

Greystone Staffing, Inc. v Warner

2013 NY Slip Op 33731(U)

July 30, 2013

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.

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

**Index No: 4355-12
Motion Seq. No. 2
Submission Date: 6/20/13**

-----X

The following papers have been read on this motion:

- Notice of Motion, Affidavit in Support and Exhibits.....x**
- Memorandum of Law in Opposition and Exhibits.....x**
- Reply Affidavit in Further Support.....x**

This matter is before the Court for decision on the motion filed by Plaintiff Greystone Staffing, Inc. ("Greystone" or "Plaintiff") on January 31, 2013 and submitted on June 20, 2013. For the reasons set forth below, the Court grants leave to renew and, upon renewal, adheres to its prior determination and declines to modify its prior decision denying Plaintiff's motion for injunctive relief.¹

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 2221, granting leave to renew

¹ This action and the related matter of *Greystone Staffing, Inc. v. Jessa Niemeyer*, Nassau County Supreme Court Index Number 4356-12 ("Related Action"), have been consolidated before the Honorable Stephen A. Bucaria, who will handle all future proceedings regarding these matters.

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Plaintiff's prior motion ("Prior Motion") for injunctive relief and, upon renewal, granting the Prior Motion.

Defendant Wendy Warner ("Defendant" or "Warner") opposes the motion.

B. The Parties' History

In its prior decision ("Prior Decision") dated May 21, 2012 (Ex. C to Missirlian Aff. in Supp.), the Court denied the Prior Motion. The parties' history, including the allegations in the complaint, the provisions of the employment agreement ("Agreement") signed by Defendant, the substance of the affidavit in support of Greystone's President Phil Missirlian ("Missirlian") and the relevant legal principles, are set forth in detail in the Prior Decision and the Court incorporates the Prior Decision by reference as if set forth in full herein.

The instant action ("Instant Action") and Related Action both involve Plaintiff's request for injunctive relief against the defendants who are former employees of Plaintiff and are now working for a competing temporary employment agency, allegedly in violation of the Agreement. The allegations in the complaint in the Related Action and the verified complaint in the Instant Action are similar. In addition, the Agreements signed by the defendants contain similar restrictions, including a Restrictive Covenant which prohibits Defendant, following her resignation from Plaintiff's employ, from engaging in the same business as Plaintiff anywhere within a radius of fifty (50) miles from any offices of Plaintiff.

In the Prior Decision, the Court denied the Prior Motion based on its conclusions that 1) Plaintiff had not demonstrated a likelihood of success on the merits in light of a) 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, b) the factual disputes regarding whether Defendant has improperly used Plaintiff's information in her new employment, which Defendant denies, and c) 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; 2) the Court was 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 was required to make an independent determination of that issue; 3) Plaintiff had

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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; and 4) Plaintiff had not shown that the equities balanced in favor of Plaintiff, given Defendant's affirmation regarding the financial difficulties encountered by Plaintiff which affected the stability of her employment with Plaintiff, and her need for the stable employment provided to her by Green Key Resources ("Green Key"), her new employer. .

Plaintiff appealed from the Prior Decision and, in a decision titled *Greystone Staffing, Inc. v. Warner*, 106 A.D.3d 954 (2d Dept. 2013) ("Appellate Decision"), the Appellate Division, Second Department affirmed the Prior Decision. In the Appellate Decision, the Second Department concluded that the plaintiff had failed to demonstrate a likelihood of success on the merits, noting that the particular covenant not to compete under review belongs to the category of agreements that is subject to a stricter standard of reasonableness and provokes undoubted judicial disfavor. *Id.*, quoting *Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303, 307 (1976). The Second Department observed, further, that in light of the fact that Plaintiff had filed for bankruptcy protection, its checks had been dishonored for insufficient funds, its retirement plan payments had been unilaterally suspended and its president had been arrested, the equities did not weigh in favor of Plaintiff. *Greystone Staffing, Inc. v. Warner*, 106 A.D.3d at 954.

In support of its motion to renew, Plaintiff relies *inter alia* on 1) deposition testimony of Donna Aliperti ("Aliperti"), a non-party and former employee of Plaintiff, which Plaintiff submits establishes that Aliperti was solicited by Defendant and Green Key, 2) deposition testimony of Diane Kalberer, a representative of CBC America, regarding matters including her conversations with Defendant and the defendant in the Related Action, and 3) affirmations of Missirlian regarding information he has received regarding solicitations made by Defendant on behalf of Green Key, and supporting emails (Exs. F and G to Missirlian Aff. in Supp.).

In opposition, Defendant provides an affidavit of Aliperti who affirms that she wishes to clarify the circumstances under which she spoke with Defendant. Aliperti affirms that in mid August of 2012, she contacted Greystone to inquire about employment opportunities and spoke

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with Terri Beller (“Beller”), a recruiter at Greystone. Beller asked Aliperti to come in to meet with her, which Aliperti did a few days later. During that meeting, Beller asked Aliperti several questions about Warner and Jessa Niemeyer, the defendant in the Related Action. Aliperti affirms that, after the initial meeting, Beller called her a week later and said she had additional questions for her, which Aliperti assumed referred to job opportunities. Beller asked Aliperti to come in for another meeting and advised Aliperti that Greystone would pay her \$100.00 “for the trouble of coming in” (Aliperti Aff. at ¶ 8).

When Aliperti attended the second meeting, Beller and two other individuals presented Aliperti with a statement to sign regarding the instant action, and told her that if she did not sign the statement, Plaintiff would probably subpoena her. After Aliperti signed the statement, one of the individuals present gave her \$100 in cash. With respect to the statement she provided, Aliperti affirms that while it is true that Warner called Aliperti about a week before Aliperti’s employment at a particular company was scheduled to end, the statement she provided “doesn’t tell the whole story” (Aliperti Aff. at ¶ 16). Aliperti affirms that, prior to being contacted by Warner, Aliperti had previously responded to a blind listing placed by Green Key on Craigslist in November of 2011 and provides documentation in support (Exs. G and H to Aliperti Aff.). Prior to that inquiry, neither Warner nor Niemeyer had ever contacted Aliperti on behalf of Green Key.

In further opposition to the motion, Defendant provides an affidavit of Bianco dated March 12, 2013 (Ex. C to Finkelstein Aff. in Opp.). Bianco affirms that, 1) prior to her deposition on November 12, 2013, Plaintiff’s representatives “repeatedly contacted me and harassed me to try to get me to come into their office for me to sign a statement of some kind regarding their lawsuits against Green Key and its employees,” which Bianco declined to sign (Bianco 3/12/13 Aff. at ¶ 2); 2) thereafter, representatives of Plaintiff again contacted Bianco, tried to convince her to sign a statement and offered her \$100 “for the inconvenience” (*id.* at ¶ 3), but Bianco would not agree to sign the statement; and 3) Bianco believed that Plaintiff “was trying to buy my testimony” (*id.* at ¶ 4).

C. The Parties’ Positions

Plaintiff submits that it has provided additional facts, which were not known to Plaintiff when it filed its Prior Motion because depositions had not yet been conducted, which

demonstrate that Defendant “intentionally deceived the Court” (Missirlian Aff. in Supp. at ¶ 35) by providing her affidavit in opposition to the Prior Motion in which she denied violating the Agreement. Plaintiff submits that it has established that Defendant continues to violate the terms and provisions of the Agreement, warranting the injunctive relief sought in the Prior Motion.

Defendant opposes Plaintiff’s motion, submitting *inter alia* that 1) the Court should consider Plaintiff’s allegedly unethical behavior in offering Bianco money to sign a statement supporting Plaintiff’s allegations; 2) the restrictive covenants at issue are unduly broad as they are the product of uneven bargaining power, are not reasonably limited to protect only Greystone’s legitimate interests, are unreasonable in time or scope, and would impose an undue hardship on Defendant; 3) Plaintiff has not met its burden of establishing the appropriateness of injunctive relief in light of the fact that a) the deposition testimony and documentation on which Plaintiff relies does not establish wrongdoing by Defendant; b) Plaintiff cannot establish that it would suffer irreparable harm without the injunctive relief because any harm is compensable by money damages; and c) a balancing of the equities favors Defendant who should be permitted to earn a living; and 4) Plaintiff has not met the elements for a motion to renew because a) it is not accurate that the deposition testimony on which Plaintiff relies was not available until this action was commenced because CPLR § 3102 allows for the use of subpoenas prior to the commencement of an action; and b) the new evidence does not demonstrate any impropriety; by way of example, i) Ms. Aliperti’s deposition testimony (Ex. D to Finkelstein Aff. in Opp.) reflects that Ms. Aliperti was not solicited, but rather responded to an advertisement and contacted Green Key herself; and ii) one of the emails provided by Plaintiff in support of its motion (Ex. F to Missirlian Aff. in Supp. and Ex. I to Finkelstein Aff. in Opp.) refers to an individual named “Lauren Smith,” not to Defendant.

In reply, Plaintiff submits that, since the issuance of the Prior Decision, Defendant has continued to breach her Employment Contract with Plaintiff by actively soliciting individuals and companies. Plaintiff contends that Defendant, in opposition to the instant motion, has not denied soliciting these individuals and companies since the issuance of the Prior Decision.

RULING OF THE COURT

A motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion. *Schenectady Steel Co., Inc. v. Meyer Contracting Corp.*, 73 A.D.3d 1013, 1015 (2d Dept. 2010), quoting CPLR §§ 2221(e)(2) and (3) and citing, *inter alia*, *Barnett v. Smith*, 64 A.D.3d 669 (2d Dept. 2009) and *Chernysheva v. Pinchuk*, 57 A.D.3d 936 (2d Dept. 2008).

The Court grants renewal and has considered the new facts presented by Plaintiff in support of its motion, including the deposition testimony of non-party witnesses. The Court denies Plaintiff's motion, and declines to disturb the Prior Decision, in light of the Court's conclusions that 1) Plaintiff has not established a likelihood of success on the merits in light of issues raised by the Court in the Prior Decision, and the Second Department in the Appellate Decision, regarding the enforceability of the restrictive covenants at issue and in light of the disputes regarding whether and, if so the extent to which, Defendant violated those restrictive covenants; 2) Plaintiff has not established that it will suffer irreparable injury without the requested injunctive relief, as Plaintiff's injury, if any, appears to be compensable by money damages; and 3) a balancing of the equities does not favor Plaintiff, in part because there are issues regarding Plaintiff's failure to compensate Defendant properly when she worked for Greystone.

All matters not decided herein are hereby denied.

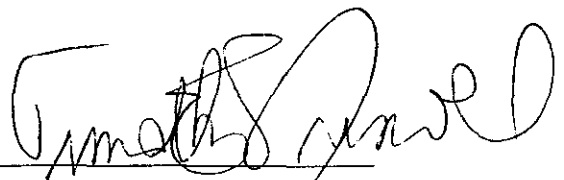
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance **before the Honorable Stephen A. Bucaria** on August 13, 2013 at 9:30 a.m.

ENTER

DATED: Mineola, NY

July 30, 2013


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

ENTERED
AUG 06 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE