

EGC Group, Inc. v Carroll

2012 NY Slip Op 31440(U)

May 14, 2012

Supreme Court, Nassau County

Docket Number: 4388-12

Judge: Timothy S. Driscoll

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

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

THE EGC GROUP, INC.,

Plaintiff,

- against -

**CHRISTINE CARROLL and
STEPHEN T. GREENBERG,**

Defendants.

-----X

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

**Index No: 4388-12
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**
- Memorandum of Law in Support.....x**
- Affirmation in Opposition and Affidavits.....x**

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff The EGC Group, Inc. ("EGC" or "Plaintiff") on April 6, 2012 and submitted on May 8, 2012. For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause in its entirety.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR Article 63, enjoining Defendant Christine Carroll ("Carroll"), preliminarily and during the pendency of this action, and until its final hearing and determination, from a) providing, directly or indirectly, advertising or marketing services to Defendant Stephen T. Greenberg ("Greenberg"); and b) directly or indirectly contacting, soliciting, and/or providing advertising or marketing services to any of the Plaintiff's

accounts, customers or clients that Carroll serviced during the last year of her employment at EGC.

Defendants oppose Plaintiff's Order to Show Cause

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. 1 to Canadeo Aff. In Supp.) alleges as follows:

EGC is a advertising and marketing agency that devotes substantial resources to developing new clients ("Clients"), sustaining relationships with existing Clients and building public goodwill. To this end, EGC employs a sales team comprised of Account Representatives and Account Supervisors.

On or about November 3, 2003, EGC hired Carroll as an Account Supervisor. Her duties included originating Clients, developing and maintaining relationships with existing Clients and servicing Clients. EGC provided Carroll with financial resources and information and support to assist Carroll in performing her duties. That included 1) paying for her business expenses, including travel and the costs associated with meeting and socializing with Clients; and 2) providing her with necessary services and equipment including office space, a website and marketing materials. The Complaint alleges that EGC's goodwill with its Clients "has significant commercial value" (Compl. at ¶ 12).

To protect its goodwill, EGC requires Account Representatives and Account Supervisors to sign a non-compete agreement ("Agreement") that prohibits them, for two (2) years after the termination of their employment, from offering or providing advertising or marketing services to EGC Clients who were EGC Clients during the last year of the Sales Representative's employment. On November 3, 2003, Carroll signed the Agreement. During her employment with EGC, Carroll developed with Clients including Greenberg, whose account she serviced. The services that Carroll provided to Greenberg included media planning, event promotion and coordination and production of advertising and marketing materials. Plaintiff alleges that Carroll owed fiduciary duties of loyalty and honesty to EGC.

On or about September 22, 2011, Carroll advised EGC that she was terminating her employment with EGC effective October 6, 2011 ("Resignation"). Plaintiff alleges that, upon

information and belief, Carroll has offered to provide advertising and marketing services to Greenberg, in violation of the Agreement and has, in fact, provided such services to Greenberg. On March 22, 2012, Plaintiff's counsel sent a letter to Defendants in which Plaintiff demanded that Carroll cease providing advertising and marketing services to Greenberg but, upon information and belief, Carroll continues to provide those services to Greenberg.

The Complaint contains eleven (11) causes of action: 1) breach of contract against Carroll, 2) breach of fiduciary duty against Carroll, 3) misappropriation of customer relationships against Carroll, 4) unjust enrichment against Carroll, 5) a request for a declaratory judgment declaring that the Agreement is valid and enforceable against Carroll, 6) a request for injunctive relief enjoining Carroll, for two years from her Resignation, from providing services to, or being employed by, Greenberg, 7) tortious interference with contract against Greenberg, 8) tortious interference with contract against Carroll, 9) aiding and abetting breach of fiduciary duty against Greenberg, 10) tortious interference with contract against Greenberg, and 10) a demand for an accounting against Carroll.

In support of Plaintiff's motion, Ernest G. Canadeo ("Canadeo"), the sole shareholder and Chief Executive Officer of EGC, affirms the truth of the allegations in the Complaint regarding Carroll's employment by EGC, her execution of the Agreement, the resources expended by EGC in support of Carroll during her employment with EGC and Carroll's Resignation. He affirms that Greenberg became a client of EGC in 2005, at which time he signed a Client Agreement ("Client Agreement") (Ex. 3 to Canadeo Aff. in Supp.). Canadeo affirms that he has been unable to locate a signed copy of the Client Agreement but he is "certain" that it was signed (*id.* at ¶ 9), and provides the unsigned copy of the Client Agreement. In 2011, Greenberg paid EGC a monthly retainer of \$4,500 until October of 2011, when Carroll left EGC. Canadeo affirms that Carroll "played no part" in bringing Greenberg's account to EGC (*id.* at ¶ 10).

Canadeo affirms that Greenberg stopped using EGC for advertising and marketing services at the same time that Carroll resigned from EGC but did not formally terminate his relationship with EGC until November of 2011. Canadeo affirms that in March of 2012 he "learned" (Canadeo Aff. in Supp. at ¶ 16) from certain media and radio station personnel that Carroll was working for Greenberg, or was engaged by Greenberg in a non-employment capacity,

providing the same marketing services to Greenberg as EGC had been providing to Greenberg. Plaintiff does not provide an affidavit from any of these media personnel. Canadeo expresses his belief that Greenberg induced Carroll to violate the Agreement by agreeing to hold her harmless for any claims that might be brought by EGC for her violation of the Agreement.

Canadeo submits that, without the requested injunctive relief, EGC will be damaged in “a substantial sum” believed to be in excess of \$180,00 (Canadeo Aff. in Supp. at ¶ 19), but also affirms that the potential damage to EGC is “more than monetary and incalculable” (*id.*). Canadeo affirms that he has no knowledge that Carroll has solicited business or is otherwise providing services to clients other than Greenberg, but “fear[s] she may have done so (or will do so), in light of her proven bad faith” (*id.* at ¶ 21).

In opposition, Carroll affirms that, while she was employed by EGC, her duties were largely administrative, and she was not involved in the creative elements of advertising and marketing, and did not negotiate rates directly with the media or engage in similar activities. She was the contact person for different EGC Clients, including Greenberg. Carroll affirms that she is not using any confidential or trade secret information from EGC in connection with her current employment with Greenberg. She affirms that resigned from EGC because it substantially reduced her pay from 2009 to 2010.

Carroll denies encouraging Greenberg to leave EGC, and affirms that Greenberg had expressed his dissatisfaction with EGC for over a year before Carroll’s Resignation. In or about October of 2011, Greenberg offered Carroll employment, which she accepted, and she submitted her Resignation to EGC. Carroll affirms that she works as an administrator in Greenberg’s medical office and her responsibilities include greeting patients at the front desk, walking them to consultation rooms and ensuring that they are satisfied with Greenberg’s services. She avers, further, that her responsibilities are not similar to those of an employee in a marketing or advertising firm. Carroll affirms that Greenberg retained a new public relations firm and graphic design firm.

Carroll affirms that she would be harmed by the issuance of the requested injunctive relief, She is single and self-supporting and submits that it would be unduly burdensome to limit her activities for Greenberg, particularly because it is not clear whether the tasks she performs

constitute advertising or marketing. She avers that she regularly communicates with patients, updates Greenberg's office Facebook account, answers telephone calls and emails and assists in promotional events. Carroll affirms that she is not competing with EGC, or Greenberg's current advertising and design firms, but her daily responsibilities include tasks that might be considered as relating to marketing or advertising.

Mindy Weissler ("Weissler"), the Executive Director of Greenberg's medical practice, affirms that she supervises Carroll in her current employment with Greenberg. Weissler affirms that Carroll was not hired as an advertising or marketing professional, but rather as an administrative employee who provides a variety of services.

Weissler also affirms that it was Greenberg's intention to terminate his professional relationship with ECG, irrespective of Carroll's employment status with ECG. She avers that Canadeo made a presentation ("Presentation") to Greenberg in December of 2010 which "substantially failed to respond to [Greenberg's] concerns for a 2011 marketing plan," including Greenberg's desire to increase his focus on internet advertising (Weissler Aff. at ¶ 5). Following the Presentation, Greenberg began relying on other vendors for his marketing needs, and eventually replaced ECG with other marketing firms.

Weissler affirms that the requested injunctive relief would disrupt Greenberg's medical practice by limiting Carroll's ability to interact with Greenberg's patients. In addition, Greenberg continues to develop his own public relations materials without EGC's assistance, which might necessitate Carroll's involvement in forwarding messages or speaking with individuals involved with that promotion. Weissler submits that the requested injunctive relief would "cause undue burden by subjecting [Carroll's] activities to scrutiny as to whether any given task would be within the extremely nebulous scope of 'marketing' or 'advertising,' and place her employment in jeopardy" (Weissler Aff. at ¶ 12).

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the requested injunctive relief by 1) establishing a likelihood of success on the merits by demonstrating that Carroll's employment with Greenberg is a breach of the restrictive covenant, and establishing that Plaintiff has a legitimate interest in protecting its client relationships developed at Plaintiff's expense;

2) demonstrating that Plaintiff will suffer irreparable harm without the requested injunctive relief because the injunctive relief is necessary to protect the goodwill that Carroll developed while employed by Plaintiff, and to discourage former employees like Carroll from inducing other representatives of Plaintiff to breach their duties to Plaintiff; and 3) the equities balance in Plaintiff's favor in light of the significant resources that Plaintiff invested to aid Carroll in developing and maintaining clients while employed by Plaintiff.

Defendants oppose Plaintiff's application, submitting that 1) Plaintiff has not demonstrated a likelihood of success on the merits in light of a) Plaintiff's failure to provide affidavits from the individuals who allegedly provided Canadeo with information about Carroll's current employment, b) the ambiguity of the non-compete clause in the Agreement, and the public policy disfavoring such covenants, and c) the fact that Carroll's current employment with Greenberg does not constitute improper competition with EGC, particularly because there is no allegation that Defendants have used trade secrets or customer lists of Plaintiff; 2) Plaintiff has not demonstrated irreparable harm without the requested injunctive relief, both because Plaintiff is seeking monetary damages and because Plaintiff has not established that Carroll played a role in Greenberg's decision to terminate his relationship with EGC; and 3) the equities balance in favor of Carroll, whose livelihood would be affected if the Court were to grant the requested injunctive relief.

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).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. See *White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Restrictive Covenants

Restrictive covenants contained in employment contracts are disfavored by the courts and, thus, 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. 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 temporal length (2) years and the public policy disfavoring such covenants, 2) the factual disputes regarding the nature of Carroll's current employment with Greenberg and whether such employment comes within the prohibited conduct set forth in the restrictive covenant, and 3) Plaintiff's failure to provide affidavits from the media and radio station personnel to whom Canadeo refers, to support his hearsay assertion that Plaintiff is providing marketing and advertising services to Greenberg.

The Court also concludes that Plaintiff has not demonstrated that it will suffer irreparable harm without injunctive relief, based on the Court's determination that any injury is compensable by money damages. Finally, Plaintiff has not shown that the equities balance in favor of Plaintiff, given Carroll's affirmation regarding her need for the compensation she receives from Greenberg to maintain her financial stability.

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

All matters not decided herein are hereby denied.

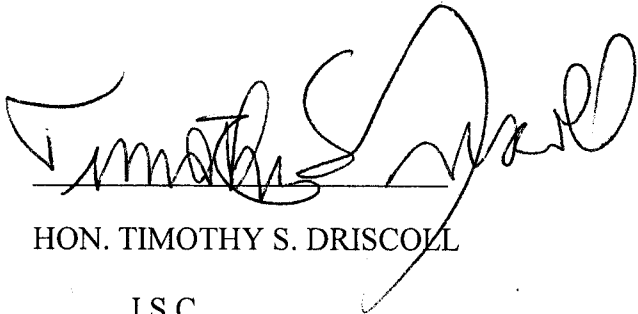
This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court for a Preliminary Conference on May 31, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY

May 14, 2012



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAY 17 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE