

Turnage v Match Eyewear, LLC
2015 NY Slip Op 32876(U)
August 12, 2015
Supreme Court, Nassau County
Docket Number: 601971-15
Judge: Timothy S. Driscoll
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ORIGINAL

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

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

-----x
PHILIP TURNAGE,

Plaintiff,

-against-

**MATCH EYEWEAR, LLC, JONATHAN PRATT
and ETHAN GOODMAN,**

Defendants.
-----x

TRIAL/IAS PART: 14

NASSAU COUNTY

Index No: 601971-15

Motion Seq. No. 2

Submission Date: 8/7/15

Papers Read on this Motion:

- Order to Show Cause, Affidavit in Support, Exhibits
and Memorandum of Law in Support.....X**
- Verified Complaint.....X**
- Affidavit of J. Pratt and Exhibits.....X**
- Affidavit of E. Goodman and Exhibit.....X**
- Defendants' Memorandum of Law in Opposition.....X**
- P. Turnage Affidavit in Reply and Exhibits.....X**
- Plaintiff's Memorandum of Law in Reply.....X**

This matter is before the court on the motion filed by Plaintiff Philip Turnage ("Turnage" or "Plaintiff") on May 11, 2015 and submitted on August 7, 2015. For the reasons set forth below, the Court grants the motion to the extent that the Court directs that the temporary restraining order issued by the Court on May 11, 2015 shall remain in effect, pending further court order, on the condition that Plaintiff post a bond in the sum of \$25,000 on or before September 4, 2015. ¹

¹ Defendants filed a motion for injunctive relief (motion sequence number 3) which was withdrawn on June 15, 2015. The affidavits of Defendants Jonathan Pratt and Ethan Goodman, which were submitted in support of that motion, have been considered by the Court in connection with the motion that is the subject of this decision.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR Article 63, preliminarily enjoining Defendants Match Eyewear, LLC (“Match”), Jonathan Pratt (“Pratt”) and Ethan Goodman (“Goodman”) (“Defendants”), pending final resolution of this action, from taking any actions barring Plaintiff from working in sales, design, production or manufacturing of eyewear, sun wear and/or eyewear or sun wear accessories.

B. The Parties’ History

The Verified Complaint (“Complaint”) alleges as follows:²

Match is a leading international manufacturer and distributor of superior quality eyewear and sun wear. Pratt was and still is the managing member of Match and Goodman was and still is a member and/or principal of Match. Turnage has been employed in the eyewear and sun wear industry for nearly 25 years, and has attained recognition and acclaim for his skills and abilities in those industries.

On or about February 1, 2012, Turnage and Match entered into an Employment Agreement (Ex. A to Comp.). In conjunction with the Employment Agreement, Turnage and Match are also parties to a Limited Liability Company Membership Unit Grant Agreement and Schedule 1 (Terms and Conditions of Employment Agreement), also annexed as part of Exhibit A to the Complaint. Pursuant to the Employment Agreement, Match retained Turnage as President of Sales and he has performed in that capacity since February 1, 2012. Plaintiff alleges that he has performed his obligations under the Employment Agreement, and helped Match grow and succeed in the eyewear and sun wear industries.

Plaintiff alleges that Match, through Pratt and Goodman, has engaged in improper conduct that causes Plaintiff concern regarding the value of his prospective interest in Match. That conduct includes, but is not limited to, 1) violating State and Federal tax laws by failing to

² Plaintiff has annexed a copy of a verified complaint as Exhibit D to his Order to Show Cause. That complaint, however, contains only two defendants in the caption while the caption of the Order to Show Cause contains three defendants. The Court has obtained a copy of the verified complaint filed electronically in this action. That verified complaint contains three defendants in the caption and differs somewhat from the complaint annexed as Exhibit D to Plaintiff’s Order to Show Cause.

report income and using Match funds to pay for personal expenses of employees and members; 2) misappropriating and failing to report cash income received at trade shows from overseas accounts; 3) repeatedly misrepresenting to Plaintiff and Match's customers the source/country of origin of certain products sold and distributed by Match; and 4) converting and improperly using computer software and programs without paying required licensing and use fees. Plaintiff also alleges that Defendants have refused to make Match's books and records available to Plaintiff.

The Complaint contains five (5) causes of action: 1) Match, by and through Pratt and Goodman, breached the Agreements between the parties by failing to pay all compensation and remuneration due to Turnage, including bonuses, sales commissions and other compensation agreed to by the parties; 2) Defendants breached their implied covenant of good faith and fair dealing; 3) Defendants, through their actions, constructively discharged Plaintiff; 4) Pratt and Goodman, acting with malice and with the intent to cause Match to breach its agreements with Plaintiff, tortiously interfered with Plaintiff's agreements with Match; and 5) a request for a declaratory judgment stating that, by virtue of Defendants' alleged breaches of the agreements between the parties, any non-competition or non-solicitation provisions in the Agreements between the parties are unenforceable.

On May 11, 2015, the Court issued a temporary restraining order ("TRO") which directed that, pending a hearing and determination of this motion, Defendants are temporarily restrained from taking any further actions to bar Plaintiff from working in sales, design, production or manufacturing in the field of designer eye wear, provided that Plaintiff neither solicits nor initiates contact with Defendants' employees, clients, or customers.

Section 2.6 of the Terms and Conditions of Employment Agreement ("Terms and Conditions"), titled "Duty of Non-Competition; Non-Solicitation," provides as follows:

In consideration for Company's continued employment of Executive and providing Executive with Confidential Information, the Executive agrees that (A) during the Term of Employment and for a period of twelve (12) months following the expiration or earlier termination thereof, the Executive shall not, directly or indirectly, without the express prior written consent of Company enter the employ of, or render any services to, any person, firm, corporation which is engaged in a "Competitive Business" or engage in any Competitive Business on Executive's own account or become interested in any such Competitive Business, directly or indirectly, as an individual, partner, shareholder, director, officer, principal, agent, employee, trustee, consultant, or in any other relationship or capacity (other than acquiring, solely as an investment, securities of any public corporation); or (B) during the Term of Employment and for a period of twenty-four (24) months following the expiration or earlier termination thereof, the Executive shall not, directly or indirectly, without the express prior written consent of Company solicit employees of Company to terminate their employment with Company and/or any subsidiary or affiliate of Company or hire any such employees or solicit business from customers or suppliers or anyone who was a customer or supplier during the preceding twelve (12) month period with Company, and/or any subsidiary or affiliate of Company (but in no event shall such prohibited solicitation apply to any persons or entities with whom the Permitted Business has conducted any business to the extent such solicitation is strictly for and in connection with the Permitted Business). Notwithstanding contrary, conflicting or contradictory clause or provision, Competitive Business shall also not include Executive's ownership of any business that otherwise qualifies as a Competitive Business but Executive's ownership of such business is less than 5% of the stock of a publicly-held corporation whose stock is traded on a national securities exchange or in the over-the-counter market.

In support of the motion, Turnage submits that the restrictive covenant ("Restrictive Covenant") in the Employment Agreement is too restrictive and is preventing Turnage from earning a living. Turnage also submits that the Restrictive Covenant should not be enforced against him because Defendants' conduct constituted a constructive discharge of Turnage's employment as of January 6, 2015. Turnage affirms that he has been employed in the eyewear and sun wear industry for nearly 25 years and, while he is proficient at his job, he submits that his abilities are not "unique or extraordinary" (Turnage Aff. in Supp. at ¶ 5; quotation marks in original). Turnage affirms the truth of the allegations in the Complaint, and affirms that, as a result of Defendants' misrepresentations regarding where the Match products were manufactured, Plaintiff made misrepresentations to his client base which jeopardized his reputation.

Turnage affirms that Mondottica USA, LLC (“Mondottica”), an eyewear wholesaler, contacted Turnage prior to April 2015. Counsel for Plaintiff advised counsel for Match that, absent an objection by Match by April 15, 2015, Plaintiff would accept Mondottica’s offer. By letter dated April 15, 2015 (Ex. C to Turnage Aff. in Supp.), counsel for Match opposed Plaintiff’s acceptance of the offer and advised Plaintiff that Match would seek to enforce the Restrictive Covenant. Match notified Mondottica of the Restrictive Covenant and Mondottica subsequently withdrew its offer to Plaintiff. Plaintiff affirms that, as a result of Match’s conduct, he has been unable to work, which has adversely affected his personal life and financial stability.

Pratt affirms that Plaintiff terminated his relationship with Match effective January 6, 2015 and, since that time, has participated in a new business that directly competes with Match, and has used Match’s confidential and proprietary business information in that new business. Pratt affirms that, pursuant to the parties’ agreements, Plaintiff is permitted to engage in a “Permitted Business” (Pratt Aff. at ¶ 13), as defined in Article 1 of the Terms and Conditions, which is defined as a business that is 1) owned equally by Plaintiff and Goodman; and 2) “engaged solely in selling, designing, manufacturing, producing or distributing eyewear and related accessories...” Plaintiff, however, may not participate in a Competitive Business until January 5, 2016 and may not either solicit or hire Match’s employees or solicit Match’s customers until January 5, 2017.

Pratt affirms that Plaintiff, while employed by Match, had access to Match’s confidential and proprietary business information, including Match’s eyewear products, independent optical sales channels, corporate clients, license and distribution agreements with third parties, and sales representatives. Pratt affirms that Match’s employees, customer list and relationships are “invaluable” to Match (Pratt Aff. at ¶ 18) because all of Match’s revenues are derived from its customers and relationships. In addition, Match’s employees and sales force are an essential component of its business. Pratt affirms that Plaintiff, at or around the time of his resignation, engaged in conduct designed to compete with Match by using its confidential and proprietary business information. Pratt affirms that Plaintiff has an external backup drive in his possession, which was purchased by Match, that contains all of Match’s confidential and proprietary business information, which he has not returned to Match.

Goodman affirms that, in the weeks prior to Turnage's resignation from Match, a sales executive responsible for Match's Canadian business who reported to Turnage tendered his resignation. Rather than directing the Canadian manager to return his computer containing Match's confidential Canadian sales data to Match's headquarters in Long Island, Turnage directed that sales executive to send the computer to Turnage's home in Louisiana. It was only after counsel for Match interceded that Turnage complied with Match's request that the computer be returned. In or about the week of December 10, 2014, shortly before his resignation, Turnage requested copies of various confidential materials, in an editable format. Those materials were provided to him on a flash drive, and that flash drive has not been returned to Match. Those materials included 1) a copy of Match's Sales Representative Training Manual and corporate procedures, and 2) marketing/customer presentation materials which detail Match's brands and products. Goodman also provides details regarding 1) his observation of Turnage at eyewear industry trade shows, 2) his observation of Turnage's wife at a trade show where she was making negative comments about Match, including her comment that Match was preventing Turnage from making a living, and 3) an email and other evidence that, Defendants submit, supports the conclusion that Turnage's post-employment conduct has caused Match's customers to stop doing business with Match.

In reply, Turnage affirms *inter alia* that 1) the purportedly confidential or proprietary information is not, in fact, confidential because it is readily available on line, by direct observation or is information within Turnage's exclusive knowledge and memory; 2) if the Court enforces the Restrictive Covenant, Turnage will be unable to earn a living because he will be unable to rely on the customer base that he has cultivated over the past 25 years; 3) Turnage's presence at trade shows does not establish that he has solicited Match's customers, Turnage has the right to attend those trade shows to learn about current trends and styles, and new products, and Turnage has not solicited business at those trade shows; 4) he has secured employment with Mondottica commencing August 1, 2015 and, to date, has not performed any work on Mondottica's behalf; and 5) Turnage provided Defendants with the original hard drives to which they make reference, as they requested.

C. The Parties' Positions

Plaintiff submits that he has established his right to the requested injunctive relief by 1) establishing a likelihood of success on the merits by demonstrating that a) Defendants have not identified any confidential information or trade secrets acquired by Plaintiff during his employment with Match; b) Plaintiff's services were not unique or extraordinary, and the fact that Plaintiff excelled at his job does not establish the uniqueness of the services that he provided; and c) the Restrictive Covenant is unenforceable because it is overly broad in time and area; 2) demonstrating that he will suffer irreparable harm without the requested injunctive relief because he will be unable to earn a living; and 3) demonstrating that the equities balance in Plaintiff's favor because Plaintiff's career will effectively be ended without the requested injunctive relief while Defendants will suffer minimal, if any harm.

Defendants oppose the motion submitting that Plaintiff has not demonstrated a likelihood of success on the merits in light of the fact that 1) Defendants dispute Plaintiff's claim that they breached the agreements between the parties and constructively discharged Plaintiff and, therefore, there is no merit to Plaintiff's contention that the Court should not enforce the Restrictive Covenant because of Defendants' conduct; 2) Plaintiff's contention that the Restrictive Covenant is unenforceable has been rendered moot by the fact that Defendants are not seeking to enjoin Plaintiff from working for Mondottica; and 3) Plaintiff's contention that Defendants failed to report income and engaged in other improper conduct is unrelated to the Employment Agreement and cannot form the basis of a grant of injunctive relief in his favor. Defendants also submit that it is Defendants, not Plaintiff, who can demonstrate a likelihood of success on the merits on their anticipated counterclaims for breach of fiduciary duty, unfair competition and conversion.

Defendants also contend that Plaintiff has failed to identify any irreparable harm. Plaintiff's contention that he will be left without employment is moot in light of the fact that Defendants do not seek to enjoin Plaintiff from working for Mondottica, despite the fact that it is in direct competition with Match. Defendants submit that the Court should enjoin Plaintiff from doing business with certain Match customers in light of facts that have been uncovered, since the issuance of the TRO, which establish that Plaintiff has been conducting business activities with

Mondottica while in possession of Match's trade secrets and confidential/proprietary information. Finally, Defendants submit that a balancing of the equities favors Defendants whose "confidential, sensitive business information is in the hands of an ex-employee who has no valid reason for being in possession of same and is now working for a direct competitor" (Ds' Memo. of Law in Opp. at p. 19).

In reply, Plaintiff reaffirms his position that 1) the information regarding which Defendants seek relief is not worthy of trade secret protection because it is readily obtainable in trade industry publications or on-line; 2) Defendants' claim that Plaintiff has obtained confidential information that would aid him in competing with Match is speculative and conclusory; and 3) a balancing of the equities favors Plaintiff who will not be able to earn a living without the requested injunctive relief.

RULING OF THE COURT

A. Injunctive Relief

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).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); see *Abinanti v. Pascale*, 41 A.D.3d

395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); see also CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

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 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). Covenants not to compete will be enforced if reasonably limited as to time, geographic area, and scope, are necessary to protect the employer's interests, not harmful to the public, and not unduly burdensome. *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc.*, 126 A.D.3d 859, 860 (2d Dept. 2015), quoting *Ricca v. Ouzounian*, 51 A.D.3d 997, 998 (2d Dept. 2008) and citing *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389 (1999); *Arthur J. Gallagher & Co. v. Marchese*, 96 A.D.3d 791, 792 (2d Dept. 2012).

A restrictive covenant in an employment agreement will only be enforceable if, *inter alia*, it is necessary to protect the employer's legitimate interests. *Arthur J. Gallagher & Co. v. Marchese*, 96 A.D.3d 791, 792 (2d Dept. 2012) citing *BDO Seidman v. Hirshberg*, 93 N.Y.2d at 388-389; *Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303, 307 (1976). An employer's interests justifying a restrictive covenant are limited to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary. *Arthur J. Gallagher & Co. v. Marchese*, 96 A.D.3d at 792, quoting *BDO Seidman v. Hirshberg*, 93 N.Y.2d at 389. In addition, the employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment. *Arthur J. Gallagher & Co. v. Marchese*, 96 A.D.3d at 792, quoting *BDO Seidman v. Hirshberg*, 93 N.Y.2d at 392. C.

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. 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, and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Ashland Mgt. v. Janian*, 82 N.Y.2d 395, 407 (1993), quoting Restatement of Torts Section 757, comment b.

D. Application of these Principles to the Instant Action

The Court grants the motion to the extent that the Court directs that the temporary restraining order issued by the Court on May 11, 2015 shall remain in effect, pending further

court order, on the condition that Plaintiff post a bond in the sum of \$25,000 on or before September 4, 2015. While Plaintiff appears to be in violation of the Restrictive Covenant, there are issues regarding the enforceability of the Restrictive Covenant given its breadth and the public policy disfavoring such covenants. In addition, there are factual disputes regarding whether Plaintiff has improperly used Defendants' confidential/proprietary information to compete with Defendants, and whether the purportedly confidential/proprietary information is deserving of trade secret protection information, or is readily available to individuals in the eyecare and sun care business. In light of Turnage's affirmation that, without the requested injunctive relief, he will be unable to earn a living, the Court concludes that Plaintiff has demonstrated sufficient irreparable harm, and a balancing of the equities in his favor, to warrant some injunctive relief.

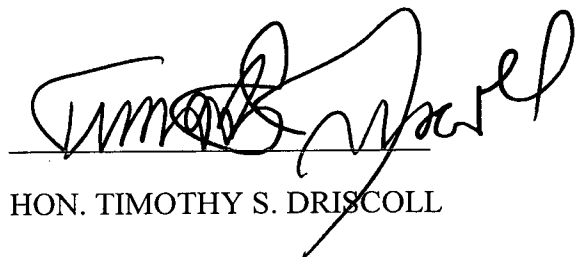
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

August 12, 2015



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

AUG 19 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE