

Business Capital, LLC v Lazar
2018 NY Slip Op 31489(U)
July 3, 2018
Supreme Court, New York County
Docket Number: 652252/2018
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 652252/2018

**BUSINESS CAPITAL, LLC, COMMONWEALTH MERCHANT
ADVANCE, INC.,**

07/03/2

Plaintiffs,

MOTION DATE 018

- v -

MOTION SEQ. NO. 001

**ABRAHAM LAZAR, ADVANCED CAPITAL VENTURES LLC,
ADVANCE CAPITAL USA LLC, BLACKRIVER CAPITAL LLC,
JOHN DOES,**

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion for PREL INJUNCTION/TEMP REST ORDR

ORDER

It appearing to this Court that a cause of action exists in favor of the plaintiffs and against the defendants and that the plaintiffs are entitled to a preliminary injunction on the ground that the plaintiffs have demanded and would be entitled to a judgment restraining the defendant Lazar from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiffs, as set forth in the aforesaid decision, it is

ORDERED that such preliminary injunction shall be effective upon the posting of an undertaking to be fixed, upon a further hearing, in the sum of \$ _____ conditioned that the plaintiff, if it is finally determined that they were not

entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendant Lazar, his agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of such defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts: enjoined from calling, soliciting, or referring, entering any cash advance transactions with any customers or independent sales offices with whom he had a relationship during his employment with plaintiffs; and it is further

ORDERED that the application of plaintiffs seeking other provisional relief is denied; and it is further

ORDERED that the temporary restraining order is vacated; and it is further

ORDERED that counsel are directed to appear for a hearing to fix an undertaking in Room 331, 60 Centre Street, New York, New York on July 18, 2018, at 11:00 AM.

DECISION

BDO Seidman v Hirshberg, 93 NY2d 382 (1999) is the seminal case that sets forth the standards for determining the validity

of an employment anti-competitive agreement. The court in Seidman applied a three-prong test to evaluate whether a restraint in such contract is reasonable, which is that: "it (1) is *no greater* than required for the protection of the legitimate business interest of the employer; (2) does not impose undue hardship on the employee and (3) is not injurious to the public. Seidman also held that New York courts give greater weight to the interest of agreements between and among professionals in restricting competition within a confined geographical area.

The Non-Solicit and Confidentiality Agreement at bar (the Agreement) is that of a merchant cash advance business. Since such business does not involve a learned profession, the interests of the employer plaintiffs are not entitled to the weight that would be given to those of a company of accountants or physicians, for example.

Irrespective of the nature of the business, plaintiffs have not demonstrated a likelihood of success on the merits of its action for breach of certain terms of the Agreement.

There is no dispute that defendant Lazar worked as a sales agent for plaintiffs for all of eight months and entered into the Agreement as condition of such contract of employment. Under Seidman, the imposition of such condition as a condition of initial employment, as opposed to promotion to a position of more responsibility, suggests overreaching and coercive use of

dominant bargaining power by plaintiffs. Seidman, supra, at 395.

Further some of the restriction are overbroad, i.e., greater than necessary to protect plaintiffs' legitimate interests. Specifically, the Agreement restricts defendant Lazar from soliciting independent sales offices (ISOs), whether they were referred by him or not, i.e., the restriction extends to ISOs with whom he never acquired a relationship during his employment. Seidman, supra, at 393. The facts of this case are distinguishable from those in Ashland Management Inc. v Altair Investments, NA, LLC, 59 AD3d 97, 100 (1st Dept. 2008), where plaintiffs brought forth evidence that on at least 40 occasions after leaving its employ, defendants used plaintiff's Federal Express account to send packages of information to plaintiff's clients for the purposes of soliciting business on behalf of the new entity that defendants formed.

However, the court severs and finds that plaintiffs are likely to succeed on restrictions related to merchants and ISOs with whom defendant Lazar developed a relationship while in the employment of plaintiffs, as plaintiffs have established that defendant Lazar violated such restriction when he solicited plaintiffs' merchants and used ISOs in his new business, with whom he interacted when in plaintiffs' employment. In making such solicitations, it had at the ready its own website, that

copied verbatim the exact same content that appears on plaintiffs' website. Plaintiffs have a legitimate business interest in "protection against defendant's competitive use of client relationships which [plaintiffs] enabled him to acquire through his performance of [sales agent] services for the [plaintiffs'] clientele during the course of his employment." Seidman, supra, at 392.

7/3/2018
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE