

**Guild Agency Speakers Bureau & Intellectual Talent
Mgt., Inc. v Speakers Boutique, Inc.**

2016 NY Slip Op 31780(U)

September 26, 2016

Supreme Court, New York County

Docket Number: 652041/16

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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THE GUILD AGENCY SPEAKERS BUREAU AND
INTELLECTUAL TALENT MANAGEMENT, INC.,

Index No.
652041/16

Plaintiff,

**DECISION
and ORDER**

- v -

Mot. Seq. 002

SPEAKERS BOUTIQUE, INC., OUTSPOKEN
AGENCY, LLC, CAITLIN BRADLEY, TARA
BERTHIER and TORI MARRA,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, The Guild Agency Speakers Bureau and Intellectual Talent Management Inc. (“Guild Agency” or “Plaintiff”), brings this action against defendants Speakers Boutique Inc. (“Speakers Boutique”), Outspoken Agency, LLC (“Outspoken”), Caitlin Bradley (“Bradley”), Tori Marra (“Marra”), and Tara Berthier (“Berthier”) (collectively, “Defendants”), seeking injunctive relief, an accounting, and compensatory damages arising from Defendants’ alleged breach of their employment and consulting agreements with Plaintiff. Bradley and Marra are former employees of Guild Agency. Berthier is a former consultant to Guild Agency through her company, Speakers Boutique. Bradley, Berthier, and Marra are co-founders of Outspoken. In the Amended Verified Complaint, Plaintiff alleges that Defendants have conspired to sabotage bookings with Guild Agency, compete with Guild Agency, solicit Guild Agency clients, and induce Guild Agency’s exclusive talent into terminating their relationships with Guild Agency. Plaintiff asserts claims for breach of contract, breach of duty of loyalty and fiduciary duty, tortious interference with contract, tortious interference with business relations, unfair competition, aiding and abetting breach of fiduciary duty and loyalty, and misappropriation of confidential information.

Plaintiff commenced this action on April 18, 2016 by filing an application seeking a temporary restraining order and a preliminary injunction enforcing certain alleged restrictive covenants in Bradley and Marra’s employment

agreements and Berthier and Speakers Boutique's consulting agreement with Plaintiff. On May 24, 2016, the parties appeared before this Court for a hearing. The hearing was adjourned to "give [Plaintiff] an opportunity to present evidence" to meet its burden of presenting clear and convincing evidence in support of its application. At the subsequent June 21, 2016 hearing, this Court denied Plaintiff's request for a preliminary injunction and lifted the temporary restraining order.

Defendants now move by Order to Show Cause for a preliminary injunction, pursuant to CPLR 6301, barring the enforcement of the alleged restrictive covenants against Defendants. Defendants submit the affirmation of James E. Patterson, Esq., dated July 19, 2016, annexing copies of (i) the Verified Answer and Counterclaims; (ii) the affidavit of Caitlin Bradley filed on May 12, 2016; (iii) the affidavit of Tori Marra filed on May 12, 2016; (iv) the affirmation of Tara Berthier filed on May 12, 2016; (v) the affidavit of Caitlin Bradley filed on June 20, 2016; (vi) the affidavit of Tori Marra filed on June 20, 2016; and (vii) the affirmation of Tara Berthier filed on June 20, 2016.

The return date for Defendants' application was August 30, 2016. To date, Plaintiff has not filed opposition to Defendants' application for a preliminary injunction.

Marra was allegedly subject to a restrictive covenant in her Non-Disclosure, Confidentiality, and Non-Competition Agreement with Plaintiff that barred her, during her employment with Guild Agency and "for a period of one (1) year following the cessation or termination of employment for any reason" from

be[ing] employed in any capacity as an employee, partner, individual proprietor, officer, stockholder, investor, director, joint venture, or in any other capacity no [sic] known or hereinafter devised in any capacity whatsoever with a business venture engaged in literary representation, publishing, or arranging, coordinating, or booking Speakers, Entertainers, Public Intellectuals, Authors, Musical Acts, Comedians or Consulting Clients with any Forum, Company, Business, Festival, Conference, Venue, or University/College (the "Entities") in the United States and Canada in any capacity other than as an employee of the [Plaintiff], or otherwise compete, directly or indirectly, with the [Plaintiff]; * * *

Amended Verified Complaint, Exhibit A ¶ 10(a).

Similarly, the non-competition clause in Bradley's Non-Disclosure, Confidentiality, and Non-Competition Agreement provides that, during her employment with Guild Agency and "for a period of one (1) year following the cessation or termination of employment for any reason," Bradley "shall not directly or indirectly"

as a partner, individual proprietor, officer, stockholder, employee, investor, director, joint venture, lender, or in any other capacity no [sic] known or hereinafter devised in any capacity whatsoever (other than holding no more than one percent (1%) of the total outstanding stock of a public company), engage in arranging, coordinating, or booking Speakers, Entertainers (Musical Acts and Musicians are not subject to this clause), Comedians or Consulting Clients with any Forum, Company, Business, Festival, Conference, Venue, or University/College (the "Entities") in the United States and Canada in any capacity other than as an employee of the [Plaintiff], or otherwise compete, directly or indirectly, with the [Plaintiff]; * * *

Amended Verified Complaint, Exhibit B ¶ 10(a).

Both non-competition clauses in Marra and Bradley's respective Non-Disclosure, Confidentiality, and Non-Competition Agreements further prohibit Marra and Bradley from

divert[ing], solicit[ing], tak[ing] away, or attempt[ing] to take away or divert, the business or patronage of any Speakers, Entertainers, Musical Acts, Comedians, Consulting Clients, Forums, Companies, Businesses, Festivals, Conferences, Venues or Universities/Colleges, or prospective Speakers, Entertainers, Musical Acts, Comedians, Consulting Clients, Forums, Companies, Businesses, Festivals, Conferences, Venues or Universities/Colleges, including, without limitation, any Entities who does or did business with the [Plaintiff] at any time during the [Defendants'] employment with the [Plaintiff], or otherwise contact[ing] said Entities who does or did business with the [Plaintiff] during such period, for any purpose competitive to the business of the [Plaintiff].

Amended Verified Complaint, Exhibit A ¶ 10(c); Exhibit B ¶ 10(c).

Defendants assert that such restrictive covenants are overbroad, anticompetitive, and serve no legitimate business purpose. Defendants further

assert that Berthier explicitly refused to sign any agreement with Plaintiff that included a non-competition provision, and that Plaintiff has failed to submit proof that Berthier or Speakers Boutique were ever subject to restrictive covenants blocking competition.

It is well settled that to prevail on an application for preliminary injunctive relief, the moving party must demonstrate (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position. *See* CPLR 6301; *Barone v. Frie*, 99 A.D.2d 129, 132 (2d Dept. 1984); *see generally Doe v. Axelrod*, 73 N.Y.2d 748 (1988). The determination as to whether to issue a preliminary injunction “is a matter ordinarily committed to the sound discretion of the lower courts.” *Doe*, 73 N.Y.2d at 750. The court need not “determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits.” *Tucker v. Toia*, 54 A.D.2d 322, 325–26 (4th Dept. 1976); *see also 2914 Third Sportswear Realty Corp. v. Acadia 2914 Third Ave., LLC*, 93 A.D.3d 573, 573 (1st Dept. 2012) (“[T]he purpose of interlocutory relief is not to determine the ultimate rights of the parties but to maintain the status quo until a full hearing on the merits can be held.”); *Jaime B. v. Hernandez*, 274 A.D.2d 335 (1st Dept. 2000).

Courts have granted preliminary injunctions to prevent employers from enforcing restrictive covenants in employment agreements where such covenants are not likely to be enforceable. *See, e.g., Frank v. Wesco Distribution, Inc.*, 68 A.D.3d 641, 641–42 (1st Dept. 2009) (affirming an order entering a preliminary injunction barring an employer from enforcing the non-competition clauses in the employment agreements because they were broader than necessary to protect the employer’s limited interests and employees would be prohibited from working in their field during the duration of the restrictive covenants); *see also Yedlin v. Lieberman*, 102 A.D.3d 769, 770 (2d Dept. 2013) (affirming grant of preliminary injunction to employee who demonstrated likelihood of success because restrictive covenant “applied to the entire United States, and would have precluded the plaintiff from merely ‘participating’ in projects that involved the defendants’ present or former clients”).

A restrictive covenant in an employment agreement not to compete “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.” *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389 (1999) (quoting *Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303, 307 (1976)). “Legitimate interests” 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." *BDO Seidman*, 93 N.Y.2d at 389.

The restrictive covenants at issue here apply to the entire United States and Canada and bar defendants Marra and Bradley from being employed or connected "in any capacity whatsoever" with any business engaged in "arranging, coordinating, or booking" "Speakers, Entertainers, Comedians or Consulting Clients" with "any Forum, Company, Business, Festival, Conference, Venue, or University/College." The restrictions broadly prohibit Marra and Bradley, "in any capacity other than as an employee of [Plaintiff]," from "otherwise compet[ing], directly or indirectly, with the [Plaintiff]."

With respect to defendants Berthier and Speakers, Plaintiff has only submitted an unexecuted version of an earlier draft of the consulting agreement between Plaintiff and Speakers.¹ In Berthier's affirmation, she attests that she negotiated a consulting agreement between Guild Agency and Speakers for a period of one year, and that during these negotiations, she made clear that she would not sign any agreement with a non-compete clause. Berthier further attests that the final version of the consulting agreement did not include a non-compete provision.

Defendants have thus demonstrated a likelihood of success in showing that the restrictive covenants are either not enforceable as overbroad or do not exist. Furthermore, Defendants have shown that enforcement of the covenants will unduly restrict Defendants from working in the speakers bureau business, causing them significant financial hardship, and that the balance of equities favors the Defendants because the loss of their ability to earn a livelihood in their chosen field is greater than the alleged potential loss sustained by Plaintiff. In failing to oppose the motion, Plaintiff does not contest the truth of Defendants' assertions in their application for preliminary injunctive relief. Accordingly, the Court finds that Defendants have demonstrated a likelihood of success on the merits, irreparable injury absent a preliminary injunction, and that a balancing of the equities weighs in their favor.

Wherefore, it is hereby

¹ The unsigned draft of the consulting agreement is annexed as Exhibit A to the affidavit of James M. Reilly, founder and CEO of Guild Agency, in further support of Plaintiff's application for a preliminary injunction (Mot. Seq. 1). In his affidavit, Reilly avers that the document is a true and correct copy of an earlier draft of the agreement that was eventually signed.

ORDERED that Defendants' motion, brought by Order to Show Cause, for a preliminary injunction, enjoining and restraining the enforcement of the non-competition clauses in defendants Tori Marra and Caitlin Bradley's employment agreements, annexed to the Amended Verified Complaint as Exhibit A, ¶ 10 and Exhibit B, ¶ 10, and the alleged restrictive covenants in the consulting agreement between Plaintiff and defendants Berthier and Speakers Boutique, is granted without opposition.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

DATED: SEPTEMBER 26, 2016

SEP 26 2016



EILEEN A. RAKOWER, J.S.C.