SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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MISSION CAPITAL LLC,

Plaintiff,

- v -

JASON JAVICH, CHEN COHEN, DOV KAUDERER, STREAMLINE FUNDING, LLC

Defendant.

INDEX NO. 650576/2022

MOTION DATE 02/24/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 31, 33, 34, 35, 36, 37, 38, 41, 42, 43, 44, 45, 46, 47, 48

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

Mission Capital LLC d/b/a SBG Funding (plaintiff) moves, by order to show cause, for a preliminary injunction, *inter alia*, enjoining: (i) Streamline Funding, LLC d/b/a Fundible (Fundible), Jason Javich, Dov Kauderer, and Chen Cohen (collectively defendants) from accessing certain of plaintiff's confidential information allegedly in defendants' possession; (ii) defendants from soliciting certain identified customers of plaintiff; and (iii) Javich from commencing employment with Fundible. Defendants oppose the motion.

Background

Plaintiff is a financial services firm that provides personalized financing solutions to small businesses (NYSCEF # 3 – Complaint, ¶ 13). Javich began working for plaintiff in February 2020 as an account executive and was employed as a manager at the time of his resignation (*id.*, ¶ 18). In addition to managing his own customers, Javich was also responsible for managing a team of seven account executives that worked under him. Javich oversaw the sales process for all of his team members, and plaintiff entrusted Javich with access to its proprietary client list database and other sensitive information (*id.*, ¶ 19). Javich asserts that he joined plaintiff's employ as an entry level funding broker, whereby his work did not require any specialized abilities, training, education, or experience, and that before he began working for plaintiff, his only full-time job had been as an administrative assistant in a radiologist's office (NYSCEF # 42, Affidavit of Javich, ¶ 5).

Plaintiff informs that in connection with his employment, Javich executed an employment agreement (NYSCEF # 3, ¶ 20). The agreement bears a DocuSign signature stamp of Javich, but Javich denies having signed the agreement (NYSCEF # 42, ¶'s 3-4). Relevant to the present motion, the alleged employment agreement includes a covenant not to compete for one year after termination from plaintiff's employment in any business that competes with plaintiff within 1,500 miles of Javich's workplace (NYSECF # 7). The employment agreement also prohibits Javich from: disclosing the names, addresses or any information about plaintiff's customers or clients; and soliciting plaintiff's customers or employees for one year after termination from plaintiff's employment (*id.*).

When Javich resigned from plaintiff's employ on October 1, 2021, he informed plaintiff of his intention to immediately begin working for Fundible (NYSCEF # 3, ¶ 27). Fundible is plaintiff's competitor having been established in 2020 by defendants Kauderer and Cohen, both former employees of plaintiff (*id.*, ¶ 17). Plaintiff sent a cease-and-desist letter to defendants on October 7, 2021 (NYSCEF # 8) and, after a standstill period, the parties entered into a Settlement Agreement on January 14, 2022 (NYSCEF # 14). Sections 9, 10, and 11 of the Settlement Agreement provided for a series of audits to determine whether defendants were using any of plaintiff's confidential information. And section 2 of the Settlement Agreement provided that Javich could commence employment with Fundible starting on April 1, 2022.

Plaintiff asserts that the results of the first audit revealed that, contrary to defendants' certifications, defendants had misappropriated plaintiff's confidential information and solicited plaintiff's customers (NYSCEF # 3, ¶ 32). Kauderer admits that Javich showed Kauderer a list of customers whose funding Javich had closed while working with plaintiff (Javich's Contact List), but denies that such information is confidential or proprietary (NYSCEF # 44 – Kauderer Aff., ¶'s 4, 12) and asserts that Fundible has not funded any deals respecting any of the customer's on Javich's Contact List (*id.*, ¶ 9). Kauderer further asserts that Fundible did delete the information Javich shared, but that the reason the audit uncovered remnants is because the deleted data had not yet been overwritten and was therefore recoverable (*id.*, ¶ 13). For this explanation, defendants offer the support of the affidavit of a technology professional (NYSCEF # 45 – Aff. of James Rocker).

After the audit, negotiations between the parties broke down because, in part, defendants believed that plaintiff's audit impermissibly went beyond the scope of Javich's Customer List (NYSCEF # 44, ¶ 15). This lawsuit then ensued. On February 24, 2022, the court granted plaintiff's request for temporary enjoinment respecting defendants' access and dissemination of plaintiff's information and Javich's employment with Fundible (NYSCEF # 30). After oral argument on February 25, 2022, the court held the enjoinment in place pending further order.

Plaintiff argues that the injunctive relief it seeks is appropriate given the nature of the information involved and defendants' reinforcement of the confidentiality and non-solicitation terms via the Settlement Agreement. Defendants oppose the motion, arguing that plaintiff has not met its evidentiary burden or demonstrated the enforceability of the restrictive covenants.

Discussion

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing.... Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party" (*1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011], citing *Doe v Axelrod*, 73 NY2d 748 [1988]). At the same time, the existence of triable issues of fact does not require the denial of a preliminary injunction when the movant meets its burden of establishing that the three prerequisites for injunctive relief have been met (*Bell & Co, P.C. v Rosen*, 114 AD3d 411, 411 [1st Dept 2014]; CPLR 6312 [c]).

At the outset, while Javich now claims that he did not sign the employment agreement, his denial is controverted in the Settlement Agreement, which he signed and thereby acknowledged that "as part of Javich's Employment Agreement, he entered into several post-employment restrictive covenants" and that "Javich agrees that [subject to allowing Javich to begin employ with Fundible on April 1, 2022], the Restrictive Covenants in the Employment Agreement remain in full force and effect" (NYSCEF # 14 at 1, 2). Furthermore, Javich does not deny having signed an offer letter. The offer letter provided that upon his acceptance of the offer, the parties would "formalize the terms of your employment in a separate employment agreement, which you will be required to sign prior to employment" (NYSCEF # 47, Ex. 3 at 3). Accordingly, for the purposes of this motion, the court deems the employment agreement to be valid and in effect.

Next, defendants' argument that plaintiff's motion must be denied because plaintiff did not submit an affidavit from a witness with personal knowledge is unavailing. CPLR 6312 (a) provides: "On a motion for a preliminary injunction the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action... ." Here, plaintiff's counsel submitted an affidavit introducing evidence of emails among the parties' counsels. As such plaintiff's counsel did have personal knowledge of such materials. Further, plaintiff's complaint, verified by plaintiff's CEO, swore as true the facts of the complaint, including respecting the terms of the employment agreement (*compare Faberge Int'l Inc. v Di Pino*, 109 AD2d 235, 239 [1st Dept 1985] [finding plaintiff failed to meet evidentiary burden where "much of plaintiff's proof rested on speculation and

conjecture and some of it was flatly contradicted by disinterested parties"] [internal quotation marks omitted]).

Likelihood of Success on the Merits Respecting the Non-Compete Covenant

"[N]oncompete clauses in employment contracts are not favored and will only be enforced to the extent reasonable and necessary to protect valid business interests" (*Morris v Schroder Capital Management Intern.*, 7 NY3d 616, 620-21 [2006]). Thus, enforcement of restrictive covenants has been limited to circumstances where they are found to be "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-89 [1999], quoting *Reed, Roberts, Assoc. v Strauman*, 40 NY2d 303, 307 [1976]).

Before addressing whether the restrictive covenants are reasonable, plaintiff first argues that "restrictive covenants reaffirmed in a settlement agreement are enforceable regardless of whether the employment agreement was valid or void" and cites *Banner Indus. of N.E., Inc. v Wicks* (71 F Supp 3d 284, [ND NY 2014], *affd*, 631 F Appx 79 [2d Cir 2016]) for support (NYSCEF # 5 – pltf's MOL at 18, fn 79). Plaintiff's reliance on *Banner* is misplaced. The defendants in *Banner* posited that because the employer breached the employment agreement, the restrictive covenant, whether enforceable or not, was accordingly voided (71 F Supp 3d at 289). The *Banner* court disagreed stating that "regardless of whether the Employment Agreement was valid, void, or voidable prior to . . . the Settlement Agreement, [the employee] bound himself to the nondisclosure and noncompetition obligations contained in the Employment Agreement when he entered into the Settlement Agreement and accepted benefits thereunder" (*id.*). The *Banner* court then assessed the reasonableness of the noncompete agreement before dismissing the employer's cause of action to enforce the restrictive covenants (*id.* at 304).

Proceeding to the assessment of the reasonableness of the restrictive covenants here, plaintiff argues that "courts routinely enforce contractual confidentiality terms and one-year customer non-solicitation restrictions, especially ... [when] they are reinforced in a settlement agreement" (NYSCEF # 5 - plaintiff's MOL at 18). While restrictive covenants with regard to the one-year time period, like the one in this case, are reasonable (*Crown It Servs v Koval-Olsen*, 11 AD3d 263 [1st Dept 2004] [upholding one year restriction]), the same cannot be said about the prohibition here on competition within 1,500 miles of the workplace (*see e.g. Vital Crane Servs., Inc. v Micucci*, 118 AD3d 1404, 1405 [4th Dept 2014] [400-mile restriction unreasonable given facts involved]). And plaintiff has failed to articulate the reasonableness of such a large geographic scope for Javich's work with plaintiff, which involved funding small businesses.

Even if, for argument's sake, the non-compete had a reasonable geographic scope, plaintiff has failed to demonstrate the necessity of enjoining Javich from working at Fundible to support its legitimate interest. New York courts have held that an employer has a legitimate interest in preventing (i) misappropriation of the employer's trade secrets or of confidential customer lists; (ii) competition by a former employee whose services are unique or extraordinary; and (iii) exploitation by former employees of the goodwill of a client or customer which has been created and maintained at the company's expense, to the employer's competitive detriment (*BDO Seidman*, 93 NY2d at 389-92). In reviewing Javich's services under the second category of the BDO Seidman standard, it cannot be said that that Javich's services are unique or extraordinary nor is the job considered a learned profession (93 NY2d at 389; *see also Briskin v All Seasons Servs., Inc.*, 206 AD2d 906, 906 [4th Dept 1994] [holding that "[t]he fact that plaintiff was a knowledgeable and experienced sales representative does not establish that his skills were unique or that he was irreplaceable"]).

Under the first category of the *BDO Seidman* standard, defendants admit that Javich shared Javich's Contact List with Kauderer but assert that the information on the list is not confidential. Defendants claim that they agreed to delete it or have already deleted it (NYSCEF # 44, ¶ 13; NYSCEF # 48, ¶ 15). To the extent defendants still have access to Javich's Contact List, because of how computers store deleted information or otherwise, plaintiff's legitimate interest in protecting its confidential information can be protected with tailored enforcement of the non-disclosure and non-solicitation portions of the employment agreement, without overly burdening Javich, by enjoining his working at Fundible, as provided below (*see e.g. Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC*, 813 F Supp 2d 489, 507 [SD NY 2011] [finding overbroad non-compete provision to be "unreasonably burdensome to [d]efendants because its enforcement is likely to result in the loss of [employees'] ability to earn a living"]). Accordingly, the branch of plaintiff's motion seeking to enjoin Javich from working at Fundible is denied.

Likelihood of Success on the Merits Regarding the Non-Disclosure and Non-Solicitation Covenants

Plaintiff also seeks, *inter alia*, to enjoin defendants from (i) accessing, disclosing, using or exploiting plaintiff's confidential information and (ii) contacting, soliciting, or servicing any customer of plaintiff's identified in information plaintiff alleges defendants misappropriated from plaintiff.

Javich breached his employment agreement by sharing with Kauderer Javich's Contact List and allegedly soliciting former clients (NYSCEF # 3, ¶ 39). Plaintiff has therefore established a prima facie case for its legitimate interest in preventing misappropriation of its confidential customer lists (*BDO Seidman*, 93 NY2d at 389).

Defendants argue that Javich's Contact List is not a trade secret, but even the cases that defendants cite acknowledge that a customer list can be treated as a trade secret provided it is "not otherwise readily ascertainable" (*Free Country Ltd v Drennen*, 235 F Supp 3d 559, 566 [SD NY 2016] [denying trade secret status as to customer list where it was admitted "that the identities and contact information of [plaintiff's] clients are known outside the company"]). Defendants' assertions that Javich's Contact List "is comprised of Publicly Available Information that can be purchased for pennies" (NYSCEF # 46 at 20) misses the mark because even if general contact information of small businesses could be purchased in the way defendants describe, defendants have not asserted that they could purchase contact information of clients specifically identified as having been *plaintiff's* clients or *Javich's* clients or that such information could otherwise be readily ascertained.

Plaintiff also must demonstrate that it will suffer irreparable harm as a result of the asserted possession of its confidential information or solicitation of its customers. To establish irreparable harm, a party seeking a preliminary injunction must demonstrate that it cannot be compensated by money damages (*Credit Index, LLC v RiskWise Int'l LLC*, 282 AD2d 246, 247 [1st Dept 2001]). Here, plaintiff has adequately shown that it is likely to suffer irreparable harm in the event that Javich's Contact List or other confidential information of plaintiff are used to support defendants' solicitation of plaintiff's customers (*see Willis of New York, Inc. v DeFelice*, 299 AD2d 240, 242 [1st Dept 2002] [in the context of restrictive covenants, irreparable harm is shown when it is shown that "in the absence of a restraint ...[a plaintiff] would likely sustain a loss of business impossible or very difficult, to quantify"]; *Ticor Title Ins. Co. v Cohen,* 173 F3d 63, 69-70 [2d Cir 1999] [it is "very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come"]).

The court must evaluate the balance of the equities and weigh the harm to plaintiff caused by denial of the injunction against the harm to defendants in granting it (*Edgewood Food Corp v Stepheson*, 53 AD2d 588, 588 [1st Dept 1976]). Here, as determined above, the balance of equities does not favor enjoining Javich from working for Fundible, which would be unduly burdensome. On the other hand, the court finds as appropriate a remedy that would protect plaintiff without causing a disproportionate harm to Javich and the public interest in protecting an individual's livelihood and competition (*see e.g. Good Energy, L.P. v Kosachuk*, 49 AD3d 331, 332 [1st Dept 2008] [enforcing non-solicitation covenant to the extent of those customers that defendant had worked with while in plaintiff's employ]). Therefore, the court grants a more limited injunction which enjoins, until October 1, 2022, Javich from disclosing or otherwise using Javich's Contact List or other of plaintiff's confidential information or soliciting those of plaintiff's customers which Javich worked with while in plaintiff's employ. It is noted that defendants

substantially agreed to this outcome as seen in Section 5 of the Settlement Agreement.

Plaintiff requests injunctive relief enjoining all defendants, including Fundible, Kauderer, and Cohen (the Fundible defendants), from soliciting plaintiff's customers identified on the Javich Contact List. Kauderer has certified to his deletion of plaintiff's information (NYSCEF # 44, ¶ 13). But because plaintiff does not explain how it expects the Fundible defendants to know which customers are on that list in order to affirmatively refrain from doing business with such customers, this order enjoins only Javich, without prejudice to other rights, if any, that plaintiff may have with respect to the Employment or Settlement Agreement. Further, in recognition of the certifications Fundible made in Section 7 of the Settlement Agreement, the Fundible defendants are enjoined from using plaintiff's confidential information they may have obtained from Javich or by virtue of information deleted but not overwritten or stored in the email or other customer management systems of the Fundible defendants.

Mandatory Injunctive Relief Requested

Plaintiff also seeks an order directing defendants to complete the audit and other functions to secure SBG Confidential Information (NYSCEF # 5 at 23). Plaintiff acknowledges that a portion of the relief it seeks involves a mandatory injunction, which plaintiff asserts is necessary to maintain the status quo (NYSCEF # 5 at 23, fn 91). "A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite" (*St. Paul Fire & Marine Ins. Co. v York Claims Serv., Inc.*, 308 AD2d 347, 349 [1st Dept 2003]).

Here, it is clear that the method and costs for completing the audit and removing plaintiff's confidential information from defendant's systems may substantially change the status quo; such changes are best not addressed on the present motion for a preliminary injunction.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion for a preliminary injunction is granted to the extent that, pending further order of the court and until October 1, 2022, defendant Jason Javich is enjoined and restrained from (i) using or disclosing the information in Javich's Contact List or other of plaintiff Mission Capital LLC d/b/a SBG Funding's confidential information that Jason Javich may have and (ii) soliciting, directly or indirectly, plaintiff's customers that he worked with while

employed by plaintiff, including those customers identified on Javich's Contact List; it is further

ORDERED that to the extent the Fundible defendants have or come to have access, through Jason Javich, to plaintiff's confidential information, including Javich's Contact List, by virtue of information deleted but not overwritten or stored in the email or other customer management systems of the Fundible defendants or otherwise, the Fundible defendants are enjoined from using such information; it is further

ORDERED that upon entry of this order the temporary restraining order is lifted; it is further

ORDERED that defendants shall serve a copy of this order with notice of entry within twenty days of this order; and it is further

ORDERED, that counsel for all parties shall forthwith meet and confer to seek resolution of the audit contemplated by the Settlement Agreement and determination as to the effectuation of Section 5 of the Settlement Agreement.

04/05/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE