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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

COMGROUP HOLDING LLC,

-against-

NAOMI GREENBAUM.

INDEX NO. 651096/2013

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____ were read on this motion to/for preliminary injunction and temporary restraining order.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s).
Answering Affidavits — Exhibits	No (s).
Replying Affidavits	No (s).

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Plaintiff's motion is granted to the extent set forth in the accompanying decision/order dated May 24, 2013.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 24, 2013

_____, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

COMGROUP HOLDING LLC,

Plaintiff,

- against -

NAOMI GREENBAUM,

Defendants.

Index No.: 651096/2013
Motion Seq. 001

DECISION/ORDER

In this action for breach of a restrictive covenant, plaintiff COMGroup Holding LLC d/b/a Alphaserve (Alphaserve) seeks to enjoin defendant Naomi Greenbaum, its former employee, from soliciting plaintiff's clients with whom defendant had contact while employed by plaintiff, or about whom defendant possessed confidential or proprietary information generated by plaintiff. Plaintiff also seeks to enjoin defendant from disclosing confidential or proprietary information generated by plaintiff. (P.'s Memo. In Support at 2.)

Alphaserve provides information technology services, including network monitoring services, to clients in a variety of industries, including the legal and financial industries. Greenbaum was employed by Alphaserve as Senior Business Development Manager from December 1, 2011 to December 2012, when she was terminated. In connection with her employment, she signed a Covenant Not To Compete And Non-Solicitation Agreement, dated December 2, 2011 (the Agreement), which prohibits any competition by Greenbaum "in the same or similar business activities" to Alphaserve's for the 12 month period following her termination.

(Agreement at 1.) This Agreement further prohibits Greenbaum from soliciting any of Alphaserve's "existing or prospective clients" for the 12 month period. (Id. at 2.) In addition, it prohibits disclosure of confidential and proprietary information. (Id. at 1.) Greenbaum also signed an Employee Proprietary Information and Inventions Agreement, dated December 2, 2011, prohibiting disclosure of confidential information. Plaintiff seeks to enforce the non-solicitation and non-disclosure covenants, but not the covenant not to compete in any similar business.

It is well settled that a preliminary injunction is an extraordinary provisional remedy that will be granted "only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant's favor." (Grant Co. v Srogi, 52 NY2d 496, 517 [1981]; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606 [2d Dept 1986]; Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996]; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005].) The proponent of a motion for a preliminary injunction must meet its burden by clear and convincing evidence. (Delta Enterp. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012].) While the proponent "need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, a party seeking the drastic remedy of a preliminary injunction must nevertheless establish a clear right to that relief under the law and the undisputed facts upon the moving papers. Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." (1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23 [1st Dept 2011] [internal citations, quotation marks and brackets omitted].)

As a threshold matter, Greenbaum argues that she was terminated without cause and that the restrictive covenants are therefore unenforceable. (D.'s Memo. In Opp. at 5-6.) While the parties dispute whether her termination was for cause, the court need not reach this issue, as there is no per se rule against enforcement of restrictive covenants where a termination is without cause. Rather, the case law cited by defendant holds that where an employer's termination of an employee is without cause, the employer may not condition the employee's receipt of post-employment benefits upon compliance with a restrictive covenant. (See Post v Merrill Lynch, Pierce, Fenner & Smith, Inc., 48 NY2d 84, 88 [1979]; see also Grassi & Co., CPAs, P.C. v Janover Rubinroit, LLC, 82 AD3d 700, 702 [2d Dept 2011]; Hyde v KLS Professional Advisors Grp. LLC, 2012 US App LEXIS 21111 *6-7 [2d Cir Oct. 12, 2012, No. 12-1484-CV].) As post-employment benefits are not at issue here, this authority is inapplicable.

New York follows a reasonableness standard in determining the validity of restrictive covenants between employees and employers. A restrictive covenant "will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." (Reed, Roberts Assocs. v Strauman, 40 NY2d 303, 307 [1976]; accord BDO Seidman v Hirshberg, 93 NY2d 382, 388-389 [1999]; see Model Mgt., LLC v Kavoussi, 82 AD3d 502, 503 [1st Dept 2011].) "[J]udicial disfavor of these covenants is provoked by powerful considerations of public policy which militate against sanctioning the loss of a [person's] livelihood. . . . Therefore, no restrictions should fetter an employee's right to apply to [the employee's] own best advantage the skills and knowledge acquired by the overall experience of [the employee's] previous employment." (Reed, Roberts Assocs., 40 NY2d at 307

[internal quotation marks and citations omitted].)

Restrictive covenants will accordingly be enforceable, if reasonable, "to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information" (Reed, Roberts Assocs., 40 NY2d at 308; accord Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp., 42 NY2d 496, 499 [1977]) or where there is actual misappropriation of customer information, as by copying or intentional memorization. (Natural Organics, Inc. v Kirkendall, 52 AD3d 488, 489 [2d Dept 2008], lv denied 11 NY3d 707; Apa Sec., Inc. v Apa, 37 AD3d 502, 503 [2d Dept 2007].) In addition, restrictive covenants, if reasonable, may be enforced "where an employee's services are unique and extraordinary and the covenant is reasonable." (Reed, Roberts Assocs., 40 NY2d at 308; 1 Model Mgt. LLC, 82 AD3d at 503.)

Thus, even where an employee has signed a restrictive covenant – here, a covenant not to solicit the employer's clients – the courts will not prohibit solicitation absent a showing by the employer that the former employee used or disclosed confidential information or confidential customer lists (see e.g. Business Networks of N.Y., Inc. v Complete Network Solutions Inc., 265 AD2d 194, 195 [1st Dept 1999] [client database]; Starlight Limousine Serv. v Cucinella, 275 AD2d 704, 705 [2d Dept 2000] [client list]) or that the employee's services were unique or extraordinary. (See e.g. Willis of N.Y. v DeFelice, 299 AD2d 240 [1st Dept 2002].)

An employee will not, however, be enjoined from soliciting clients "who came to the firm solely to avail themselves of [the employee's] services and only as a result of [the employee's] own independent recruitment efforts, which [the employer] neither subsidized nor otherwise financially supported as part of a program of client development." (BDO Seidman, 93 NY2d at 392, 393.)

As to the restrictive covenant barring disclosure of confidential information, Alphaserve makes a prima facie showing that it maintains confidential materials regarding its clients and that Greenbaum had access to this information. More particularly, Alphaserve submits the affidavits of its officers and employees attesting to the following information: Alphaserve maintains "Technical Documents" and a "Sales Document" which contain information with respect to all of Alphaserve's potential accounts, pricing information, and client needs, including technological infrastructure needs. (Aff. Of Eric Guttridge [Alphaserve's Chief Operating Officer], In Support [Guttridge Aff.], ¶¶ 2-8.) In her position as Senior Business Development Manager, Greenbaum was not only privy to information contained in the "Technical Documents" and "Sales Document" but was also provided with copies of these documents and was trained to use them. (Id., ¶¶ 9, 14-16, 20.) Alphaserve's preparation of the Technical Documents was based on Alphaserve's analysis of the clients' networks and particular needs and "represents Alphaserve's investment of substantial time and effort." (Id., ¶ 5.) In an effort to maintain the confidentiality of the documents, Alphaserve enters into non-disclosure agreements with its clients, requires employees who have access to such information to sign confidentiality agreements, and requires that employees return all Alphaserve documents containing proprietary information upon their termination. (Id., ¶¶ 11, 13, 21.)

Alphaserve makes a further showing that Greenbaum retained confidential information following her termination. After the termination, Greenbaum returned certain of Alphaserve's information, including schematics and presentations. (Aff. Of Arup Das [Alphaserve's Chief Executive Officer], In Further Support [Das Aff.], ¶¶ 2-3, Ex. B [D.'s Counsel's Letter].) Alphaserve claims that Greenbaum is still in possession of its confidential information, as

evidenced by a chart, annexed to Greenbaum's opposing papers (Ex. C to Greenbaum Aff. In Opp.), which lists various Alphaserve clients with information about their contacts and the services provided to them.

In opposition, Greenbaum asserts that this document is publicly available and is contained in plaintiff's promotional material or brochures. (Greenbaum Aff. In Opp., ¶ 29.) However, Greenbaum does not attach this material, and the document on its face does not appear to be a part of a brochure or promotional packet. Greenbaum also asserts that Alphaserve's field of business consists of approximately 70 hedge funds that are widely known in the industry, and that the identities of plaintiff's clients are therefore publicly known. (Greenbaum Aff., ¶¶ 4, 29.) She makes no showing in support of this claim, which is disputed by Alphaserve. (See Aff. Of Vasu Rao [Alphaserve's Chief Financial Officer], ¶ 15.) In any event, Greenbaum fails to submit contrary evidence, or to raise a triable issue of fact, in opposition to Alphaserve's showing that the specific technological monitoring needs of its clients constitute confidential information. Significantly, also, while Greenbaum contends that she has not "share[d] any allegedly proprietary information with any third parties" (Greenbaum Aff., ¶ 25), Alphaserve makes a showing, discussed further below (infra at 7), that Greenbaum in fact solicited its client using Alphaserve's confidential information.

The court accordingly holds that Alphaserve demonstrates a likelihood of success on the merits of its claim that it expended considerable time and effort to develop and maintain client information, and that this information is therefore confidential. (See Crown IT Servs., Inc. v Koval-Olsen, 11 AD3d 263, 265 [1st Dept 2004][restrictive covenant enforced where employer "expended significant time and effort cultivating a business relationship" with client];

Gundermann & Gundermann Ins. v Brassill, 46 AD3d 615, 616 [2d Dept 2007] [non-solicitation covenant enforceable where employer "incurred significant costs in training employees, in overhead expenses, and in developing its client base."] Compare Columbia Ribbon & Carbon Mfg. Co., 42 NY2d at 499 [trade secret protection will not attach and solicitation will not be enjoined where "customers' names are readily ascertainable from sources outside its business], with Leo Silfen, Inc. v Cream, 29 NY2d 387, 392-393 [1972] [solicitation of employer's customers will be enjoined, even absent restrictive covenant, where customers are not readily available from public information and are discoverable only by extraordinary efforts].)

This court further holds that Alphaserve demonstrates a likelihood of success on the merits of its claim that Greenbaum has wrongfully solicited an Alphaserve client. Alphaserve submits the affidavit of Nicholas Mancini, Chief Technology Officer of CRT Capital Group LLC (CRT), Alphaserve's client, attesting that he had contact with Greenbaum while she was employed by Alphaserve and that following her termination she contacted him and visited his offices to market the monitoring services offered by her new employer. (Mancini Aff. In Further Support, ¶¶ 5-9.) Greenbaum claims that she had a prior relationship with CRT (Greenbaum Aff., ¶ 21), but does not provide any details as to such relationship or any evidence that she serviced CRT before joining Alphaserve. Further, Mancini categorically states that Greenbaum did not have an established relationship with CRT and did not do business with CRT prior to working for Alphaserve. (Id., ¶ 6.) Greenbaum also avers that she did not solicit CRT but, rather, that CRT reached out to her through a LinkedIn "inmail." (Greenbaum Aff., ¶¶ 25-26.) Again, however, she does not attach a copy of this purported e-mail, does not deny meeting with

CRT, and thus does not raise an issue of fact as to whether she solicited CRT.[1]

Alphaserve also makes the necessary showing of irreparable harm. In the absence of an injunction prohibiting Greenbaum's solicitation of Alphaserve's clients, Alphaserve "would likely sustain a loss of business impossible, or very difficult, to quantify." (Willis of N.Y., 299 AD2d at 242; see BDO Seidman, 93 NY2d at 396.) Finally, the balance of the equities lies in Alphaserve's favor. Defendant acknowledges that in her current employment she has "not been assigned to any accounts that involve any of Alphaserve's clients." (Greenbaum Aff., ¶ 24.) Therefore, enforcement of the non-solicitation and non-disclosure provisions will not affect defendant's ability to earn a livelihood.

While the court concludes that Alphaserve is entitled to injunctive relief, the requested injunction is overbroad insofar as it seeks to prohibit Greenbaum from soliciting not only existing but prospective customers. Greenbaum will be enjoined, for a period of 12 months from the date of her termination of employment with Alphaserve, only from soliciting clients of Alphaserve with whom she had contact while employed by Alphaserve, other than clients who came to Alphaserve solely as a result of Greenbaum's independent efforts. This restriction is reasonable as it will not prevent her from working with Alphaserve's "entire client base" or clients developed through her own efforts – restrictions that would not serve to promote a legitimate interest on Alphaserve's part. (See BDO Seidman, 93 NY2d at 392-393.)

It is hereby ORDERED that the parties shall confer with a view to reaching agreement on

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[1]The court rejects defendant's contention that the Mancini affidavit should not be considered or that defendant should have the opportunity to submit a sur-reply to it. Defendant's affidavit in opposition addressed her relationship to CRT and contacts with CRT after termination of her employment with Alphaserve. (Greenbaum Aff., ¶¶ 21-28.) The Mancini affidavit is thus properly considered as it was responsive to the Greenbaum affidavit.

the form of an order granting a preliminary injunction consistent with this decision and on the amount of an undertaking. If they are able to reach agreement, they shall file a proposed order with a stipulation consenting to the order. If they are unable to reach agreement, plaintiff shall settle order and, if the parties dispute the undertaking, they shall each file a five page affidavit or affirmation, as appropriate, setting forth the requested amount of the undertaking and the factual basis therefor, together with a five page memorandum of law; and it is further

ORDERED that the parties shall appear in Part 60, 60 Centre Street, New York, New York, Room 248, on July 18, 2013 at 3:30 p.m. for a preliminary conference.

This constitutes the decision and order of the court.

Dated: New York, New York
May 24, 2013

MARCY FRIEDMAN, J.S.C.