

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

-----X
S & M KLEIN COMPANY, INC.,

Plaintiff,

- against -

**KENNETH H. GLASS, KRISTIN A. HOWARD, and
THE LOUIS KOCH INSURANCE AGENCY, INC.,
Defendants.**

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 000296-10
Motion Seq. No: 1
Submission Date: 2/1/10**

-----X

The following papers have been read on this Order to Show Cause:

**Order to Show Cause, Affidavit in Support and Exhibits.....X
Memorandum of Law in Support.....X
Affirmation in Opposition (Corporate Defendant).....X
Affirmation in Opposition (Individual Defendants) and Exhibits.....X
Affidavit in Opposition (K. Howard).....X
Affidavit in Opposition (K. Glass).....X
Memorandum of Law of Individual Defendants.....X**

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff on January 7, 2010 and submitted on February 1, 2010, seeking certain injunctive relief. For the reasons set forth below, the Court denies Plaintiff's application in its entirety and vacates the Temporary Restraining Order issued on January 7, 2010 and revised on January 12, 2010 and January 25, 2010.

BACKGROUND

A. Relief Sought

Plaintiff S & M Klein Company, Inc. (“Klein”) moves for an Order enjoining Defendants Kenneth H. Glass (“Glass”), Kristin A. Howard (“Howard”) and The Louis Koch Insurance Agency, Inc. (“Koch”), and their agents, from 1) either directly or indirectly soliciting, accepting (with or without prior solicitation) referrals and/or compensation or benefit, however same may be described for the sale of insurance policies and/or rendering of advisory services to any person or entity which as of December 9, 2009 had been a client and/or account and/or lead of Plaintiff; and 2) contacting in any manner any person or entity which had been a client and/or account and/or lead of Plaintiff.

Defendants oppose Plaintiff’s application.

B. The Parties’ History

In support of its application, Plaintiff provides an Affidavit in Support of Steven J. Klein (“Steven”) dated January 5, 2010. Klein affirms as follows:

Steven has been the President of Klein since 1995. Klein is a general insurance business located at 118-35 Queens Boulevard, Forest Hills, New York. Its business includes selling and servicing life, accident, health and other forms of insurance. Klein currently has thirty five (35) employees.

Glass is a licensed insurance broker who worked with Stiepelman Insurance Group prior to working for Klein. On or about September 5, 1997, Klein hired Glass who executed an Employment Agreement (“Glass Agreement”) in connection with that employment. His compensation consisted of salary and commission.

Paragraph 4 of the Glass Agreement, titled “Interest of Employee in Clients,” provides as follows:

(a) Employee Produced Clients: In the event that [Glass] originates new clients for [Klein], should his employment be terminated hereunder, Glass shall own all business he originates and writes directly. In the event [Glass] produces and writes business from a lead furnished from [Klein], [Klein] shall own the business. In the event that [Glass’] employment with [Klein] terminates, [Glass] shall have the option to buy the business that he has produced from leads of [Klein] for one times annual commissions. Such payment shall be made as follows:

(i) fifty percent (50%) down payment; and

(ii) thereafter twelve (12) equal monthly installments due on the first day of each month

(b) In the event that a client that [Glass] owns expresses a desire to remain with [Klein] upon the termination of [Glass'] employment, [Klein] shall have the option to purchase the client consistent with the methodology set forth in paragraph (a) above.

Paragraph 5 of the Glass Agreement, titled "Restrictive Covenant," provides as follows:

During the term of this Agreement and for a period of thirty-six (36) months following the termination of [Glass'] employment by [Klein], [Glass] covenants and agrees that he will not solicit any of the existing customers of [Klein] which exist on the date of his ceasing to become an employee of [Klein], nor will he solicit any of the aforesaid customers on behalf of any partnership/corporation/association/individual.

[Glass] acknowledges that this covenant is reasonable as to its duration and expressly acknowledges that it does not contain a geographical scope in that the covenant is relegated solely to [Glass'] solicitation of [Klein's] customers. [Glass] acknowledges that this non-solicitation provision fairly and justly protects what he acknowledges to be the legitimate business interest of [Klein] in that the customers have been developed through the time, money and energies of [Klein], and are not readily ascertainable to the public.

Paragraph 6 of the Glass Agreement, titled "Enforcement of Restrictive Covenant," provides as follows:

In the event of the breach of the foregoing restrictive covenant, it is understood and agreed that [Klein] shall be entitled to injunctive relief by application to any court of competent jurisdiction, in addition to seeking any other available legal remedies, including but not limited to, damages ancillary to the breach of the restrictive covenant.

Klein hired Howard on or about September 7, 1999. On January 16, 2007, Howard and Klein entered into a Confidentiality Agreement and Covenant Not to Compete ("Howard Agreement"). Pursuant to Section 2 of the Howard Agreement, titled "Non-Competition," Howard agreed that 1) during her employment, and for two (2) years following the termination of that employment, she would not perform work for any customer with whom Klein was actively

engaged during Howard's employment, within Nassau and Suffolk Counties, or the Five Boroughs; 2) for two (2) years following the termination of her employment, Howard would not solicit any client and/or account of Klein that was active at the time of Howard's termination; and 3) while employed by Klein, and for two (2) years following her termination, Howard would not employ, or solicit for employment, any employee or agent of Klein or its affiliate. The Howard Agreement also contains a provision regarding Klein's right to seek injunctive relief, similar to the comparable provision in the Glass Agreement.

Klein provided Glass with a book of Klein customers and accounts, as well as leads that led to sales. Those include Falco Construction, Inc., LBP Lido Beach Blvd., LLC, Stemco Electrical Service of NJ, LLC and Stemco Electric, LLC. Klein also provided Glass with an office and support staff.

Howard, who had limited experience in the insurance field, began with Klein by working on personal line clients. With training provided by Klein, she began to handle commercial line clients and eventually became an Account Executive. Howard worked closely with Glass, and the two had customers in common, including Falco Construction, Inc. ("Falco").

Glass resigned from Klein on December 9, 2009. Upon Glass' resignation, Klein asked Howard to resign, and she did so, effective December 11, 2009. Klein subsequently received information that 1) Glass and Howard had become affiliated with Koch; 2) certain Klein clients, including Falco, transferred their accounts to Koch; and 3) the Individual Defendants, while still affiliated with Klein, allegedly diverted business opportunities that properly belonged to Klein.

The Complaint asserts the following causes of action against Glass and Howard:

First: Improper diversion of business opportunities from Klein,

Second: Taking property, including customer lists, from Klein, with intent to defraud,

Third: Violation of their fiduciary duty to Klein,

Fourth: Breach of their Agreements with Klein,

Fifth: Injunctive relief based on the alleged breaches of the Agreements,

Sixth: Recovery of the value of Glass and Howard's improperly received benefits.

The Complaint asserts the following causes of action against Koch:

First: Tortious Interference based on Glass' diversion of opportunities to Koch,

Second: Tortious Interference based on Howard's diversion of opportunities to Koch,

Third: Tortious Interference based on Koch's conduct in violation of the Restrictive Covenants,

Fourth: Tortious Interference based on Howard's diversion of opportunities to Koch in violation of her Agreement with Klein,

Fifth: Injunctive based on Koch's participation with Glass and Howard in breaches of their Agreements.

Plaintiff also asserts a cause of action that is the sixth cause of action against Koch and seventh cause of action against Glass and Howard. In this joint cause of action, Plaintiff seeks an accounting from all Defendants.

On January 7, 2010 the Court signed a TRO, which the Court revised on January 12, 2010 after hearing the arguments of counsel ("Existing TRO"). The Existing TRO provided that, pending the hearing and determination of this application:

[T]he Defendants, their agents, servants, employees and/or all persons acting under him or by virtue of their authority are prohibited, enjoined and restrained... from continuing to initiate contact and/or communication in any form or fashion with any person or entity which as of December 9, 2009 had been a lead of [Klein].

On January 12, 2010, the Court also directed Plaintiff to provide Defendants with the names of individuals or entities who, Plaintiff believes, are potential leads of Klein. Plaintiff subsequently provided that information to Defendants and the Court directed, on January 25, 2010, that the Existing TRO now applied to approximately ten (10) companies and one (1) individual. Counsel for Plaintiff placed the names of those companies and individual on the record, which are as follows: ABR Construction, Inc., Charles Mary (CM) Air Conditioning; LB Acquisition Corp.; Lido Beach Boulevard Corp.; Monroe Basketball, Inc.; Shoreline Townhouse, Inc.; Stemco Electric, LLC; Stemco Electric; Team Work Foundation; and Matthew and Deborah Wilk ("Named Customers").

In their opposition to Plaintiff's application, Individual Defendants provide Affidavits in Opposition of Glass and Howard. Glass affirms as follows:

Glass' Agreement with Klein addressed 1) ownership of business and clients that Glass originated, and 2) ownership of business and clients that Glass obtained from a lead that Klein furnished. Glass estimates that he originated up to 98% of his book of business and, pursuant to the Agreement, there are no restrictions on his transfer or solicitation of that business. With respect to business that he obtained through a Klein lead, the Agreement permits Glass to purchase that business pursuant to a designated formula. Given that he is permitted to purchase business obtained from a Klein lead, Glass submits that injunctive relief is inappropriate.

Glass also affirms that all of the customers' names that constitute his book of business are readily obtainable from numerous sources, including the Internet and telephone book. Thus, he submits, the customer lists are not trade secrets entitled to protection. He also argues that injunctive relief is inappropriate because, by virtue of the provision in the Agreement that permits him to purchase business obtained through a Klein lead, Klein's damages are ascertainable.

Glass also disputes that he obtained the Named Customers from Klein leads, and provides the circumstances under which, he affirms, those Named Customers became customers of Glass. He affirms that many of the Named Customers, including CM Air Conditioning and LB Acquisition Corp., have executed Change of Broker Letters. He provides copies of these letters, and thus asserts that his relationship with these customers cannot be subject to any injunction. With respect to Plaintiff's application for injunctive relief regarding Falco, Glass affirms that Falco has executed a Change of Broker Letter and, therefore, Glass may conduct business with that company.

Howard affirms as follows:

Howard's job as an Account Executive with Klein was clerical in nature, and she received no compensation other than her salary. She has a similar position with Koch, which sometimes requires her to speak with former Klein clients who are now Glass clients, who have signed Broker of Record Letters. In light of the Court's ruling that Defendants are permitted to work with clients who have signed such letters, Howard submits that her contact with these clients does not violate the Existing TRO. Moreover, Howard submits, Plaintiff has failed to adduce evidence that she violated her Agreement with Klein. Howard also affirms that she is in

agreement with Glass' affirmations in his Affidavit in Support.

C. The Parties' Positions

Plaintiff submits that injunctive relief is appropriate because 1) if Klein loses a client due to Defendants' actions, that client is irretrievably lost, and Plaintiff will lose both current commissions and potential future commissions; 2) the loss of a client results in the loss of goodwill; and 3) because the loss of future revenue may be difficult to establish, Plaintiff's loss is not readily compensable by money damages.

Defendants Glass and Howard oppose Plaintiff's application submitting, *inter alia*, that 1) the injunctive relief that Plaintiff seeks would be void as against public policy because it would prevent Defendants from conducting business with customers who sought out Defendants' services without solicitation on the part of Defendants; 2) Plaintiff cannot demonstrate that it will suffer irreparable harm without injunctive relief because the Glass Agreement provides a method for calculating compensation owed when a client, obtained as a result of a Klein lead, becomes a Glass client; 3) Plaintiff has provided no support for its assertion that it will suffer a loss of good will without injunctive relief; and 4) because the Agreements do not define the word "solicit," and the Court must construe any ambiguities against Plaintiff as the drafter of the Agreements, Plaintiff is not likely to prevail on the merits because the Court cannot definitely conclude that the Individual Defendants engaged in solicitation in violation of the Agreements.

Defendant Koch oppose Plaintiff's application, submitting that the requested injunctive relief far exceeds any legitimate concern that Plaintiff may have, and is really an effort by Plaintiff to disrupt Glass' ability to exercise his right, pursuant to the Agreements, to pursue his business through another agency;

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the

injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

B. Plaintiff has not Demonstrated a Likelihood of Success on the Merits

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, 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. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c).

Courts generally disfavor restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment. Courts will only enforce such covenants that are reasonably limited temporally and geographically, and then only to the extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of trade secrets or confidential customer lists. *H & R Recruiters, Inc. v. Kirkpatrick*, 243 A.D.2d 680, 681 (2d Dept. 1997). Moreover, where the employer's past or prospective customers' names are readily ascertainable from sources outside its business, trade secret protection will not attach and their solicitation by the employee will not be enjoined. *Id.*

The Glass Agreement specifically contemplates, and addresses, the possibility that

Howard would terminate his employment with Klein and work elsewhere. Moreover, Defendants have demonstrated that many of the Named Customers have executed Change of Broker Letters, which undermines Plaintiff's claim that it was Defendants' improper solicitation that caused the Named Customers to move their business from Klein. With respect to others, Glass provides sworn allegations disputing Plaintiff's assertion that Glass secured those Named Customers as a result of Klein's leads.

The Court also concludes, given the advanced technology available in this, the dawn of the new millenium, that the names and personal data regarding potential insurance clients are likely available from numerous publicly-available sources, including the internet. Thus, the Plaintiff has not demonstrated a likelihood of establishing that Defendants obtained the names and personal information of customers solely by access to Plaintiff's internal records

In light of the foregoing, the Court concludes that Plaintiff has not demonstrated a likelihood of success on the merits.

C. Plaintiff has not Demonstrates a Risk of Irreparable Harm without an Injunction

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

Given that the Glass Agreement provides a formula for Glass to compensate Klein for clients he obtained, and subsequently kept, as a result of Klein leads, the Court concludes that Plaintiff's damages are compensable by money damages. Thus, Plaintiff has not demonstrated that it will suffer irreparable harm without injunctive relief.

D. A Balancing of the Equities does not Favor Plaintiff

Given that both Plaintiff and Defendants are actively engaged in the insurance business,

and the Change of Broker Letters strongly suggest that clients who switched to Defendants did so of their own accord, the record does not clearly establish that the equities militate in favor of Plaintiff. Thus, Plaintiff has not demonstrated that a balancing of the equities tilts in favor of Plaintiff.

E. Conclusion

In light of the foregoing, the Court denies Plaintiff's Order to Show Cause in its entirety, and vacates the TRO issued by the Court on January 7, 2010 and modified on January 12, 2010 and January 25, 2010.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Preliminary Conference on March 4, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

February 5, 2010

HON. TIMOTHY S. DRISCOLL

J.S.C.