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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Justice

Attitude New York Inc,

-v-

Jeffrey Kaplan

INDEX NO. 116196/06

MOTION DATE

MOTION SEQ. NO. 01

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
APR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/16/07

LOUIS B. YORK J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 2

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ATTITUDE NEW YORK, INC.,

Plaintiff,

-against-

JEFFREY KAPLAN,

Defendant.

Index No. 116196/06

YORK, J.

This action arises from defendant Jeffrey Kaplan's alleged breach of a restrictive covenant by his solicitation of his former employer's celebrity clientele as customers for his own limousine company. Plaintiff Attitude New York, Inc. (Attitude) moves, pursuant to CPLR 6301, for a temporary restraining order and permanent injunction enjoining defendant from disclosing and utilizing confidential company information and/or trade secrets he obtained while working as a chauffeur for plaintiff. Plaintiff also moves to enjoin defendant from soliciting plaintiff's clients, retaining and/or copying client information and documents belonging to plaintiff which were obtained during defendant's employment with plaintiff, from permitting defendant's personal telephone number to be given to plaintiff's clients, and from providing limousine service to plaintiff's clients.

BACKGROUND

Plaintiff is a limousine company which services Connecticut, New Jersey, and New York. Defendant was a chauffeur for plaintiff from October of 1998 until he resigned on June 19, 2006.

Plaintiff contends that over the past twenty years, it has spent a significant amount of time and money cultivating and developing relationships with its customers. Plaintiff's clients include

high-level executives, athletes, celebrities, and politicians. Plaintiff argues that its celebrity clients often travel using aliases and that the client's contact information is not publicly available. Plaintiff contends that it has taken great care in protecting its customer list and contact information. Jeffrey Rose, plaintiff's president, avers that besides himself, defendant and only four other employees had access to Attitude's computer files which contained confidential contact information.

Every employee, including defendant, was required to sign an "Employee Confidentiality Agreement" (the Agreement), a purpose of which was to prevent the dissemination of plaintiff's client information and its customer list.

Section 1 (D) of the Agreement states:

> In consideration of such employment or continued employment, and receipt of the information, employee hereby expressly agrees that he/she:
>
> i. Shall regard, preserve and hold the information as highly confidential and as trade secrets of the company.
> ii. Shall not disclose any of the information nor permit it to be disclosed, directly or indirectly (the information interpreted broadly to be inclusive rather than exclusive) to any person or entity, absent prior written consent and approval except as required in order to carry out your proscribed duties.
> iii. Shall not photocopy or duplicate, and will not permit any person or entity to photocopy or duplicate any of the information without the company's prior consent and approval.
> iv. Shall not make any use of the information for his/her own financial or other benefit or such benefit of any person or entity other than the company.
> v. Shall return to the company all information including, but not limited to, customer lists, books maintained by the employee, lists, notebooks, reports, memorandum, correspondence and documents of every character and description which pertain to the company prior to employee's last day of work or immediately if employee is terminated involuntarily. Employees shall not retain any copy or copies thereof.

(Nevins Affirm., ex. A).

Section 2 of the Agreement prohibits employees from soliciting, interfering, and competing with plaintiff's business for one year after leaving the company. In this regard, the Agreement states:

> Employee agrees that during the term of his/her employment with the company, and for the period of one year after an employee's termination or other separation from the company for any reason, employee shall not, directly or indirectly interfere or compete with the company's business in any manner, including, but not limited to, by employing or utilizing the information in any solicitation, communication or other contact with any of the company's clients or employees. For purposes of this agreement, "Client" is defined as any person or entity which the company has solicited or conducted business with and is or has been at any time part of the company's information.

(*Id.*).

On June 19, 2006, defendant resigned from Attitude and announced that he was starting his own limousine company. Plaintiff alleges that upon leaving Attitude, defendant violated the Agreement by taking documents and information, including client business cards, and is now utilizing this information to retain at least four of plaintiff's celebrity clients. Although defendant returned nine business cards to the plaintiff, plaintiff alleges that defendant has other business cards collected during the course of his employment which he has failed to return, despite verbal and written requests. Plaintiff contends that defendant further violated the Agreement by driving plaintiff's celebrity clients including Goldie Hawn, Paul Giamatti, Lance Armstrong, and Jaime Pressly[1], after he resigned from Attitude.

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[1] Although plaintiff alleged in its complaint that defendant provided limousine service to Kate Hudson in July of 2006, defendant denies having any contact with Hudson following his employment with Attitude. Defendant also denies that he has driven Jaime Pressly since leaving Attitude (Kaplan Aff., ¶¶ 24, 29).

Defendant admits that during the course of his employment with Attitude, he gave out his personal cellular phone number to several high profile passengers (Kaplan Aff., at ¶ 21). Defendant also admits that after leaving Attitude, he was directly contacted by Goldie Hawn's personal assistant for his service as well as by Lance Armstrong and Paul Giamatti (*Id.*, at ¶¶ 23, 26, 30). However, defendant argues that he was not given special access to any confidential information and that he never utilized Attitude's computer system to ascertain passenger contact information.

The verified complaint consists of the following six causes of action: (1) that defendant disclosed information deemed confidential by the plaintiff in breach of the Agreement; (2) that defendant used confidential information to his financial benefit in breach of the Agreement; (3) that defendant solicited plaintiff's clients for his own business in breach of the Agreement; (4) that defendant refused to return confidential contact information he received from the plaintiff in violation of the Agreement; (5) that defendant has been soliciting clients in violation of the Agreement; and (6) that defendants tortiously interfered with plaintiff's current and prospective business relations.

DISCUSSION

Pursuant to CPLR 6301, a preliminary injunction may be granted to restrain the defendant from the "commission or continuance of an act, which, if committed or continued during the pendency of the action would produce injury to the plaintiff." Entitlement to a preliminary injunction requires a showing of three factors: (1) the likelihood of success on the merits; (2) irreparable injury absent the granting of preliminary injunctive relief; and (3) a balancing of the equities in the movant's favor. *Sterling Fifth Assoc. v Carpentille Corp., Inc.*, 5 AD3d 328, 329

(1st Dept 2004); *Little India Stores, Inc. v Singh*, 101 AD2d 727, 728 (1st Dept 1984).

New York courts generally disfavor the enforcement of restrictive covenants which prevent an employee from pursuing a similar vocation. *American Broadcasting Cos., Inc. v Wolf*, 52 NY2d 394, 404 (1981). The party seeking injunctive relief "must demonstrate a strong probability of ultimate success and thus a right to the relief sought, particularly in a proceeding to enforce a restrictive covenant against a former employee." *Rick J. Jarvis Assocs., Inc. v Stotler*, 216 AD2d 649, 650 (3d Dept 1995).

New York has adopted the standard of reasonableness in determining whether employee non-compete agreements are valid. *BDO Seidman v Hirshberg*, 93 NY2d 382, 389 (1999). In *Reed, Roberts Assocs. v Strauman* (40 NY2d 303, 307 [1976]), the court held, "a restrictive covenant will only be subject to specific enforcement to the extent that it is 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." In determining whether a covenant not to compete is necessary to protect an employee's legitimate interest, an employer may assert protection of trade secrets, protection of confidential customer information, protection of an employee's client base or protection against irreparable harm where an employee's services are unique or extraordinary. *BDO Seidman v Hirshberg*, *supra* at 389; *Crown IT Servs. v Koval - Olsen*, 11 AD3d 263 (1st Dept 2004).

Plaintiff has demonstrated a likelihood of success on the merits of its claim that its customer list and contact information for celebrity clients are trade secrets and should be protected as legitimate interests. Plaintiff alleges that it is not attempting to restrict or prevent defendant from operating a competing business, but instead is seeking to prevent defendant from

exploiting plaintiff's confidential company material. The information which plaintiff has collected from its clients is confidential in nature and is not publicly accessible. Celebrity assistants, publicists and managers private contact information was gathered over the years by plaintiff through services rendered. Defendant only became aware of the celebrity clients and their assistants' contact information as a result of his employment with Attitude.

Furthermore, plaintiff has taken steps to ensure that its client contact information would remain confidential. Along with requiring its employees to sign the Agreement, which specifically states that the information was highly confidential, it created a password-protected contact list. Plaintiff also instructed its drivers to not give out their personal phone numbers to clients for confidentiality and dispatcher organization purposes. Defendant admittedly violated this policy when he gave out his personal cell phone number to clients. Defendant also appears to have disregarded the Agreement by retaining confidential information after he left Attitude including several business cards with client contact information.

Defendant cites to *American Executive Limousine, Ltd. v Nudo* (122 AD2d 755 [2d Dept 1986]), and *Starlight Limousine Service, Inc. v Cucinella* (275 AD2d 704 [2d Dept 2000]), in support of his argument that customer lists of limousine services do not qualify as a trade secret. In both cases, the court held that the customer contact information was easily identifiable and could be acquired without the use of non-confidential sources. Here, as the client contact information is not easily ascertainable or available to the general public, the information can be considered a legitimate interest which the employer is entitled to protect.

An employee's services which are special, extraordinary or unique may entitle an employer to injunctive relief. In *BDO Seidman v Hirshberg*, *supra*, the Court of Appeals held

that the protection of customer relationships which an employee acquired during the course of employment may be considered to be a legitimate interest and stated, "[t]he employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment." 93 NY2d at 392. While defendant contends that his services as a limousine driver are not unique or extraordinary, plaintiff contends that defendant had unique relationships with certain clients who specifically requested his service. Defendant admits that "it was these relationships that kept many passengers coming back to Attitude. These passengers did not want an Attitude driver to chauffeur them around town; they wanted and specifically requested me. I became their personal chauffeur whenever they were in New York and, because of the services I provided, they recommended me, not Attitude, to their family and friends" (Kaplan Aff., at ¶ 16). Therefore, the service defendant provided to Attitude's clients may be found to be unique and a legitimate interest worth protecting.

A restrictive covenant must also be reasonable in both time and area. *Reed, Roberts Assocs.*, 40 NY2d at 307. Here, while the restrictive covenant is broad and prevents former employees from competing with plaintiff's business for one year, plaintiff is not seeking to restrict defendant from operating his own limousine service or from soliciting is own clients in any geographic area. Rather, plaintiff is only asking that defendant be restrained, for a period of one year, from utilizing plaintiff's confidential client information by soliciting the business of its clients, which the court deems reasonable.

Finally, the Agreement does not place an undue burden on the defendant nor is same injurious to the public. Plaintiff is not attempting to stop defendant from operating a limousine

business and the enforcement of the Agreement would in no way impact the general public who are free to choose from a multitude of other limousine services.

Although plaintiff has established a likelihood of success on the merits of its claim that defendant exploited plaintiff's confidential business information and has been soliciting some of its former customers, plaintiff must also prove that it will suffer irreparable harm. Irreparable harm is an "injury for which [a] monetary award cannot be adequate compensation ... ." *Jackson Dairy, Inc. v H.P. Hood & Sons*, 596 F2d 70, 72 (2d Cir 1979), see also *Credit Index, LLC v RiskWise Intl., LLC*, 282 AD2d 246 (1st Dept 2001). Plaintiff argues that several of its past celebrity clients are now clients of the defendant including Goldie Hawn, Paul Giammati, Jaime Pressly, and Lance Armstrong. Plaintiff alleges that these clients would have continued using plaintiff's services if they were not contacted by defendant. Plaintiff alleges that they have lost these clients and argues it is difficult to calculate monetary damages that would redress the loss of a relationship with a celebrity client that could provide an indeterminate amount of business.

There is no evidence that these celebrity clients had an exclusive arrangement with Attitude, or that they would have continued as Attitude customers after defendant left the company as opposed to calling another limousine company. Even assuming that plaintiff establishes that they would not have lost the business of these clients but for defendant's solicitation in violation of the Agreement, plaintiff fails to establish that it cannot be adequately compensated by an award of monetary damages for any business it lost to defendant by his solicitation of a handful of the plaintiff's clients through June 19, 2007. *Atlantis Worldwide, Ltd. v Benitez*, 290 AD2d 379 (1st Dept 2002). There is no allegation that defendant is operating on a cash basis, as opposed to charge accounts, making the calculation of plaintiff's lost profits

impossible or even difficult to calculate. "Damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable." *SportsChannel America Assoc. v National Hockey League,* 186 AD2d 417, 418 (1st Dept 1992).

Without the showing of irreparable injury, preliminary injunctive relief is not warranted.

CONCLUSION AND ORDER

For the foregoing reasons, the motion for preliminary injunctive relief is denied.

Dated: April 6, 2007

ENTER:

J.S.C.