

Jordan, Edmiston Group, Inc. v Wong

2023 NY Slip Op 31443(U)

May 1, 2023

Supreme Court, New York County

Docket Number: Index No. 651416/2023

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X	
THE JORDAN, EDMISTON GROUP, INC. (d/b/a JEGI CLARITY),	INDEX NO. 651416/2023
Plaintiff,	MOTION DATE
- v -	MOTION SEQ. NO. 001
JOSHUA WONG and BRIGHTTOWER, LLC,	
Defendants.	DECISION + ORDER ON MOTION
-----X	

HON. BARRY R. OSTRAGER

The motion by plaintiff The Jordan, Edmiston Group, Inc. (“JEGI”) for a preliminary injunction is resolved as follows based on the testimony and documents introduced at an evidentiary hearing held on April 25, 2023.

Plaintiff is an independent investment bank headquartered in New York City which offers investment banking and consulting services. Defendant Joshua Wong formerly worked with JEGI as a Managing Director and had duties involving the development of business prospects and client relationships. As part of his employment with plaintiff, Mr. Wong entered into an Employee Confidentiality and Non-Competition Agreement (the “Agreement”) dated June 4, 2018. NYSCEF Doc. No. 2.

The Agreement contains a provision which prohibits Mr. Wong from working with other investment banks focused on the media, information, marketing and/or technology sectors for a one-year period after the termination of Mr. Wong’s employment with plaintiff. The Agreement also contains provisions preventing Mr. Wong from sharing or using confidential information belonging to JEGI or its clients. Mr. Wong resigned from JEGI on February 6, 2023. On February 27, 2023, Mr. Wong accepted an offer of employment with defendant BrightTower,

LLC (“BrightTower”) and soon after commenced his employment there. BrightTower is a direct competitor of JEGI located in New York City and many of its Managing Directors are former JEGI employees.

Plaintiff alleges that Mr. Wong violated the non-compete provision in the Agreement by joining BrightTower shortly after his employment with JEGI ended. Plaintiff also alleges that Mr. Wong brought confidential JEGI information (largely comprised of information regarding JEGI’s prospective clients) to BrightTower in violation of the Agreement’s confidentiality provisions. As for its claim against defendant BrightTower, plaintiff alleges that BrightTower tortiously interfered with the Agreement between plaintiff and Mr. Wong.

On March 30, 2023, plaintiff made an application for a preliminary injunction against Mr. Wong and BrightTower, in which plaintiff seeks to (1) bar defendant Joshua Wong from performing any services for or having any involvement with defendant BrightTower, LLC (“BrightTower”); (2) enjoin Wong from disclosing or using any JEGI confidential information or trade secrets; (3) order that Wong immediately return any and all JEGI documents or information in his possession, custody, or control; (4) order that Wong certify that he has returned any and all JEGI documents or information in his possession, custody, or control; (5) enjoin BrightTower from reviewing or in any way using any JEGI confidential information and/or trade secrets; (6) order that BrightTower turn over to JEGI any JEGI documents or information in its possession, custody or control, including electronic versions of such documents contained within its systems; (7) order that BrightTower certify that is has not used, will not use, and has captured and turned over to JEGI all JEGI documents or information in its possession, custody or control, including any and all electronic versions of such documents housed on or contained within its systems, including details regarding the steps that it has taken to do so; and (8) order expedited discovery.

On April 25, 2023, the Court held an evidentiary hearing on plaintiff's application for a preliminary injunction. The evidentiary hearing was held via Microsoft Teams with counsel for all parties. The Court reviewed voluminous documents and direct testimony affidavits prior to the hearing. Direct testimony was by affidavit and during the hearing, affiants Wilma Jordan (JEGI), Douglas Stowe (JEGI), Joshua Wong (BrightTower), and Amirali Akhavan (BrightTower) were cross-examined.

To prevail on its application for a preliminary injunction, plaintiff must demonstrate (1) a likelihood of success of the merits of plaintiff's underlying claims, (2) that plaintiff will suffer irreparable harm absent the injunction, and (3) that the balance of the equities tips in plaintiff's favor.

A. Barring Joshua Wong from working at BrightTower

The Court denies the first prong of plaintiff's application for injunctive relief, which seeks to bar defendant Wong from continuing to work at BrightTower. Restrictive covenants in an employment agreement, generally disfavored under New York law, are only enforced to the extent they are (1) reasonable in time and area, (2) necessary to protect the employer's legitimate interests, (3) not harmful to the general public, and (4) not unreasonably burdensome to the employee. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388–89 (1999).

The non-compete restrictive covenant contained in the Agreement reads as follows (Exhibit 1, ¶3(C) (emphasis added)):

Employee hereby agrees to not:

[...]

for a period of one year after leaving the employment of Employer, become an owner, manager, operator, licensor, licensee, lender, partner, stockholder, joint venturer, director, officer, employee, consultant, partner, agent, independent contractor, in boutique investment banks in New York and/or identified below that focus on the media, information, marketing services and/or technology

sectors, including but not limited to: AGC, Berkery Noyes, BMO Capital Markets, DCS Advisory, DeSilva & Phillips, Evercore Partners, GCA Savvian, GP Bullhound, Greenhill & Co., Harris Williams, Houlihan Lokey, Jefferies, KeyBanc Capital Markets, Lazard, LUMA Partners, Marlin & Associates, MHT MidSpan, Moelis & Company, PALAZZO Securities, Petsky Prunier, Piper Jaffray, Portico Capital, Qatalyst Partners, Robert W. Baird, Stephens, Vaquero Capital, Vista Point, and William Blair, *and such other boutique investment banks that may, from time to time, be identified as direct competitors and tracked by JEGI's Marketing Department in its reasonable and customary fashion....*

It appears that Mr. Wong has breached the non-competition provision of the Agreement. However, there are issues as to the enforceability of a non-competition provision that, if literally applied, would preclude Mr. Wong from pursuing his profession anywhere in the world. While the provision does refer to New York-based investment banks, the overall restriction does not exclusively apply to New York. Many of the specifically-listed firms have offices in several cities (including international offices) and the language of the provision does not specify that the restriction applies only to those firms' New York offices. Paragraph 3(C) of the Agreement also generally permits plaintiff to enforce the restrictive covenant against Mr. Wong's employment at other investment banks that plaintiff deems to be a direct competitor, regardless of location.

Plaintiff has also failed to establish that it would suffer any irreparable harm in the absence of an injunction granting this prong of relief. Plaintiff's affiants emphasized the importance of developing key relationships with prospective clients and concerns about losing prospective clients to BrightTower as a result of Mr. Wong's employment at BrightTower. Prospective clients are companies with which plaintiff was having active conversations but which have not signed an Engagement Letter officially retaining plaintiff. Because there is no guarantee that any of these prospective clients would retain plaintiff, any harm to JEGI is

speculative and, in any event, could be compensated by monetary damages.

B. Enjoining Joshua Wong from disclosing confidential information

The Court grants the second prong of plaintiff's application to the extent of enjoining defendant Wong from disclosing or using any of JEGI's confidential information with respect to JEGI's current clients and prospective clients who signed Non-Disclosure Agreements with JEGI, as well as other confidential information belonging to these companies.

The Agreement defines "confidential information" as follows (Exhibit 1, ¶1):

[T]he term "Confidential Information" shall mean any and all information, whether oral or written... relating to [JEGI] or to its properties, assets, operations, marketing and product plans, financial condition or Business, or to any client of Employer and such client's property, assets, operations, or business, in any and all respects, acquired by Employee during the course of his employment other than such information which at the date hereof can reasonably be shown by Employee to have been in the public domain....

Plaintiff has demonstrated a likelihood of success on its claim that Mr. Wong violated the non-disclosure provision of the Agreement by sharing Confidential Information with BrightTower. Plaintiff submitted as evidence an email exchange between Mr. Wong and a BrightTower employee dated March 1, 2023 in which the BrightTower employee requested that Mr. Wong provide a "list of active prospects that you are in communication with and/or just tracking. Also, your key PE relationships," to which Mr. Wong responded: "I will have all those materials prepared." Exhibit 7. This evidence is significant.

Throughout the transcript of proceedings of April 25, 2003, the parties acknowledged an important distinction between a "client" and a "prospective client." A client has formally retained JEGI's services by executing an Engagement Letter. As alluded to above, while prospective clients have not formally engaged JEGI, they may have executed non-disclosure

agreements and provided Confidential Information to which Mr. Wong was privy. The testimony established that it is not uncommon for a prospective client to execute non-disclosure agreements with JEGI in order to protect any confidential and proprietary information the prospective company may share with JEGI. Thus, while the definition of “Confidential Information” contained in the Agreement does not explicitly cover information belonging to prospective clients, JEGI and its employees (including Mr. Wong) are bound by the terms of any non-disclosure agreements signed with prospective clients.¹

The fact that prospective clients have entered into non-disclosure agreements with JEGI makes it extremely likely that confidential information was disclosed to JEGI. Further, the very fact that JEGI has entered into non-disclosure agreements with prospective clients may itself be confidential information relating to JEGI’s business. Mr. Wong conceded this fact during his cross-examination. *Transcript of April 25, 2023* at 109:20–25.² Mr. Wong further conceded during cross-examination that at least some of the prospective clients he had been working with while with JEGI had signed non-disclosure agreements with JEGI. *Tr.* at 105, 108–09. Mr. Wong’s testimony during cross-examination failed to advance his case, as he displayed a fair amount of ethical insouciance. Defendants did not proffer any evidence sufficient to refute plaintiff’s claim.

Plaintiff has also demonstrated that it would suffer irreparable harm absent the Court granting this prong of the requested injunction. Certain third-party prospective clients agreed to

¹ Plaintiff submitted documentary evidence of a typical non-disclosure agreement entered into between plaintiff and a prospective client (Exhibit 9), and Mr. Wong conceded during cross-examination that all non-disclosure agreements entered into with JEGI were substantially the same as the example provided by plaintiff. Mr. Wong also testified that, per the terms of these prospective client non-disclosure agreements, Mr. Wong as an employee of JEGI was bound by these agreements’ terms. *Transcript of April 25, 2023*, 96–101.

² “*Transcript of April 25, 2023*” is hereafter referred to as *Tr.*

share with plaintiff confidential and proprietary information because plaintiff promised to protect that sensitive information. If a prospective client was to learn that a former JEGI employee disseminated their confidential and proprietary information to other firms, JEGI's reputation would clearly be harmed. An injury to a company's reputation cannot be compensated by monetary damages. *See Newmark Partners, LP v. Hunt*, 200 A.D.3d 557, 557 (1st Dept. 2021).

The balance of the equities also clearly tips in plaintiff's favor because plaintiff seeks to keep confidential third-party information private. There is no basis to suggest that defendant Wong would suffer any harm by the granting of an injunction requiring him to abide by the non-disclosure agreements to which he knew he was bound.

C. Returning confidential information to JEGI

The Court declines to grant the relief requested in prongs three and four of the requested preliminary injunction without prejudice to any application by plaintiff following discovery. Those prongs seek to order Mr. Wong to return confidential information to JEGI and/or to order Mr. Wong to certify that he has done so. The requested relief is not necessary at this time. The parties entered into a Stipulation on March 22, 2023 (NYSCEF Doc. No. 15) pursuant to which Mr. Wong claims and has certified that he does not have any JEGI confidential documents, including information related to prospective clients, in his possession. NYSCEF Doc. No. 26.³

D. Relief against defendant BrightTower

Plaintiff's application is denied as to the fifth, sixth, and seventh prongs,⁴ which seek to impose a preliminary injunction against defendant BrightTower. The elements of tortious

³ Defendant BrightTower also certified that they have never received any of JEGI's confidential information from defendant Wong. NYSCEF Doc. No. 23.

⁴ The seventh prong seeks to order BrightTower to certify that it has not used, will not use, and has captured and turned over to JEGI all JEGI documents or information in its possession. Pursuant to the Stipulation entered into between the parties (NYSCEF Doc. No. 15),

interference with contract are (1) the existence of a valid contract between plaintiff and Mr. Wong, (2) BrightTower's knowledge of that contract,⁵ (3) BrightTower's intentional procurement of the breach of that contract, and (4) damages. To prove the intentional procurement element, plaintiff must show that, but for BrightTower's conduct, Mr. Wong would not have breached the contract. *See Cantor Fitzgerald Associates, L.P. v. Tradition N. Am.*, 299 A.D.2d 204 (1st Dept. 2002).

Assuming there was a valid contract, the testimony adduced during the evidentiary hearing does not support a finding that, but for BrightTower's conduct, Mr. Wong would not have left the employ of JEGI. Indeed, Mr. Wong solicited and received prior offers of employment. Mr. Wong testified that he had affirmatively taken several steps dating back to November 2022, including engaging a recruiter and interviewing at several firms, before initiating any interaction with BrightTower and that he would have accepted employment with one of the other investment banks that offered him a position if he did not receive an offer from BrightTower. See Wong Direct Testimony Affidavit, ¶27. This testimony was corroborated by BrightTower's witness Mr. Akhavan. See Akhavan Direct Testimony Affidavit, ¶34.

The injunction against Mr. Wong is conditioned upon plaintiff posting a \$50,000.00 bond pending the outcome of the case. Plaintiff is directed to post the bond by 3:00 p.m. on May 8, 2023 and efile proof of the bond by the end of the day on May 8, 2023. Defendant Joshua Wong shall respond to the Complaint within 20 days.⁶ A preliminary conference is scheduled for

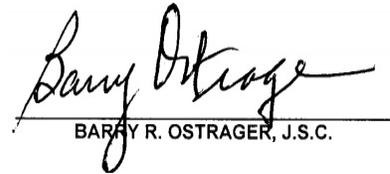
BrightTower efiled a certification claiming it has never received any JEGI confidential documents. NYSCEF Doc. No. 23.

⁵ There is no serious dispute regarding BrightTower's knowledge of Mr. Wong's non-compete agreement. BrightTower's witness Mr Akhavan testified that he, as a former Managing Director of JEGI, was familiar with the JEGI non-compete agreement and further acknowledged that BrightTower itself has such agreements (including one to which Mr. Akhavan is bound). *Tr.* at 133–34, 136–39.

⁶ Defendant BrightTower filed its Answer to the Complaint on April 10, 2023. NYSCEF Doc. No. 33.

June 15, 2023 at 11:00 a.m. The parties are directed to efile a letter containing dial-in access for the conference no later than May 26, 2023. The parties are directed to meet and confer and complete the Preliminary Conference Order form available on the Part 61 website with a Note of Issue deadline no later than 9 months after the date of this Order and with interim deadlines agreed to by the parties. The proposed Preliminary Conference Order shall be efiled no later than May 26, 2023. If the proposed Preliminary Conference Order is acceptable, it will be So Ordered and no appearance will be necessary on June 15, 2023. The parties are encouraged to consensually resolve this case.

Dated: May 1, 2023



 BARRY R. OSTRAGER, 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"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: