

Haque v Sound Point Capital Mgt. LP

2018 NY Slip Op 31378(U)

June 29, 2018

Supreme Court, New York County

Docket Number: 653016/2018

Judge: Andrea Masley

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

PRESENT: Hon. ANDREA MASLEY
Justice

PART 48

MURTAZA HAQUE,

INDEX NO. 653016/2018

Plaintiff,

- v -

MOTION DATE _____

SOUND POINT CAPITAL MANAGEMENT LP, and
STEPHEN KETCHUM,

MOTION SEQ. NO. 001 + 002

Defendants.

The following papers, numbered 1 to _____, were read on this motion FOR A PRELIMINARY INJUNCTION REGARDING A NONCOMPETE.

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) —

Exhibits — Memorandum of Law -----

No(s). _____

Answering Affirmation(s) — Affidavit(s) — Exhibits -----

No(s). _____

Replying Affirmation — Affidavit(s) — Exhibits -----

No(s). _____

Upon the foregoing papers, it is

By letter dated August 10, 2012 (the Agreement), defendant Sound Point Capital Management, LP offered to employ plaintiff Murtaza Haque as a consultant paying \$48,000 per year, and no benefits or bonus. However, the salary would increase to \$150,000 per year (\$12,500 per month) with plan benefits and bonus, if he accepted an offer of employment. The job consisted of "advice and assistance with respect to various investments" and "generating potential investment ideas and performing credit analysis on such ideas." The letter continues that, after closing a particular deal, Sound Point "intends to offer you an opportunity to join Sound Point as a full-time employee." "If Sound Point extends you an offer as a full-time employee and you accept such offer, you shall be terminated as a consultant." "Sound Point's offer of employment, if any, is not to be considered a contract guaranteeing employment for any specific duration...you will be an employee 'at will.'" "The terms of this agreement and the possible offer of employment shall be governed by and interpreted according to the law of the state of New York." The letter includes a paragraph entitled "Confidentiality, Non-Disparagement, and Non-Solicitation" and references Exhibit A which provides:

"Prior to your termination of your Sound Point Services, and for a period of three (3) months thereafter, you will not, directly or indirectly (whether as officer, director, owner, partner, consultant, employee) or otherwise engage in, assist or have an interest in, or enter the employment of or act as an agent, advisor or consultant for, any person or entity which is engage in, or will be engaged in, the investment management business" (p.6).

"Sound Point is a multi-billion dollar private asset management firm founded in 2008 with particular expertise in credit strategies. Sound Point manages \$17.1 billion as the investment advisor for various hedge funds vehicles, including 18 CLOs

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

(collateralized loan obligation product), as well as various managed accounts. Sound Point manages money on behalf of institutions, pensions, foundations, insurance companies, wealth management firms, family offices and high net worth individuals." ¶2, Stephen J. Ketchum affidavit dated June 22, 2018.¹ At the time of his departure, Haque was designated a key person for Sound Point's CLOs, was one of four members of the investment committee and was designated portfolio manager for eight of Sound Point's CLOs. Id at 4.

Haque terminated his employment with Sound Point on May 18, 2018 and on June 4, 2018, commenced employment with GoldenTree Asset Management LP (GoldenTree) as a portfolio manager.

In his June 15, 2018 petition, Haque seeks a declaratory judgment that the Agreement is unenforceable as a matter of law and alleges Sound Point's tortious interference with prospective business advantage. In motion sequence number 001, Haque seeks a TRO and preliminary injunction allowing him to continue his employment with GoldenTree.

In motion sequence number 002, Sound Point seeks a TRO and preliminary injunction enforcing the noncompetition provision for 90 days; enjoining Haque from destroying evidence; and enjoining Haque from using Sound Point's confidential, proprietary and trade secrets.

For injunctive relief under CPLR 6301, the movant must establish likelihood of success on the merits of the action; the danger of irreparable harm in the absence of a preliminary injunction; and a balance of equities in favor of the moving party. Under New York law, restrictive covenants are strictly construed. (*Columbia Ribbon & Carbon Mfg. Co v A-1-A Corp.*, 42 NY2d 496, 499 [1977].) Employees will be enjoined when a restrictive covenant is reasonable in scope, duration and geographical. (*Reed, Roberts Assocs., Inc. v Strauman*, 40 NY2d 303 [1976].)

"While powerful public policy considerations militate against enforcement of restrictive covenants, at the same time, the employer is entitled to protection from unfair or illegal conduct that causes economic injury. The rules governing enforcement of anticompetitive covenants and the availability of equitable relief after termination of employment are designed to foster these interests of the employer without impairing the employee's ability to earn a living or the general competitive mold of society. Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on an employee's employment mobility

¹In signing the OSC and the TRO on June 21, 2018, the court did not rely on the undated and unsigned statement of Stephen J. Ketchum, Haque's former supervisor, a Managing Partner and Chief Investment Officer of Sound Point, submitted in support of Sound Point's requested TRO, which is not notarized. However, his affidavit was subsequently provided to the court, dated June 22, 2018, signed and notarized.

where a mutuality of obligation is bargained for by the parties. Indeed, the modern trend in the case law seems to be in favor of according such covenants full effect when they are not unduly burdensome."

(*Maltby v Harlow Meyer Savage, Inc.*, 166 Misc. 2d 481, 485 [Sup Ct, NY County 1995] [citations omitted].)

Haque argues that Sound Point cannot establish success on the merits because it has no legitimate protectable business interest for a restrictive covenant to protect. He insists that there is no evidence of his misuse of Sound Point's confidential information and no risk of inevitable disclosure. Rather, any email that Haque sent to himself during his employment was part of his ordinary course of business and performance of his duties. Finally, Haque claims his services as a portfolio manager are not unique.

Haque insists enforcement will cause him irreparable harm. He objects to the non-compete as over broad as the Agreement fails to define the "prohibited conduct." Haque claims that enforcement of the restrictive covenants will jeopardize his current employment at GoldenTree and render him unemployable causing him irreparable harm. Haque objects to Sound Point's failure to compensate him during the three month hiatus. By comparison, he insists that Sound Point will suffer no harm. Accordingly, Haque concludes that depriving Haque of employment and income for three months far exceeds no harm to Sound Point, and, thus, the balance of the equities is in his favor.

At argument on the TRO, the court invited the parties to brief the issue of whether there was any consideration for the restrictive covenants. In its June 19, 2018 response, Sound Point provided a long list of cases applying *Zellner v Conrad* (183 AD2d 250 [2d Dept 1992]), which held that continued employment constitutes sufficient consideration for a non-compete where discharge was the alternative, or where the employee remained with the employer for a substantial time after the covenant was signed. (See *Addison Hosp. Grp LLC v Kaciupski*, 2018 NY Slip Op 50853 [U], *5 n 3 [Sup Ct, NY County 2018] [adopting *Zellner* and noting with regard to a 12-month non-compete that "[a] restrictive covenant will be upheld without consideration where an at-will-employee remained with the employer for a substantial amount of time after the covenant was signed".) Instead, Haque repeated his arguments emphasizing Sound Point's alleged inability to establish irreparable harm. For this proposition, Haque relies on *Gilliland v Acquafredda Enters., LLC* (92 AD3d 19 [1st Dept 2011]), a case involving a real property easement, and not relevant here. In the absence of opposition, the court is compelled to find at this preliminary juncture that there was consideration for the 90 day non-compete.²

Although Sound Point has yet to answer, it has established success on the

²The court reminds the parties that a decision on a motion for a preliminary injunction is not a final determination of the merits and rights of the parties.

merits of a breach of contract claim of both the confidentiality provision and the covenant not to compete for 90 days.

As to confidentiality, the Agreement provides that the employee shall not "knowingly divulge, furnish, or make available to any third Person or (ii) or use for your own purposes (except for the performance of your duties and responsibilities to Sound Point." Sound Point asserts that Haque violated the Agreement by sending Sound Point's proprietary information to his personal Gmail and Yahoo e-mail accounts. Sound Point conducted a computer search and established that, from September 2017 to his departure, Haque sent himself documents relating to Sound Point's investments, memos, strategies, talking points, models, business plans, investor presentations, and executive summaries.³ Wendy Ruberti, Sound Point's general counsel and chief compliance officer, declares that Sound Point takes all necessary measures to protect its proprietary information, e.g. employee desktops do not allow USB devices to prevent downloading. (Ruberti Affidavit, June 18, 2018.) Ruberti explains that such downloading is unnecessary because Sound Point uses Citrix which allows remote access.⁴ Employees, including Haque, certify annually that they are in compliance with Sound Point's policies including use of Citrix. Accordingly, she opines, Haque's downloading could not have been for Sound Point's benefit. The court also rejects Haque's argument that Sound Point must also show that Haque actually and improperly transferred to a third-party the purloined data.

Likewise, Sound Point has established success on the merits for violation of the non-compete provision. Admittedly, Haque began working for GoldenTree 15 days after departing Sound Point's employ well before the 90 day restriction expired. The court finds that the restrictive covenant is reasonable in scope, duration and geographical area. (*Reed Roberts Assoc v Strauman*, 40 NY2d 303.) The 90-day duration here is short compared to cases in the Commercial Division which generally exceed a year. Indeed, the duration *Recovery Racing*, a case relied upon by Haque, rejected by Judge Mendez, was 18 months. When the court weighs this short duration against the other factors of scope and geography, which are far broader, the court is compelled to find it reasonable.

Sound Point also establishes irreparable harm if this proprietary information is disclosed to a competitor such as GoldenTree, Haque's new employer. Rick Richert, Sound Point portfolio manager, states

³In her June 27, 2018 affidavit, Wendy Ruberti expanded on her initial search and found a hiatus from 2015 to September 2017 and an increase in email activity as Haque's date of departure approached. The court finds the two affidavits reliable as they appear to be based on actual computer searches. They are not the same as the conclusory and speculative statements on information and belief rejected by Judge Mendez in the *Recovery Racing V, LLC v Mackeigan*, a case relied upon by Haque, 2016 WL 2956931 (Sup Ct, NY County 2016).

⁴Ruberti also confirmed that Haque never complained about issues with using Citrix and that other employees had accessed Citrix 2,452 times since January 1, 2018 demonstrating an absence of problems.

"This information is highly proprietary in nature. While CLO portfolios are available on Index (Once they are launched), the underlying processes are not. Sound Point has a very specialized way of managing and maintaining portfolio construction, and Sound Point is a top decile-ranked manager by several third-party research firms. Competitors in the space who became aware of those processes could replicate them, and if they were aware of those being considered for a Sound Point CLO in the process or ramping, they could target those same loans for purchase and thereby drive up the purchase prices." ¶4.

Therefore, the court also rejects Haque's unsupported assertion that Sound Point has no legitimate protectable business interest. Accordingly, this case differs from *Recovery Racing*, where the employer seeking to enforce a noncompete against the service manager of an auto repair shop in Manhattan had been hired by the new owner of the repair shop when the employer sold the business and left Manhattan. Here, Sound Point is an ongoing business in competition with Haque's new employer.

The balance of the equities favors Sound Point. The court's rejects Haque's dramatic claim that enforcement of the restrictive covenant will render him unemployable as conclusory. Rather, Haque's 90 days without work is not the same potential loss of livelihood for 18 months in *Recovery Racing*. Haque's position also significantly differs from the mechanic in *Recovery Racing*.

Sound Point has established a likelihood of success on the merits, irreparable harm and a balancing of the equities in its favor and the motion for a preliminary injunction is granted on condition that Sound Point pay Haque's salary in lieu of an undertaking. (See *Maltby, supra.*, 166 Misc 2d at 487.) This provision also addresses Haque's alleged irreparable harm and balances the equities.

Accordingly, it appearing to this court that a cause of action exists in favor of the defendant Sound Point Capital Management, LP and against the plaintiff and that the defendant is entitled to a preliminary injunction on the ground that the plaintiff threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the defendant's rights, as set forth in the decision, it is

ORDERED that plaintiff is enjoined and restrained for 75 days (90 - 15 days of not working prior to employment with GoldenTree) from May 18, 2018 from engaging in employment with GoldenTree Asset Management LP or any other competitor in the CLO business; and it is further

ORDERED that, in lieu of an undertaking, defendant Sound Point Capital Management, LP is directed to pay plaintiff's salary for the 90-day non-compete period. (Based on the 2012 Agreement, the monthly amount would be \$12,500 per month for three months. The parties shall modify the amount of compensation consistent with the plaintiff's last paycheck); and it is further

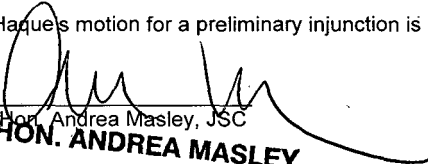
ORDERED, that Sound Point's motion is granted to the extent that Haque is enjoined from destroying evidence and from using Sound Point's confidential,

proprietary and trade secret; and it is further

ORDERED, that all parties are directed to preserve documentary evidence including electronic information stored on computers and phones. No one shall trade in a mobile phone; and it is further

ORDERED that plaintiff Murtaza Haque's motion for a preliminary injunction is denied.

Dated: June 29, 2018
New York, New York


Hon. Andrea Masley, JSC
HON. ANDREA MASLEY
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 as appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE