

Setter Capital, Inc. v Chateauvert
2020 NY Slip Op 32341(U)
July 15, 2020
Supreme Court, New York County
Docket Number: 651992/2020
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

-----X

SETTER CAPITAL, INC.

Plaintiff,

- v -

MARIA CHATEAUVERT,

Defendant.

INDEX NO. 651992/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

Upon the foregoing documents, it is DENIED

Plaintiff Setter Capital, Inc. (Setter) moves, pursuant to CPLR 6301, for a preliminary injunction enjoining its former employee defendant Maria Chateauvert from “directly or indirectly soliciting, inducing or recruiting or attempting to interfere with the relationship between plaintiff and any customer, client supplier, licensee or other business relation of plaintiffs or otherwise disrupt, damage, impair or interfere in any manner with the business of plaintiff until February 3, 2022.” (NYSCEF Doc. No. [NYSCEF] 7, Proposed Order to Show Cause.)

Plaintiff has the burden to establish: (1) a likelihood of success on the merits of the action; (2) the danger of irreparable injury in the absence of preliminary injunctive relief; and (3) a balance of equities in favor of the moving party. (*Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005].)

Setter describes itself as serving a “niche market” using its “proprietary secondary

market network, SecondaryLink™ - a go-to hub for over 5,000 institutional investors, managers and industry participants to follow the ever-evolving secondary market and to connect and collaborate on diligence and secondaries on over 9,000 private equity, real estate, infrastructure, real asset and hedge fund families and over 20,000 funds.” (NYSCEF 1, Complaint ¶ 13.) Setter’s proprietary information is located on SecondaryLink™, including “the Setter Liquidity Rating” which ranks thousands of funds according to their liquidity, saleability and popularity. (*Id.* ¶ 14.) Setter updates and keeps Setter Liquidity Rating current at its own expense.” (*Id.*) For 14 years, Setter has collected “current and past pricing of funds and non-public details about various buyers and sellers such as their goals, general and trade preferences, transaction history, assets, current and past investments, investments sizes, plans, strategies, assets desired to sell, assets desired to buy, preferred geographical investment locations, and other information not available to the public and essential to the day to day operation of Setter Capital’s business.” (*Id.* ¶ 15.)

At issue are confidentiality and non-compete provisions in a September 16, 2013 agreement (NYSCEF 2) that defendant signed two years after graduation from college in exchange for a salary of \$45,000 (Agreement). (NYSCEF 29, Chateauvert aff ¶¶ 3, 6, 12, 14, 16, 18.)¹ The Agreement states the scope of defendant’s employment is to provide “a highly personal service on a sustained and recurring basis to the Clients of Setter Capital.” (NYSCEF 8, Agreement at 1.) Specifically, defendant describes her job as making cold calls using a script and sending emails to identify buyers and sellers in the secondary market which she would pass off to a more senior Setter employee. (*Id.* ¶¶ 26, 29, 31, 52.)

¹ All parties shall meaningfully identify exhibits and other documents in NYSCEF. For example, identifying an affidavit as “Affidavit” is insufficient and useless. Please review the Part 48 Rules and Procedures.

"The Secondary Market (*a.k.a.*, the Private Equity Secondary Market) is a marketplace for buying and selling Limited Partners' ('LPs') interests in private equity funds, and other alternative investments. The LP's interests come in different shapes and forms (*e.g.*, private equity, venture capital, real estate, etc.) and are desirable to 'institutional investors,' and accredited investors."

(*Id.* ¶47.) According to defendant, the secondary market differs from wealth management, general accounting or other professional services industries because there are no exclusive relationships. (*Id.* ¶¶ 38-46.) While defendant admits that plaintiff gave her a list, she asserts that such information is publicly available and describes how and where it is available. (*Id.* ¶¶ 34, 35.) Eventually, in 2017, defendant was promoted to match buyers and sellers for which she was paid a commission (*Id.* ¶¶ 53, 64.) Defendant resigned in February 2020; at which time, she was earning \$85,000 plus commission. (NYSCEF 1, Complaint ¶ 1; NYSCEF 29, Chateauvert aff ¶ 64.)

As a threshold issue, there is a question as to whether this court has jurisdiction over defendant, a Canadian resident. Although the Agreement includes a choice of law and forum selection clause in which the parties agreed to submit to this court's jurisdiction, it is unclear that such tender is enforceable under the NY General Obligations Law (GOL). GOL § 5-1401 provides for the enforcement of choice of law provisions in contracts over \$250,000 and GOL § 5-1402 provides for the enforcement of forum selection provisions in contracts over \$1,000,000. (*IRB-Brasil Resseguros, S.A. v Inepar Investments, S.A.*, 20 NY3d 310, 316 [2012] ("The goal of General Obligations Law § 5-1401 was to promote and preserve New York's status as a commercial center and to maintain predictability for the parties."), *cert denied* 569 US 994 [2013]).

However, GOL §5-1401 does not apply to contracts "for labor or personal services," and the Agreement here states that the employee is "to provide a highly personal service on a sustained and recurring basis to the Clients of Setter Capital." (NYSCEF 8, Agreement at 1.)

Further, “NY-GOL § 5-1402 provides that an action based on a contract may be maintained in a New York court against a non-resident where: (1) the contract contains a choice of law clause pursuant to NY-GOL § 5-1401” (*CPI NA Pamassub B.V. v Ornelas-Hernandez*, 2009 NY Slip Op 30259[U], *7 [Sup Ct, NY County 2009].) Thus, if GOL §5-1401 is not applicable here, in turn neither is GOL §5-1402. (*Barden Solutions, Inc. v Bassetti*, 18 Misc 3d 1144[A], 1144A, 2005 NY Slip Op 52351[U], *2 [Sup Ct, Monroe County 2005].) Moreover, the court questions whether defendant, two years out of college when she signed the Agreement, was the sophisticated business person the legislature envisioned in 1985 when GOL §5-1401 and §5-1402 were enacted. (See *IRB-Brasil Resseguros, S.A.*, 20 NY3d 310, 314 [2012] (The Sponsor’s Memorandum states, “In order to encourage the parties of significant commercial, mercantile or financial contracts to choose New York law, it is important ... that the parties be certain that their choice of law will not be rejected by a New York Court” [*id.* at 8]. The Legislature desired for parties with multi-jurisdictional contacts to avail themselves of New York law if they so designate in their choice-of-law provisions, in order to eliminate uncertainty and to permit the parties to choose New York’s “well-developed system of commercial jurisprudence.” [*id.* at 7]).

If the court cannot exercise jurisdiction pursuant to the Agreement, then plaintiff must establish jurisdiction. (*High St. Capital Partners, LLC v ICC Holdings, LLC*, 2019 N.Y. Slip Op. 31361[U] [Sup Ct, NY County 2019].) Here, the court finds this as an issue of fact that undermines plaintiff’s likelihood of success. “While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that “subvert the plaintiff’s likelihood of success on the merits ... to such a degree that it cannot be said that the plaintiff established a clear right to relief.” (*Matter of*

Advanced Digital Sec. Sols., Inc. v Samsung Techwin Co., Ltd., 53 AD3d 612, 613 [2d Dept 2008] [internal quotation marks and citations omitted].)

In addition to the issue of jurisdiction, plaintiff fails as to likelihood of success on the merits as its presentation is insufficient to establish a protectable trade secret. The elements of a protectable trade secret are: "(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." (*Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 407 [1993], quoting Restatement of Torts § 757, comment b.) Plaintiff fails to counter Chateauvert's description of her job which was to make thousands of cold calls.² Likewise, plaintiff fails to respond to whether the lists, including personal contact information, are publicly available or not. Rather, defendant's explanation for why buyers and sellers want their contact information to be public makes sense and undermines plaintiff's unsupported assertion otherwise.

Further, the admitted availability of plaintiff's liquidity rating online undermines any argument that it is confidential. Plaintiff's submission is silent as to efforts taken to protect this secret contact information. Plaintiff relies on NDAs mentioned in defendant's emails but fails to provide copies of such NDAs. From the emails, it appears that the NDAs concern deal details

² Despite being invited to submit a reply brief, and the court asking again at the argument on July 14, 2020, plaintiff failed to describe the industry any differently. The court incorporates the transcript of the argument on this motion in this decision. Plaintiff is directed to submit the transcript to be so ordered.

and not plaintiff's secret database. Therefore, preliminarily, plaintiff has failed to satisfy any of the necessary elements for a protectable trade secret.

Plaintiff also fails to establish irreparable harm. While plaintiff fails to address irreparable harm or even mention damages that does not preclude the fact that money damages are available. Indeed, the harm that plaintiff asserts is the diversion of future deals which is hardly irreparable.

Finally, the balance of equities favors defendant. The requested injunction is impermissibly broad such that defendant will lose her livelihood.³ The purpose of a noncompete is to prevent unfair competition; not competition altogether. (*BDO Seidman v Hirshberg*, 93 NY2d 382 [1999].)

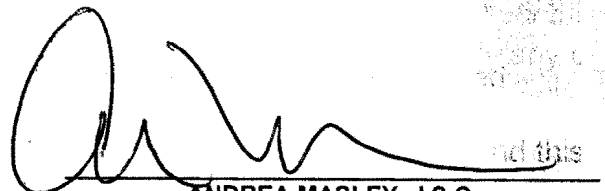
Accordingly, it is

ORDERED that the motion is denied, and all TROs are vacated; and it is further

ORDERED that no party has requested permission to redact, yet the parties filed

numerous redacted documents in NYSCEF. All parties are directed to follow the law and this part's rules concerning sealing and redacting documents filed in NYSCEF within 10 days of this decision and order. Otherwise, parties shall be ordered to file all documents with no redactions, may be subject to financial penalties or any other appropriate remedy.

7/15/2020
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

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

³ The court notes that Justice Marcy Friedman, who heard this motion when it was initially filed on June 8, 2020, rejected plaintiff's requested TRO as overly broad. (NYSCEF 45, Transcript 14:1-7.)