

Sussman Educ., Inc. v Gorenstein
2018 NY Slip Op 33326(U)
December 17, 2018
Supreme Court, New York County
Docket Number: 655978/18
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Andrew Borrok
Justice

PART 57

Sussman Education, Inc.

INDEX NO. 655978/18

-v-

MOTION DATE _____

MOTION SEQ. NO. 2

Eric Gorenstein et al.

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ ☐ No(s). _____

Replying Affidavits _____ ☐ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

The Plaintiff's motion for a preliminary injunction is granted for the reasons set forth on the record and to the extent indicated below.

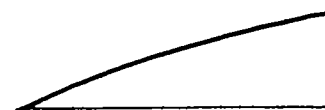
A preliminary injunction should be granted only if the movant demonstrates (i) a likelihood of ultimate success on the merits, (ii) irreparable injury to movant if the preliminary injunction is not issued and (iii) the balance of equities favors the movant. *Willis of New York, Inc. v. DeFelice*, 299 Ad.2d 240 (1st Dept. 2002).

Reference is made to a certain (x) Confidentiality, Non-Competition and Non-Solicitation Agreement (the **Non-Competition Agreement**), dated June 13, 2014, between Sussman Sales Company, Inc. and Eric Gorenstein and (y) a certain letter, Agreement (the **Employment Agreement**), dated June 13, 2014, by and between Sussman Sales and Eric Gorenstein.

According to the terms of the Employment Agreement, Mr. Gorenstein was hired to be an Account Representative for the plaintiff servicing Long Island, Rockland and Westchester counties and such other territories as may be added or changed based on customer demand and representative performance.'

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

Dated: _____

 _____, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
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The Non-Competition Agreement provides in relevant part:

2. Non-competition and Non-solicitation

(a) During my employment with Company and for a period of twenty-four (24) months thereafter (the **Non-Competition Period**), I shall not either directly or indirectly, on my own or on others' behalf, engage in, or assist others in any of the following activities (except on behalf of the Company):

(i) (whether as principal, partner or otherwise) engage in, own, manage, operate, control, finance, invest in, participate in, or otherwise carry on, or be employed by, associated with, or in any manner connected with, lend such my name to, lend my credit to, or render services or advice to a competing business; or provide or develop for use in a competing business any products, technology, or services that are the same or substantially similar to the products, technology and services provided by or developed by the Company.

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(b) During my employment with Company, and for a period of twenty-four (24) months thereafter (the **Non-Solicitation Period**), I shall not either directly or indirectly, on my own or on others' behalf, engage in, or assist otherwise in any of the following activities:

(i) induce or attempt to induce any publisher or business relation of the Company to cease doing business with the Company or to do business with a Competing Business, or in any way interfere with the relationship between the Company and any publisher or business relation with the Company as such relationship relates to a Competing Business;

(ii) on behalf of or for the benefit of a Competing Business, solicit or attempt to solicit the business or patronage of any person who is a publisher, K-12 school or business relation of the Company whether or not Employee had personal contact with such Person...

(d) I acknowledge and agree that the provisions of this Section 2 (the "Restrictive Covenants" are reasonable and valid in geographical and temporal scope and in all other respects and are necessary in order to secure the Company the benefits for which it has contracted...

Dated: _____

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3.(b) Injunctive Relief. I acknowledge and agree that, by virtue of my position with the Company, the services to be rendered by me to the Company under this Agreement and my access to and use of confidential records and proprietary information, any violation of me of any of the undertakings contained in this agreement may cause the Company or its affiliates immediate, substantial and irreparable injury for which it has no adequate remedy at law. Accordingly, I agree that in the event of a breach or threatened breach by me of any said undertaking, the Company will be entitled to temporary and permanent injunctive relief in any court of competent jurisdiction.

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Simply put, the Plaintiff has satisfied each prong of the test. The Plaintiff argues that there is no doubt that Mr. Gorenstein breached the above referenced non-competition agreement which is enforceable and which the Plaintiff is only seeking to enforce as against the parties listed on Schedule A and Schedule B to their moving papers because he is engaged with ERC (hereinafter defined) and has solicited clients of the Plaintiff. The Plaintiff offers substantial evidence of the breach, including without limitation, a business card of Mr. Gorenstein from ERC indicating that he is the Program Coordinator for New York and a chain of emails from PS 33 where ERC sent a proposal to PS 33 cc'ing Mr. Gorenstein and PS 33 responding and incorrectly misdirecting their response to Mr. Gorenstein's Sussman email account." Second, the Plaintiff correctly argues that it will suffer irreparable harm in that it will lose business, goodwill and clients which in the absence of the injunction Mr. Gorenstein will drive to ERC which under BDO Seidman is difficult to quantify. Third, the Plaintiff correctly argues that the balance of the equities favor the injunctive relief in that the injunction only seeks to prevent Mr. Gorenstein from engaging with the parties identified on Schedule A and Schedule B of the moving papers and for only 2 years. Under the limited scope of the injunction, Mr. Gorenstein can still earn a living. The Plaintiff argues that nothing prevents Mr. Gorenstein from selling services in Putnam or Orange counties or in New Jersey or in any other place outside of Long Island, Westchester, Rockland or any area not under the jurisdiction of the NYC Department of Education.

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In opposition, Mr. Gorenstein argues, among other things, that the non-competition agreement is unenforceable because (i) Mr. Gorenstein is owed commissions, (ii) Mr. Gorenstein was fired without cause because in 2017 he was allegedly the highest earning salesman, (iii) it is not limited in scope in that among things it includes clients that he had a relationship prior to his employment with the plaintiff, and (iv) there is no actual geographic limit in the provision. None of these arguments however are availing. To the extent that Mr. Gorenstein alleges that he is owed commissions, although the Plaintiff disputes this claim, the Plaintiff is prepared to provide an undertaking in the exact amount of the commission that Mr. Gorenstein claims. Mr. Gorenstein was fired in August, 2018 – approximately 10 months following the review that he offers in evidence as support for the notion that he was fired without cause. The Plaintiff alleges that Mr. Gorenstein was fired because he wasn't properly servicing his client and began fabricating his whereabouts stating that he was doing the company's business when in fact he was not.

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[Signature], J.S.C.

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Mr. Gorenstein does not offer any evidence that his performance in 2018 mirrored that of 2017 and his 2017 performance is simply not evidence that rebuts plaintiff's allegations that he was not properly servicing Plaintiff's clients or not fabricating his whereabouts. By way of example, although Mr. Gorenstein emailed certain sales information to himself, he offers none of this sales information to indicate that like in 2017, in 2018, he was performing at the highest level he allegedly performed in 2017 or even an acceptable level for the Plaintiff in 2018 – the year his services were terminated. Further, Mr. Gorenstein does not allege or offer any evidence to support the notion that his alleged prior relationships became clients of the plaintiff solely because of his prior relationship. *See, Good Energy, L.P. v. Kosachuk*, 49 A.D.3d 331, 332, 853 N.Y.S.2d 75, 76 (1st Dep't 2008); *Fullman v. R&G Brenner Income Tax Consultants*, 24 Misc. 3d 1214(A), 897 N.Y.S.2d 669 (Sup. Ct. N.Y. Cty. 2009); *see also Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina*, 9A.D.3d 805, 806, 780 N.Y.S.2d 675, 677 (3d Dep't 2004). Finally, Mr. Gorenstein was hired by the Plaintiffs to service a particular area per the Employment Agreement and the enforcement sought of the non-compete provision is limited to Schedule A and Schedule B of the Plaintiff's motion. The non-competition agreement must be read in conjunction with the Employment Agreement which does contain geographic specificity. The non-compete does not prevent Mr. Gorenstein from working outside of Westchester, Long Island, Rockland or areas outside of the jurisdiction of the New York Department of Education.

Dated: _____

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Upon the foregoing papers, it is ordered that this motion is

Accordingly, it is hereby

ORDERED, that the Court issues a preliminary injunction against (i) Mr. Gorenstein restraining and enjoining Mr. Gorenstein from rendering services to ERC (hereinafter defined) and solicit or attempt to solicit any of the parties identified on Schedule A and Schedule B of the moving papers to do business with ERC and (ii) M. Infantino & Associates, Inc. d/b/a Education Associates Company (ERC) from engaging or encouraging Mr. Gorenstein to solicit or attempt to solicit business or patronage from Sussman clients or Sussman partners as identified on Schedule A and Schedule B of the moving papers. For the avoidance of doubt, nothing herein prevents ERC from engaging without Mr. Gorenstein with respect to any such clients or partners; and it is further

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Upon the foregoing papers, it is ordered that this motion is

ORDERED, that the Plaintiff is ordered to file an undertaking in the amount of \$42,520 within ten (10) business days of the date hereof; and it is further

ORDERED, that the Plaintiff is directed to serve in accordance with CPLR 308, a summons and complaint within ten (10) business days of the date hereof; and it is further

ORDERED, that the Defendants shall file an answer within twenty (20) days thereafter; and it is further

ORDERED that a preliminary conference shall be held at 11:30 in Room 238 a 60 Centre Street on January 22, 2019.

¹ Exhibit A to Affidavit of Eric Gorenstein in Opposition to Preliminary Injunction.² See business card of Mr. Gorenstein showing Mr. Gorenstein as Program Coordinator for New York City for ERC attached as Exhibit 3 to Affidavit of Steve Sussman in Support of Preliminary Injunction and Temporary Restraining Order (the Sussman Affidavit) ¶15 as proof that Mr. Gorenstein was engaged by ERC; See also ¶24 of the Sussman Affidavit and Exhibit 11 of the Sussman Affidavit where Mr. Sussman indicates that a representative from PS 33 (one of Sussman's largest client) an email on October 11, 2018 at 12:55 to Mr. Gorenstein Sussman email account and personal account asking that he print a proposal that he had ERC put together for the school and responding to an email that had been sent from ERC approximately 30 minutes earlier sending such proposal from Velma Rosario, dated October 11, 2018, 12:28 PM to Santos Lynette and cc'ing Eric Gorenstein re: Rally Education Proposal for PS 033; Timothy Dwight (X033).Dated: 12/17/18Andrew Barrok, J.S.C.
Hon. Andrew Barrok

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