

Arenson Off. Furnishings, Inc. v Archondo

2006 NY Slip Op 30258(U)

October 24, 2006

Supreme Court, New York County

Docket Number: 0602541/2006

Judge: Karla Moskowitz

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SCANNED ON 10/30/2006
SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----x
ARENSON OFFICE FURNISHINGS, INC.

Plaintiff,

- against -

GIOVANNI E. ARCHONDO and BUSINESS
FURNITURE INC,

Defendants.
-----x

INDEX NO 602541/2006
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: October 24, 2006

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KARLA MOSKOWITZ J.S.C.

FILED
OCT 30 2006
NEW YORK
COUNTY CLERK

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Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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ARENSON OFFICE FURNISHINGS, INC.

Index No. 602541/2006

Plaintiff,

- against -

GIOVANNI E. ARCHONDO AND BUSINESS
FURNITURE INC,

DECISION and ORDER

Defendants.

----- x

MOSKOWITZ, J.:

Plaintiff Arenson Office Furnishings, Inc. (“Arenson”) sues Giovanni Archondo (“Archondo”), a former employee and Business Furniture, Inc. (“BFI”), Archondo’s current employer. Plaintiff claims Archondo has breached the non-solicitation portions of his employment agreement, has disclosed confidential information in violation of that same agreement and his inherent duty of loyalty and has improperly lured away Arenson employees. Plaintiff has sued Archondo for breach of contract and unjust enrichment and BFI for tortious interference with contractual relations.

Plaintiff has moved for a preliminary injunction: (1) to prevent Archondo from soliciting any Arenson customer with whom Archondo dealt while Arenson employed him; (2) to prevent Archondo from interfering with any of Arenson’s relationships with any customer, supplier or other party with whom Arenson does business and with which Archondo dealt while he was employed by Arenson; (3) to prevent Archondo from using Arenson’s confidential information to compete against Arenson. Plaintiff also seeks to enjoin BFI’s alleged continuing inducement of

Archondo to breach his agreement. At oral argument on the motion for a preliminary injunction, both sides agreed that a hearing was not necessary to decide this motion. (Tr. Pgs 40-41). The parties also resolved their respective discovery disputes. (Tr. Page 5).

BACKGROUND

Plaintiff Arenson, a New York Corporation, sells and rents office furniture to an institutional customer base. It has other business lines such as the rental of props for the entertainment industry. Arenson conducts its furniture business primarily through a direct sales force that operates mostly in the tri-state metropolitan area. BFI is a direct competitor to Arenson's office furniture business, also in the tri-state region.

Archondo was an employee of Arenson in a direct sales position from April 1, 2002 to April 28, 2006. During this entire period, Archondo was part of Arenson's "Government Hospitals and Commercial Sales" group that includes hospitals and other institutional health care providers as customers. Prior to working for Arenson, Archondo worked for a company called Furniture Consultants, Inc. (FCI) in a different capacity to that at Arenson. The record supports that Archondo developed his own contacts at Elmhurst Hospital, Bellevue Hospital and Queens Hospital while at FCI. (Stone Aff. ¶ 5 and Exs. A through E to Def. Supplemental Memorandum dated August 17, 2006). It would appear that many furniture companies service the same clients within the health care industry. It is unclear whether Archondo had a prior relationship with the New York City Health and Hospitals Corporation ("HHC"), but it is uncontested that Arenson did have a relationship with HHC prior to Archondo's employment with it.

Several months after commencing work at Arenson, plaintiffs requested and Archondo executed a "NonCompete/Confidentiality Agreement" (the "Agreement") In the Agreement,

Archondo agreed not to divulge confidential information. (Complaint Ex. A). He also agreed that, if he resigned, he would not, “for a period of two years within the New York, Connecticut and New Jersey area:”

contact or solicit, or direct any person, firm, corporation, association, or other entity to contact or solicit, any Arenson Customer for the purpose of providing or attempting to provide any services and/or products that are directly competitive with the services or products provided by Arenson Office Furnishings, Inc.

The Agreement fails to define “Arenson Customer.” In that same Agreement, Archondo agreed not to solicit “the services of any Person who is an employee of Arenson, nor solicit any Employee to terminate employment with Arenson.”

Finally, the Agreement prohibits Archondo from disclosing Arenson confidential information. The Agreement defines “Confidential Information” as:

information generally unknown to the public or to our industry to which you gain access primarily because of your employment at Arenson and includes, but is not limited to, information relating to the Company strategies, marketing or sales plans, privacy, advanced sales, volume or unit figures, expansion plans, salary levels, product knowledge, current and potential customers, customer lists and accounts, financial data, employment benefits and operational costs.

The Complaint alleges that around April 3, 2006, Archondo gave notice that he would be resigning from employment with Arenson. (Complaint ¶ 17). At that time, he stated that he “would be taking a sales position unrelated to hospital customers.” (Id). Shortly thereafter, Archondo reversed position and said he would not be resigning. However, on April 24, 2006, Archondo again announced his resignation. He ultimately left Arenson on April 28, 2006. Shortly thereafter, Archondo began working for BFI.

The record supports (and defendants do not deny) that commencing in about February

2006, Archondo began e-mailing work-related e-mails to a private e-mail in the name of his wife, Lisette Archondo. The information these e-mails contained included information related to potential new business for Arenson with specifications and price quotes that Archondo had requested from suppliers. (See Supplemental Affidavit of Lawrence P. Tuck, sworn to August 17, 2006, "Tuck Supplemental Aff." ¶ 4 and Ex B). Archondo claims that he needed to send these e-mails so that he could work from home, but it was not until early 2006 that Archondo sent any e-mails to his wife's computer despite having worked for Arenson since 2002. (*Id.*) Plaintiff accuses Archondo of contacting customers on behalf of BFI when he was still working at Arenson. Lawrence Tuck, the Executive Vice President of Arenson, claims that the bookings for customers Arenson serviced have been less than what they had been when Archondo was a sales representative and in particular there have been no new bookings from Elmhurst since Archondo left and joined BFI. (Tuck Supplemental Aff. ¶ 15).

As an example of e-mail activity before Archondo left Arenson, plaintiff shows that on April 7, 2006, a supplier called Longo sent floor plans for a lab renovation for New York Hospital Queens to Archondo's wife's e-mail address. (Affirmation of Gershom R. Smith, dated August 17, 2006, "Smith Aff." Ex 13 at P-545). In another example, on April 19, Archondo, again using his wife's e-mail address, sent an e-mail to Bruce Stone at BFI, asking Stone to provide a quote for seating to Scott Fuller at Bellevue. (Smith Aff. Ex. 11 at BFI 000089)

On April 19, 2006, Archondo, while at Arenson, received a request for a proposal from HHC regarding a project on the 11th floor of 346 Broadway in Manhattan. (Smith Aff. Ex 12 at P-776). Even though this request came to him as an employee of Arenson, during his first week at BFI, Archondo sent an e-mail to the supplier Infinium, with whom Archondo had worked at

Arenson, asking “any word on the 11th Fl quote?” (Smith Aff. Ex. 15).

On April 26, 2006, while still employed at Arenson, Archondo again, using his wife’s e-mail, requested from another supplier, Neocase, quotes on the “D1” and “CPEP” projects at Elmhurst Hospital specifically for BFI. (Smith Aff. Ex 16 at BFI-90). This occurred again on April 28, 2006 when Archondo asked Neocase for another quote for BFI. (*Id.*) On May 1, 2006, Archondo’s first day with BFI, he sent the quote from his wife’s e-mail address to his colleagues at BFI and asked them to provide the quote to Elmhurst. (*Id.*)

On July 19, 2006, Arenson commenced this action by order to show cause seeking expedited discovery and a preliminary injunction. Originally, plaintiff sought a broad injunction enjoining and restraining Archondo from violating the provisions of the Agreement including restraining him from:

- soliciting any Arenson customer with whom Archondo dealt while Arenson employed him;
- interfering with Arenson’s relationship with any customer, supplier or other party with which Arenson does business and with which Archondo dealt while Arenson employed him;
- soliciting any Arenson employee to leave his or her employment with Arenson and
- using Arenson confidential information for any purpose, including for the benefit of BFI.

Apparently conceding that money damages would suffice for projects that had already occurred, at the oral argument on the motion for injunctive relief, plaintiff agreed to limit the injunction to precluding Archondo (and anyone he conveyed information to) from working on projects that he worked on at Arenson that are “ongoing.” (August 22, 2006 Tr. Pg 56-57). This is apparently because Arenson believes that Archondo is using his knowledge of Arenson’s

pricing structure, marketing plans and other information to compete unfairly on behalf of BFI.

DISCUSSION

A party seeking a preliminary injunction must show (1) a likelihood of success on the merits, (2) irreparable harm without the injunction and (3) that the balance of equities are in its favor. (See *J.A. Preston Corp., v. Fabrication Enterprises, Inc.*, 68 NY2d 397, 406 [1986]; *CoinMatch Corp., v. Fordham Hill Owners Corp.*, 3 AD3d 313, 312 (1st Dep't 2004); CPLR 6301).

In the employment context, restrictive covenants can adversely impact a person's ability to earn a living. Therefore, a court must interpret restrictive covenants quite narrowly. (See *Columbia Ribbon & Carbon Mfg Co., v. A-1--A Corp.*, 42 NY2d 496, 499 [1977]; *Purchasing Assoc., Inc. v. Weitz*, 13 NY2d 267, 272 [1963]).

To be enforceable under New York law, a restrictive covenant must satisfy the four-pronged test set forth in *BDO Seidman v. Hirshberg*, 93 NY2d 382 (1999). Accordingly, the enforcement of the restrictive covenant must be necessary to: (1) protect the employer's legitimate interests, (2) reasonable in time and area; (3) not unreasonably burdensome to the employee; and (4) not harmful to the general public. (*Id.* at 388-389).

Further, an employer may assert only four types of "legitimate interests" under the first prong of the BDO Seidman test: (1) protection of trade secrets; (2) protection of confidential customer information; (3) protection of an employer's client base; and (4) protection against irreparable harm where an employee's services are unique or extraordinary. (*Id.* at 389-392)

If an employer demonstrates at least one legitimate interest, a court has discretion to enforce partially an otherwise overbroad covenant to the extent necessary to protect the

established legitimate interest. (*Id.* at 394-395). An employer must also demonstrate “an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct” before a court will partially enforce the restrictive covenant. (*Id.* at 394).

I. Likelihood of Success on the Merits

A. Confidential Information

Arenson has identified sufficient interests in the protection of its client base and the protection of its confidential information to warrant further inquiry. Arenson contends that Archondo has used information he obtained while working at Arenson, in particular, pricing information and information about pending projects, and will continue to use that information to compete unfairly for BFI and against Arenson. The record is replete with indications that Archondo has indeed usurped information about pending projects that he learned while working at Arenson in order for BFI to compete unfairly against Arenson. For example, it would appear that Archondo has attempted to steer the “D1” and “CPEP” projects away from Arenson and to BFI. However, this does not end the inquiry. For no injunction can issue enforcing the non-compete provision of Archondo and Arenson’s agreement unless, *inter alia*, the information Archondo used to compete was confidential in the first place and the non-compete is reasonable in time and scope.

1. Is the Information Confidential in the First Place?

Archondo contends that pricing information is generally available in the industry and therefore the pricing information Arenson is worried about is not confidential in the first place. To establish that particular information is confidential customer information, Arenson must demonstrate that: (1) the information is not known in the trade and (2) is only discoverable

through extraordinary efforts. (*See Battenkill Veterinary Equine PC v. Congelosi*, 1 AD3D 856 [3d Dep't 2003]). Arenson contends that information regarding Arenson's profit margins (including information as to discount rates available to Arenson and Arenson's labor rates for installation and service) is confidential because it allows Archondo to know what prices for product, delivery, installation and services Arenson can offer to customers and allows him to undercut Arenson's pricing. (Pl. Mem at 9). Arenson also contends that, by knowing the discounts that Arenson offers, Archondo can perhaps offer deeper discounts. However, Arenson does not indicate why the information is generally unknown and only discoverable through extraordinary efforts. All Arenson offers is a self-serving quote from section 1 of the Agreement it drafted stating:

“Confidential Information” means any information generally unknown to the public or to our industry to which you gain access primarily because of your employment at Arenson and includes, but is not limited to information relating to Company strategies, marketing or sales plans, privacy, advanced sales, volume or unit figures, expansion plans, salary levels, product knowledge, current and potential customers, customer lists and accounts, financial data, employment benefits and operations costs.”

Just calling information confidential does not make it so. Pricing information is not generally confidential. (*See Silipos, Inc. v. Bickel*, 2006 WL 2265055 at *5 [SDNY August 8, 2006] *cf. Marietta Corp. v. Fairhurst*, 301 AD2d 734, 738 [1st Dep't 2003] [hotel amenities supplier's pricing data and market strategies did not constitute trade secrets]; but see *Portware, LLC v. Barot*, 11 Misc.3d 1059[A] [NY County 2006][after hearing, finding that pricing information was confidential]). Without further explanation, the court cannot discern how pricing information from suppliers would ever be confidential. The information resides with a third party and presumably any potential buyer could obtain a price quote.

However, knowledge of pending transactions is knowledge of confidential information.

(*See Ticor Title Ins. Co. v. Cohen*, 1998 WL 355420 at *4 [SDNY July 2, 1998], *aff'd* 159 F3d 774 (2d Cir. 1998), *op issued by* 173 F3d 63 (2d Cir 1999). It is undisputed that while at Arenson Archondo had access to information regarding pending projects such as the "D1" and "CPEP" projects at Elmhurst Hospital and the "11th Floor" project at 346 Broadway. Archondo appears to have used his knowledge of these pending transactions to compete unfairly against Arenson for ongoing segments of these projects. Thus, to the extent Archondo knew about pending transactions, he did have access to confidential customer information. This is sufficient to trigger the non-disclosure portions of the Agreement.

2. Enforceability

The non disclosure of confidential information portion of the agreement is valid and enforceable to the extent that it forbids Archondo from disclosing or exploiting Arenson's confidential information, including knowledge of the details of pending transactions. The scope of the restrictive covenant in the Agreement is reasonable because it runs for only two years from April 28, 2006. (*See, e.g., Battenkill*, 1 AD3d at 858 [three-year non-compete was reasonable]). Because the plaintiff agreed to limit the injunction to pending projects, the scope is reasonable because Archondo can still compete for customers, and even the same customers, just not the aspects of the projects that are ongoing.

Therefore, Archondo is enjoined from working on those projects that began while he was working at Arenson, including the "D1" and "CPEP" projects at Elmhurst Hospital and the "11th Floor" project at 346 Broadway referred to earlier. Apparently, these projects last for many years. The record contains indications that Archondo took these projects from Arenson by directing the business to BFI while he was still at Arenson. Although the initial portion of this lost project may

be compensable via money damages, the ongoing nature of the project and Archondo's seeming lack of inhibition to use Arenson time and confidential information, mandates that the court grant an injunction precluding Archondo from working on these projects for the duration of the non-compete period. This is to ensure that Arenson is able to compete fairly for whatever portion of these projects remain. However, customers whom Archondo had a preexisting relationship may not come within the injunction. This issue must await a hearing. (See part C *infra*)

Finally, although Archondo claims Arenson pressured him to execute the Agreement, he points to nothing indicating coercion. There is nothing coercive about the mere imposition of a restrictive covenant after the commencement of employment.

B. Is Archondo an Unique Employee?

Although the court has based its decision to issue an injunction of Archondo's use of confidential information, it will address Arenson contention that it is entitled to injunctive relief on the mere grounds that Archondo was a unique employee. Plaintiff cites *Ticor Title Insurance Co., v. Cohen*, 173 F3d 63 (2d Cir 1996) to support its argument that Archondo's services are unique and extraordinary because he allegedly was a "star" salesman. Traditionally, courts have found an employee to be unique in "various categories of employment where the services are dependent on an employee's special talents; such categories include musicians, professional athletes, actors and the like." (*Ticor*, 173 F3d at 70). Employees who do not fit into such categories do qualify if the employer establishes that the employee's "services are of such character as to make his replacement impossible or that the loss of such services would cause the employer irreparable injury." (*AM Media Communications Group v. KilGallen*, 261 F Supp 2d 258, 264 [SDNY 2003] [citations omitted]).

Plaintiff has failed to demonstrate that Archondo's services are worthy of protection as a unique employee. In *Ticor*, the employee was a senior vice president receiving a contractual minimum annual pay of \$600,000 whose actual salary reached \$1.1 million. Here, by contrast, Archondo was a mere salesman and one of many. Further, plaintiff's contention that it hired Archondo despite his lack of sales experience belies its contention that Archondo was somehow unique or extraordinary.

C. Non Solicitation

Arenson has no legitimate interest in preventing Archondo from competing for the business of customers with whom he never developed a relationship while at Arenson or customers with whom he had a relationship with prior to his employment at Arenson. (*See Healthword Corp. v. Gottlieb*, 12 AD3d 278, [1st Dep't 2004]; *Willis of New York Inc., v. Defelice*, 299 AD2d 240, 242 [1st Dep't 2002]).

Here, the record supports that Archondo had relationships with at least Queens Hospital, Elmhurst Hospital and Bellevue Hospital prior to working for Arenson. (*See, e.g.*, Affidavit of Giovanni E. Archondo, sworn to July 28, 2006 at ¶ 6)¹. Arenson claims it had relationships with these same clients. (*See Supplemental Tuck Aff* ¶ 19-20). Arenson also claims that, even if Archondo did have prior relationships with the same customers that Arenson did, the two built up those customer relationships over the years that Archondo was at Arenson, using time and effort from both and money from Arenson. The court can only resolve this issue through a hearing. It is unclear whether and to what extent Archondo had prior relationships and to what extent Arenson

¹The court is aware that Archondo has appended several e-mails from customers stating that they had a preexisting relationship with Archondo. However, as these e-mails are unsworn and appear to be merely for the purposes of this litigation, the court cannot credit them.

had prior relationships. Therefore, whether Archondo can contact these customers must await the close of discovery and a hearing.

D. Non-Solicitation of Arenson Employees

Plaintiff offers no evidence that Archondo solicited Arenson employees to leave their employment. Plaintiff suggests that Archondo had something to do with another Arenson employee, David Fleck, leaving Arenson for BFI, but offers no proof in support of that contention. Archondo, however, has interposed an affidavit from David Fleck, who swears that Archondo had nothing to do with his recent move to BFI. In addition, in an affidavit, Lisa Adonotti of BFI claims she was the one who brought Fleck to BFI, having known him for several years. Accordingly, plaintiff is unlikely to prevail on its claim that Archondo is improperly soliciting the employment of Arenson employees.

E. Interference with Suppliers

By the same token, plaintiff offers no credible evidence that Archondo has interfered with Arenson's relationship with its suppliers. Lawrence Tuck swears in his affidavit that he "recently received e-mail notification that Neocase has moved itself from Arenson's exclusive distribution contract with HHC to BFI's exclusive distribution contract with HHC." (Tuck Aff. at ¶22). Tuck continues, speculating without any support that, because Archondo sold Neocase products at Arenson, he caused Neocase to enter into an exclusive distributorship agreement with HHC to BFI's exclusive distribution contract with HHC. (Id. at ¶¶ 22-23). However, Neocase's vice president of sales states in an affidavit that "Neocase entered into a distribution contract with BFI because of the success of their longstanding relationship and Neocase's belief that BFI can meet its needs and not because of Giovanni Archondo's affiliation with BFI." (See Affidavit of Jeffrey

Lewis, sworn to August 15, 2006, attached as Exhibit N to the defendants supplemental memorandum).

Likewise, Mr. Tuck claims without support that “since leaving Arenson and joining BFI, Archondo has placed Infinium in the HHC/BFI exclusive-distribution contract.” (Tuck Aff at ¶ 23). In addition, Carl Milianta, Arenson’s President, claims that Shawn Gaffney, the president of Infinium told him that Archondo called him and asked if he would be willing to have Infinium listed as a supplier on BFI’s HHC contract and that Gaffney agreed. (See Affidavit of Carl Milianta, sworn to August 14, 2006 at ¶ 4a-b). This is pure hearsay that the court disregards particularly in light of Mr. Gaffney’s own affidavit in which he swears that: (1) Infinium never had an exclusive relationship with Arenson and (2) Infinium entered into an exclusive distribution contract with BFI for HHC as a result of discussions between Infinium and Bruce Stone of BFI, not Archondo. (Def Supp. Mem. at Ex M sworn to August 14, 2006.) Thus, plaintiff has failed to show that Archondo has interfered with its relationship with suppliers.

II. Irreparable Injury

To be entitled to a preliminary injunction, plaintiff must show irreparable injury. This means that damages will not suffice to protect plaintiff’s interests. (See *Willis of New York, Inc v. DeFelice*, 299 AD2d 240, 242 [1st Dep’t 2002]). Because the projects are ongoing, without a restraint on Archondo’s ability to work on those projects for BFI, Arenson would probably sustain a loss of business that would be very difficult, if not impossible, to quantify. Therefore, Arenson has shown the irreparable damage necessary to justify the limited injunction enjoining Archondo from working on those projects that he worked on at Arenson that are ongoing for the duration of the contractual period.

III. Balance of the Equities

A plaintiff seeking an injunction must also show that the burden an injunction would cause is less than the harm the defendant's activities are causing plaintiff. Here, the injunction does not prevent BFI from competing for the continuing aspects of the projects. Nor does it prevent Archondo from working for the same clients, but on different projects. The injunction only evens the playing field by taking Archondo and his knowledge of Arenson's confidential pricing structure out of the picture. Therefore, the balance of the equities favors plaintiff.

In accordance with the foregoing decision, plaintiff's application for a preliminary injunction is granted to the extent of prohibiting Archondo from working on projects that he worked on at Arenson to the extent they were not former customers of Archondo and is otherwise denied. Plaintiff shall furnish and maintain an undertaking in an amount to be set in the order to be settled during the pendency of the preliminary injunction. The parties shall contact the Part Clerk to arrange for a hearing on the limited issue of determining those customers, if any, with whom Archondo had a prior relationship. The parties shall settle an order in accordance with this opinion. The parties shall also appear for a conference on December 12, 2006 at 10:00 am.

Dated: October 24, 2006

[Signature]
COUNTY JUDGE
I.S.C.
FILED
OCT 30 2006