

Ascential Group Ltd. v Millerberg
2020 NY Slip Op 31689(U)
May 28, 2020
Supreme Court, New York County
Docket Number: 657340/2019
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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ASCENTIAL GROUP LIMITED, ASCENTIAL INC., AND
ONECLICKRETAIL.COM, LLC

Plaintiff,

- v -

SPENCER MILLERBERG,

Defendant.

-----X

INDEX NO.	657340/2019
MOTION DATE	01/21/2020
MOTION SEQ. NO.	001
DECISION + ORDER ON MOTION	

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 17, 18, 19, 20, 23, 24, 25, 26, 41 were read on this motion to/for PRELIMINARY INJUNCTION.

In this action arising out of the sale of a business, plaintiffs Ascential Group Limited, Ascential Inc., and OneClickRetail.com, LLC (OCR) (collectively, Ascential) move for a preliminary injunction enjoining defendant Spencer Millerberg from hiring or “enticing away” any Ascential officers or employees, inducing any party having a business relationship with Ascential to terminate such relationship, and using or disseminating Ascential’s confidential information.

Defendant Millerberg and plaintiff Ascential Group Limited entered into a Membership Interest Purchase Agreement (MIPA) as of August 24, 2016. (MIPA, Preface [Aff. of Michael Lisowski (Chief Operating Officer of the Ascential Group), Ex. A] [NYSCEF Doc. No. 4].) Pursuant to the MIPA, a subsidiary of Ascential Group Limited purchased the shares of OCR from Millerberg and others in return for a cash payment of \$44 million and earn-out payments over the next four years, with the total payment not to exceed \$225 million. (MIPA § 1.02.) In connection with the MIPA, Millerberg and plaintiffs signed an employment agreement, dated as of August 24, 2016, under which Millerberg assumed the positions of President and Chief

Executive Officer of OCR Information Services LLC. (Employment Agreement § 1.1 [Lisowski Aff., Ex. B] [NYSCEF Doc. No. 4].)

The MIPA contains non-compete, non-solicit, and confidentiality clauses applicable to Millerberg, among others, as a Restricted Party, for a period of six years from the Closing Date (the Restricted Period). (Id., § 5.04 [a] – [c], § 5.05.) The Employment Agreement also contains non-compete, non-solicit, and confidentiality clauses. (Employment Agreement, §§ 6.1-6.3, Ex. A.)

As a threshold matter, the court notes that plaintiffs’ order to show cause seeks relief only under the non-solicitation and confidentiality clauses. At the oral argument, plaintiffs did not appear to seek relief under the non-compete clause. (Oral Argument Transcript, at 30 [NYSCEF Doc. No. 41].) In plaintiffs’ reply brief, however, plaintiffs asserted that defendant’s production of documents “exposes additional breaches of his agreements not to compete with Ascential, and . . . provide[s] a basis for expanding the scope of the preliminary injunction.” (Pls.’ Reply Memo., at 12 [NYSCEF Doc. No. 23].) To the extent that plaintiffs seek relief for the first time on the reply under the non-compete clause, that request is not properly entertained by the court on this motion. The court turns to plaintiffs’ claims under the non-solicitation and confidentiality clauses.

The MIPA provision precluding the solicitation of Ascential’s clients (MIPA client solicitation provision) states in pertinent part:

“During the Restricted Period, no Restricted Party shall, directly or indirectly, urge, induce, or seek to urge or induce any Company Client or any supplier, licensee, licensor, franchisee, employee, consultant or other business relationship of the Company or Buyer or any of its Affiliates to terminate their business relationship with the Company or Buyer or any of its Affiliates or to cancel, reduce, limit or in any manner interfere with the business relationship of the Company or Buyer or any of its Affiliates with any Company Client or any supplier, licensee, licensor, franchisee, employee, consultant or other business relation of the Company or Buyer or any of its Affiliates.”

(MIPA, § 5.04 [b].)

The MIPA provision precluding the solicitation of Ascential's officers and employees

(MIPA employee solicitation provision) states in pertinent part:

“During the Restricted Period, no Restricted Party shall, directly or indirectly, whether for its own account or for the account of any other Person, hire, offer to hire, entice away or in any other manner persuade or attempt to persuade any individual who is or was an officer, employee, consultant or agent of the Company Group or the Business as of or prior to the Closing Date or during the Restricted Period. . . .”

(MIPA, § 5.04 [c].)¹

The MIPA provision precluding the use of Ascential's confidential information provides in pertinent part:

“After the Closing, none of Seller or the Seller Owners shall, and each of Seller and the Seller Owners shall cause its Affiliates not to, disclose or permit others to disclose any of the Company Information to any Person (other than the Company, Buyer or its Affiliates or officers or employees of the Company, Buyer or its Affiliates who are subject to obligation of confidentiality to the Company, Buyer or one of its Affiliates) or use or permit others to use any of the Company Information.”

(MIPA, § 5.05.) “Company Information” is defined in pertinent part as: “the identities of the current, former or prospective employees. . . .” (MIPA, Art. X.)

To obtain a preliminary injunction, the movant must “demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005].) The movant must establish its entitlement to a preliminary injunction by clear and convincing evidence. (Delta Enter. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012]; Gilliland v Acquafredda Enterprises, LLC, 92 AD3d 19, 24 [1st Dept 2011].)

¹ MIPA § 5.04 [b] also precludes solicitation of employees.

A fact-based standard must be applied to determine whether a non-solicitation clause has been breached. (See generally Bessemer Trust Co., N.A. v Branin, 16 NY3d 549, 557 [2011] [applying fact-based standard in determining whether the seller of the good will of a business breached the implied covenant not to solicit former customers].)

Here, in claiming that Millerberg violated the non-solicitation provisions of the MIPA and the Employment Agreement, plaintiffs focus on Millerberg's alleged solicitation of Hugh Hinkson, a former OCR employee who left OCR to join Pattern, an alleged competitor of Ascential. (Memo. In Support, at 11-12 [NYSCEF Doc. No. 11].) As acknowledged by Millerberg, in the summer of 2019, Millerberg met with Garrett Bluhm, a Pattern employee, at Bluhm's request. (Millerberg Aff. In Opp., ¶ 35 [NYSCEF Doc. No. 18].) Bluhm brought a "stack of printed LinkedIn profiles" for employees he was considering hiring, and asked Millerberg about the individuals in the profiles, including Hinkson. (Id., ¶¶ 35-36.) After Millerberg's meeting with Bluhm, Hinkson asked Millerberg for advice "on how to negotiate a potential job offer. . ." at an upcoming interview that Pattern had scheduled with Hinkson. (Id., ¶ 38.) During this conversation, Millerberg stated that he had told Bluhm that Hinkson was "in the top 3 people [Bluhm] should steal from ocr." (Id., ¶ 40; Text Messages [Lisowski Aff., Ex. F] [NYSCEF Doc. No. 4].) On or about August 9, the CEO of Pattern, David Wright, contacted Millerberg for a reference for Hinkson, which Millerberg provided. (Millerberg Aff. In Opp., ¶ 42.) Five additional Ascential employees resigned and commenced employment with Pattern after Hinkson left OCR. Millerberg claims that he was not aware of these resignations until Ascential commenced a lawsuit against Hinkson. (Id., ¶ 43.)

Plaintiffs characterize Millerberg's conversation with Bluhm as "telling Bluhm which employees Pattern should go after." (Pls.' Reply Memo., at 9.) They contend that Millerberg engaged, at a minimum, in indirect solicitation prohibited by MIPA § 5.04 (c). Moreover,

plaintiffs argue that Millerberg divulged confidential information during this conversation as to which high-performing employees Pattern should try to poach from Ascential. (Pls.' Reply Memo., at 11.) Plaintiffs also describe Millerberg's advice to Hinkson as "coaching" and as part of a series of events in which Millerberg "brokered a deal between Pattern and Hinkson." (Id., at 10.)

Millerberg posits that Bluhm approached him because of Millerberg's "deep ties to the industry, his experiences and the contacts and network he has built within the industry." (Def.'s Memo. In Opp., at 11 [NYSCEF Doc. No. 17].) He argues that his actions did not violate the non-solicitation clause because he merely "responded truthfully" to Bluhm's questions as to Hinkson's abilities. (Id.) Millerberg also asserts that, during his conversation with Hinkson, he never encouraged him to leave Ascential, but "simply responded to Mr. Hinkson's request for advice on how to approach the interview process with Pattern." (Id., at 12.) While Millerberg "regrets" his use of the word "steal" in his message to Hinkson, he asserts that he used "steal" to mean "hire away from Ascential," which "was what Pattern was trying to do." (Id., at 12.) Millerberg also denies that his call with Wright violated the non-solicitation clause because Wright sought a reference for Hinkson, which Millerberg provided. (Id., at 12-13.)

Whether or not Pattern is a competitor, an issue this court need not decide on this motion, Millerberg's actions go far beyond merely answering questions honestly or giving a reference. Bluhm and Millerberg evaluated a "stack" of LinkedIn profiles of prospective employees for the benefit of Pattern, a third-party. During this evaluation, Millerberg provided his opinion as to the quality of each prospective hire. Millerberg's opinion of Hinkson and other Ascential employees was based upon their performance at Ascential relative to other employees—information that was not public. Millerberg would not have been in possession of such information absent his role in the company. Information as to the identities of the "most capable" or "top" Ascential

employees thus constitutes confidential information within the meaning of the MIPA. On these facts, plaintiffs demonstrate a likelihood of success on the merits of their claim that Millerberg assisted a third-party's search for prospective employees using confidential information obtained during his employment.

In this context, Millerberg's provision of advice to Hinkson about interviewing and negotiating a job offer with Pattern cannot be dismissed as advice to a friend but, rather, supports plaintiffs' claim that Millerberg facilitated Pattern's hire of Hinkson away from Ascential. Millerberg's attempt to excuse his use of the word "steal" in his text messages to Hinkson is ineffective. Taken together, these facts sufficiently show at least indirect solicitation. (See Marsh USA Inc. v Karasaki, 2008 WL 4778239, *20 [SDNY 2008].)

Plaintiffs thus demonstrate a likelihood of success on the merits of their claim that Millerberg violated the MIPA employee solicitation and confidentiality provisions. Irreparable harm is presumed because the MIPA anti-solicitation covenant arose in connection with Millerberg's sale of his business. (See UAH-Mayfair Mgt. Group, LLC v Clark, 177 AD3d 572, 573 [1st Dept 2019]; BDC Mgt. Servs. LLC v Singer, 144 AD3d 597, 597-98 [1st Dept 2016].) Further, plaintiffs satisfy the requirement that the balance of equities tips in their favor because a preliminary injunction will maintain the status quo—i.e., the prohibition on solicitation—established in their contract with Millerberg. (See Buchanan Capital Markets, LLC v DeLucca, 144 AD3d 508, 509 [1st Dept 2016].)

On this record, plaintiffs do not demonstrate a likelihood of success on the merits of a claim that Millerberg violated the MIPA client solicitation provision. On the reply, plaintiffs make a showing that Millerberg provided services to Ascential clients. As held above, however, that new factual information is not appropriately considered on the reply.


It is accordingly hereby ORDERED that the motion of plaintiffs for a preliminary injunction is granted to the following extent:

It is hereby ORDERED that defendant Millerberg and all those acting in concert with him, are enjoined and restrained from directly or indirectly (a) whether for Millerberg’s own account or for the account of any other Person, hiring, offering to hire, enticing away or in any other manner persuading or attempting to persuade any individual who is or was an officer, employee, consultant or agent of Ascential Group Limited, Ascential Inc., and OneClickRetail.com, LLC (collectively, Ascential); (b) using, copying or disseminating any of Ascential’s Company Information, which is defined in the MIPA entered into as of August 24, 2016 between and among Ascential Group Limited and Spencer Millerberg; and it is further

ORDERED that the undertaking is fixed in the sum of \$50,000 conditioned that plaintiffs, if it is finally determined that they were not entitled to an injunction, will pay to defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 60 by telephone on June 23, 2020 at 2:30 p.m. The parties should circulate a dial-in to the court and all parties in advance of the conference. The parties should also submit a completed preliminary conference order to the Part 60 email in advance of the preliminary conference.

5/28/2020
DATE


MARCY S. FRIEDMAN, J.S.C.

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