

Greystone Staffing, Inc. v Warner

2012 NY Slip Op 33683(U)

May 21, 2012

Supreme Court, Nassau County

Docket Number: 4355-12

Judge: Timothy S. Driscoll

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
GREYSTONE STAFFING, INC.,

Plaintiff,

- against -

WENDY WARNER,

Defendant.
-----x

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 4355-12
Motion Seq. No. 1
Submission Date: 5/8/12**

The following papers have been read on this Order to Show Cause

- Order to Show Cause, Affidavit in Support and Exhibits.....x**
- Affidavit in Opposition.....x**
- Defendant's Consolidated Memorandum of Law in Opposition.....x**

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff Greystone Staffing, Inc. ("Greystone" or "Plaintiff") on April 19, 2012 and submitted on May 11, 2012. For the reasons set forth below, the Court denies the Order to Show Cause in its entirety.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 6301, enjoining and restraining Defendant Wendy Warner ("Warner" or "Defendant") from 1) soliciting and/or doing business with any current or former customers of Plaintiff; 2) using, or disclosing to any person and/or entity, for any purpose, any Confidential Information of Plaintiff; 3) contacting, directly or

indirectly, any person, firm, corporation, employer, client or applicant, who was at any time prior a customer or client or prospective customer or client of Plaintiff; 4) interfering, directly or indirectly, with any such business of Plaintiff; 5) directly or indirectly soliciting or accepting business or employment, whether as an employee or independent contractor, from any person or entity who was at any time within one (1) year prior to the termination of employment with Plaintiff, a customer of Plaintiff, to provide services similar to or the same as any of the services provided by Plaintiff; 6) offering or attempting to offer employment to any employee, consultant, or independent contractor of Plaintiff, or otherwise inducing or attempting to induce any employee of Plaintiff to leave the employ thereof; 7) transferring, selling or otherwise disposing of any Confidential Information belonging to the Plaintiff; and 8) continuing her employment with Green Key Resources (“Green Key”).

Defendant opposes Plaintiff’s Order to Show Cause.

B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. C to Missirlian Aff. In Supp.) alleges as follows:

Greystone is engaged in the “highly competitive” business of recruiting and providing personnel on a temporary and/or permanent basis to its customers and/or clients (Compl. at ¶ 9). On or about March 19, 2001, Greystone entered into an employment contract with Defendant (“Agreement”) (Ex. A to Missirlian Aff. in Supp.). The Agreement contains provisions regarding, *inter alia*, 1) the employee’s obligation to notify Greystone of any contact with, or inquiries by, a competitor of Greystone, and 2) materials deemed Trade Secrets and Confidential Information, and the employee’s agreement never to disclose or use Trade Secrets and Confidential Information,

Plaintiff alleges that it provided Defendant with access to its Trade Secrets and Confidential Information, including customer lists, characteristics of customers, internet and computer data and Plaintiff’s financial information. Plaintiff further alleges that its Confidential Information was not ascertainable by any means other than through Plaintiff.

The Agreement contained a restrictive covenant (“Restrictive Covenant”) which reflected Defendant’s agreement that, for a period of one (1) year after termination of her employment with Plaintiff, Defendant would not, directly or indirectly, engage in the same business as Plaintiff anywhere within a radius of fifty (50) miles from any offices of Plaintiff. Defendant also agreed that she could not 1) contact any person or company who was at any prior time a customer of Plaintiff; 2) interfere with Plaintiff’s business; 3) solicit or accept business or employment from any person or entity who was, at any time within one (1) year prior to the termination of Defendant’s employment, a customer of Plaintiff, to provide services that were similar to those provided by Plaintiff; or 4) offer, or attempt to offer, employment to any employee, consultant or independent contractor of Plaintiff, or otherwise induce any employee of Plaintiff to leave his employment. The Agreement also required Defendant, upon termination of her employment, to deliver to Plaintiff all materials, including correspondence and computer data, in her possession or control. Defendant resigned from her employment with Plaintiff in November of 2011.

The Complaint contains two (2) causes of action. In the first cause of action, Plaintiff alleges that Defendant breached the Agreement by, *inter alia*, 1) improperly retaining and using Confidential Information to obtain an unfair competitive advantage over Plaintiff; 2) failing to notify Plaintiff of, and provide Plaintiff with information regarding, her contact with Green Key, a competitor of Plaintiff; and 3) soliciting or accepting business or employment with Green Key, offering or attempting to offer employment to employees of Plaintiff, and/or inducing employees of Plaintiff to leave the employ of Plaintiff.

In the second cause of action, Plaintiff seeks injunctive relief similar to that requested in the instant Order to Show Cause. In support of that request, Plaintiff alleges, *inter alia*, that 1) Plaintiff invested significant time and developmental costs in developing and maintaining the Confidential Information; 2) the Confidential Information was not ascertainable by any means other than through Plaintiff; and 3) in the Agreement, Defendant agreed that disclosure of the Confidential Information in violation of the Agreement would cause serious and irreparable harm to Plaintiff.

In his Affidavit in Support of Plaintiff's application, Phil Missirlian ("Missirlian"), the President of Plaintiff, affirms the truth of the allegations in the Complaint regarding Defendant's execution of the Agreement, the terms of the Agreement, the nature and importance of the Trade Secrets and Confidential Information, Defendant's breach of the Agreement and the basis for Plaintiff's request for injunctive relief. Missirlian also affirms that Defendant, in her capacity as regional manager, managed the sales force of Plaintiff, contributed to marketing strategies and had personal knowledge of pricing and margins used by Plaintiff. In addition, Defendant had "unencumbered access" (Missirlian Aff. in Supp. at ¶ 4) to the computer databases of Plaintiff, and acquired "intimate knowledge" (*id.*) of Plaintiff's clients, employees and methods of operation.

In opposition, Defendant affirms that when she began her employment with Greystone in 2001, Greystone presented her with the Agreement and required her immediate signature. She affirms that Greystone clearly communicated to her that she should not make any changes to the Agreement, and that she would not be hired if she did not sign the Agreement.

Defendant affirms that her primary responsibilities while employed by Greystone were client development, contact and sales. She sought to ensure that candidates were placed with the most appropriate job assignment. She had access to client lists, so that she could confirm placements and client satisfaction, but did not retain that information in hard copy after her resignation ("Resignation") from Greystone.

Defendant avers that problems developed at Greystone in 2009 when Greystone unexpectedly filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. Greystone filed for additional bankruptcy protection in 2010. Greystone's court filings in the 2010 bankruptcy matter included a schedule of aged receivables which made public the telephone numbers of Greystone's clients.

In March of 2011, Greystone encountered payroll problems when numerous checks were dishonored for insufficient funds. Greystone's controller said that Greystone was only able to pay half of its payroll obligations. In April of 2011, Greystone did not process direct deposits for its candidates, and the temporary staff was not compensated. Defendant affirms that she was not paid according to her payment schedule, and Greystone suspended internal staff Holiday Club

deposits and 401(k) payments. Defendant borrowed funds from family members to cover her expenses, and was concerned that Greystone was going out of business.

Defendant affirms, further, that in May of 2011, she learned that Missirlain had been arrested for fraud based on his failure to pay withholding taxes in excess of \$400,000. In July of 2011, Greystone's subscriptions to Monster.com, Careerbuilder.com, Newsday and Pennysaver were suspended for non-payment, and the staff learned that Greystone's headquarters building was scheduled for public auction. In addition, Greystone's human resources manager resigned.

Defendant avers that she is the primary provider for her family, and needed employment on which she could depend. Accordingly, she resigned from Greystone on November 15, 2011 and began working for Green Key one week later. Defendant affirms that she took no information of any kind from Greystone when she resigned. Green Key directed Defendant not to bring any customer lists or other documentation that would violate the Agreement, and Defendant complied with that directive. Defendant affirms that she is, and will remain, in compliance with her obligations under the Agreement, except that she maintains that the fifty (50) mile radius restriction in the Agreement is overbroad and unenforceable.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the requested injunctive relief by establishing a likelihood of success on the merits by demonstrating that Defendant breached the Agreement. Plaintiff argues that the Restrictive Covenant is enforceable in light of 1) the special and unique nature of Plaintiff's services, 2) the limited temporal and geographical limitations in the Restrictive Covenant, and 3) Defendant's acknowledgment of the reasonableness of those restrictions when she signed the Agreement.

Plaintiff also argues that it has established irreparable injury without the requested injunctive relief in that it will sustain a loss of business that is difficult to quantify. Finally, Plaintiff submits that a balancing of the equities favors Plaintiff because there is no evidence that Defendant will be harmed by the requested injunctive relief, while Plaintiff faces a substantial loss of business without the requested restrictions.

Defendant oppose Plaintiff's application, submitting *inter alia* that 1) there are no protectable trade secrets or confidential information in the temporary staffing industry as it is the type of business that relies more on "common sense, cold calling, advertising and being a good salesperson" (D's Memo. of Law at p.2); 2) Greystone cannot demonstrate irreparable harm in light of the fact that Greystone voluntarily published its customer lists in connection with its bankruptcy filings; 3) Plaintiff has not demonstrated that Defendant shared any of Plaintiff's information with Green Key, or used Plaintiff's information to Green Key's advantage; 3) the Agreement is unenforceable because its restrictions are "anti-competitive and coercively overreaching" (*id.* at p. 5); 4) the information that Plaintiff characterizes as trade secrets does not warrant trade secret protection because it is readily ascertainable from publicly available sources; 5) the Restrictive Covenant is unreasonable in time and geographical scope; 6) the requested injunctive relief would impose an undue hardship on Warner by preventing her from soliciting business from a wide range of businesses, with whom Greystone does not have an exclusive agreement; and 7) the public would be harmed by the enforcement of the restrictions in the Agreement which would prevent Green Key from competing in the temporary staffing industry and deprive the public of the benefits of that competition.

RULING OF THE COURT

A. Preliminary Injunction Standards

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

B. Restrictive Covenants

Powerful considerations of public policy militate against sanctioning the loss of a person's livelihood. *Post v. Merrill Lynch*, 48 N.Y.2d 84, 86 (1979), citing *Purchasing Assoc. v. Weitz*, 13 N.Y.2d 267, 272 (1963). This policy is so potent that covenants tending to restrain anyone from engaging in any lawful vocation are almost uniformly disfavored, and are sustained only to the extent that they are reasonably necessary to protect the legitimate interests of the employer, and are not unduly harsh or burdensome to the one restrained. *Id.* at 87, citing, *inter alia*, *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499 (1977). Restrictive covenants contained in employment contracts are disfavored by the courts and are to be enforced only if reasonably limited temporally and geographically, and to the extent necessary to protect the employer's use of trade secrets or confidential customer information. *Gilman & Ciocia, Inc. v. Randello*, 55 A.D.3d 871, 872 (2d Dept. 2008).

C. Trade Secrets

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. *H & R Recruiters, Inc. v. Kirkpatrick*, 243 A.D.2d 680, 681 (2d Dept. 1997). A trade secret is any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to gain an advantage over competitors who do not know or use it. *Ashland Mgt. v. Janian*, 82 N.Y.2d 395, 407 (1993), citing Restatement of Torts Section 757, comment b. In deciding a trade secret claim, the court should consider the following factors: 1) the extent to which the information is known outside of the business, 2) the extent to which it is known by employees and others involved in the business, 3) the extent of measures taken by the business to guard the secrecy of the information, 4) the value of the information to the business and its competitors, 5) the amount of effort or money expended by the business in developing the information, 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.*

D. Application of these Principles to the Instant Action

The Court denies Plaintiff's Order to Show Cause in its entirety. The Court concludes that Plaintiff has not demonstrated a likelihood of success on the merits in light of 1) the issues regarding the enforceability of the restrictive covenant given its breadth, particularly the 50 mile radius restriction on Defendant's future employment, and the public policy disfavoring such covenants, 2) the factual disputes regarding whether Defendant has improperly used Plaintiff's information in her new employment, which Defendant denies, and 3) the issues regarding whether Plaintiff's customer lists and other information are deserving of trade secret information, given the accessibility of employment information on the internet and in newspapers, and in light of Defendant's assertion that some of that information was filed publicly by Greystone during its bankruptcy proceeding.

With respect to the showing of irreparable harm, the Court concludes that it is not bound by the language in the Agreement which states that disclosure of the Confidential Information in violation of the Agreement would cause serious and irreparable harm to Plaintiff, and must make an independent determination of that issue. The Court concludes that Plaintiff has not demonstrated irreparable harm without the requested injunctive relief in light of the issues regarding whether Plaintiff's customer lists and other information are deserving of trade secret protection, and in consideration of Defendant's affirmation that she did not retain any of Plaintiff's information when she resigned from Greystone.

Finally, Plaintiff has not shown that the equities balance in favor of Plaintiff, given Warner's affirmation regarding the financial difficulties encountered by Plaintiff which affected the stability of her employment with Plaintiff, and her need for the compensation she receives from Green Key to maintain her financial stability.

In light of the foregoing, the Court denies Plaintiff's Order to Show Cause in its entirety.

[* 9]
All matters not decided herein are hereby denied.

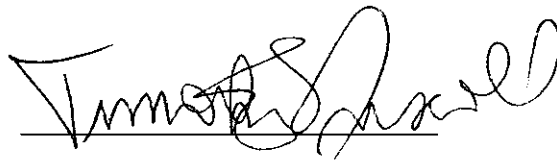
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on June 11, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY

May 21, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
MAY 25 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE