereafter, trial.

Defendants filed the within order to show cause seeking a preliminary injunction pursuant to CPLR §6301: (1) Restraining and enjoining plaintiff from directly or indirectly operating, owning, being associated with or being employed by any real estate appraisal or real estate consulting company that does business in New York City; (2) Restraining and enjoining plaintiff, and all persons and/or entities acting on her behalf, for her benefit or in active concert or participation with her, from directly or indirectly disclosing, reproducing, or using any confidential, proprietary and/or trade secret information of any kind, nature or description belonging to Mitchell Maxwell, including, but not limited to, its customer lists, identities of key contact personnel at clients, preferences and special needs of clients, marketing and pricing strategies, and other confidential data relating to Mitchell Maxwell's business; (3) Restraining and enjoining plaintiff, and all persons and/or entities acting on their behalf, for their benefit or in active concert or participation with them, from directly or indirectly contacting, soliciting, servicing, accepting compensation for servicing, or referring Mitchell Maxwell's clients; (4) Restraining and enjoining plaintiff, and all persons and/or entities acting on their behalf, for their benefit or in active concert or participation with them, from directly or indirectly contacting, soliciting, accepting the business of any Mitchell Maxwell clients, including those clients whom plaintiff has already done work for, or on behalf of, in violation of the Independent Contractor Agreement entered by and between plaintiff and Mitchell Maxwell on November 4, 2004 ("the Agreement"); (5) Directing plaintiff to fully disclose their client and /or customer list; (6) Directing plaintiff to disgorge the profits from all work performed in violation of the Agreement to Mitchell Maxwell; and (7) Directing plaintiff to pay Mitchell Maxwell's counsel fees and costs associated with the within application.

In seeking a preliminary injunction, defendants assert that, during the course of discovery, defendants have learned that plaintiff has been violating the non-compete clause covenant of the Agreement, and thus, emergency injunctive relief is warranted.

A preliminary injunction is a drastic remedy which should only be granted where the movant has demonstrated in the moving papers a clear legal right to the relief demanded based upon the undisputed facts. *See Cohen v. Department of Social Servs.*, 37 AD2d 626, *affd* 30 NY2d 571(1972); *William M. Blake Agency, Inc. v. Leon*, 283 AD2d 423, 424 (2nd Dept 2001). As a provisional remedy, its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits. *Residential Board of Managers of the Columbia Condominium v. Alden*, 178 AD2d 121 (1st Dept 1991).

To be entitled to a preliminary injunction, plaintiff must clearly demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in their favor. *See W.T. Grant Co. v. Sroggi*, 52 NY2d 496, 517 (1981); *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 (1990); *Borenstein v. Rochel Props., Inc.*, 176 AD2d 171, 172 (1st Dept 1991). Irreparable injury has been held to mean an injury for which monetary damages are insufficient. *See James v. Gottlieb*, 85 AD2d 572 (1st Dept 1981); *Klein, Wagner & Morris v. Klein*, 186 AD2d 631, 633 (2nd Dept 1992).

Upon review of the submitted papers, defendants' motion for a preliminary injunction is denied, in that defendants have failed to meet their burden of establishing a "clear right to the demanded relief", to be entitled to the drastic relief requested. *Cohen v. Department of Social Services*, 37 AD2d at 626.

At the outset the court notes that the within order to show cause was signed by the presiding *Ex Parte* Judge, in this court's absence. Further, discovery has been completed, a note of issue filed, and thus, in accordance with the court's standard procedure, the parties are to be scheduled for mediation shortly, and a trial date scheduled, soon thereafter.

By filing the within order to show cause, defendants seek the granting of the ultimate relief requested in their counterclaims, that plaintiff be directed to stop her improper activities, which is an inappropriate use of a preliminary injunction. *See New York City Police Officers v. City of*

New York, 34 AD3d 392 (1st Dept 2006)(“[t]he purpose of a provisional remedy is to maintain the status quo, pending a hearing on the merits, rather than to determine the parties’ ultimate rights” [citations omitted]). Further, while defendants maintain that “emergency” injunctive relief is warranted at this juncture, post note of issue, it appears that defendants asserted the within allegations that plaintiff was violating the Agreement, over one (1) year ago, in an e-mail to plaintiff’s counsel, yet failed to move for injunctive relief until now. [Exh. B, Affirmation in Opposition].

Moreover, defendants have not established the above detailed elements to be entitled to injunctive relief. In particular, a likelihood of success on the merits has not been demonstrated, as there is no indication in the moving papers that defendants did not initially breach the Agreement by failing to pay plaintiff for her services for the months of January through March 2010, prior to her termination, as argued by plaintiff. Thus, it has not been established in the within submissions that the restrictive covenants in the Agreement are actionable.

Additionally, while defendants argue that they will suffer alleged irreparable injury if plaintiff is not enjoined at this juncture based upon plaintiff’s alleged “theft of confidential information” and “poaching of clients”, such allegations are conclusory and speculative at best, in that noticeably absent is the identity of a single client who has allegedly been “poached”; nor has *actual* harm been described and the alleged confidential information stolen is not specified. Furthermore, even if defendants are able to prevail on any of their counterclaims, defendants have an adequate remedy at law, and thus, the harsh equitable relief sought herein is not justified. *See Schulte Realty Co. v. Pulvino*, 179 NYS 371 (App Term, 1st Dept 1919); *Pinnacle Equities New York, Inc. v. Zapco 1500 Investment, L.P.*, NYLJ, September 3, 1997, at 22, col 4 (Sup Ct, New York County).

Defendants have also not sustained their burden of demonstrating that a balance of the equities favors the granting of injunctive relief in their favor. *See W.T. Grant Co. v. Srogi*, 52 NY2d 496, 517 (1981); *Hoppmann v. Sargent Stein, Inc.*, 141 AD2d 332 (1st Dept 1988); *Borenstein v. Rochel Props., Inc.*, 176 AD2d at 172. If an injunction were to be granted as defendants request,

plaintiff, an individual, would in essence be prohibited from earning a living; such prohibition would be a harsh penalty, where, at this juncture, there are significant facts in dispute and mediation/trial are expected to be scheduled by the Clerk's office imminently, as discovery has been completed and a note of issue filed.

This court is mindful that preliminary injunctions are drastic remedies which should be used sparingly. *See 67A NY Jur_2d, Injunctions §47.* Thus, based upon the within submissions, this Court declines to grant defendants' request to issue a preliminary injunction. *Nevertheless, as trials and appeals are costly, the parties are encouraged to continue their settlement negotiations.*

Accordingly, it is

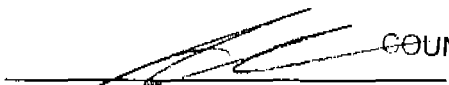
- ORDERED that defendants' motion for a preliminary injunction is denied; it is further
- ORDERED that any and all stay issued by the signing of defendants' order to show cause dated November 17, 2011 is hereby vacated forthwith; and it is further
- ORDERED that within thirty days of entry of this decision/order, plaintiff shall serve upon defendants, a copy with notice of entry.

FILED

This constitutes the decision and order of the Court.

DEC 07 2011

Dated: December 5, 2011



 Doris Ling-Cohan, JSC

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