

<b>GFI Brokers, LLC v Giardina</b>
2007 NY Slip Op 31517(U)
April 20, 2007
Supreme Court, New York County
Docket Number: 0600927/2007
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED PART 60  
*Justice*

**FBEM**

GFI BROKERS, LLC,

INDEX NO. #600927-2007  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

Plaintiff,

- v -

VICTOR GIARDINA and TRADITION  
(NORTH AMERICA) INC.,

Defendants,

NYS SUPREME COURT  
REVIEWED  
APR 24 2007  
E-FILING DEPT.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM  
DECISION.

**FILED**

APR 23 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/20/07

Bernard J. Fried  
J.S.C. **BERNARD J. FRIED**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**FBEM**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

-----X  
GFI BROKERS, LLC,

Plaintiffs,

INDEX NO.: 600927-2007

-against-

VICTOR GIARDINA and TRADITION  
(NORTH AMERICA) INC.,

Defendants.

**FILED**

APR 23 2007

**APPEARANCES:**

For Plaintiff:

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and  
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**FRIED, J.:**

Plaintiff GFI Brokers, LLC (“GFI”), an interdealer broker, moved by order to show cause for a preliminary injunction and temporary restraining order, pursuant to CPLR Section 6301, enjoining Defendant, a former employee, Victor Giardina (“Giardina”) from violating provisions of his employment agreement (the “Agreement”) and engaging in other unlawful conduct. On March 22, 2007, I heard oral argument on this motion, denied plaintiff's request for TRO and set a briefing schedule for the preliminary injunction. On April 10 and April 11, 2007, I heard oral argument, and three witnesses were called by Plaintiff: Nicholas Brown (“Brown”), Managing Director at GFI and Giardina's former supervisor, Giardina, and Jason Forwood (“Forwood”), who was the manager of the NDF and IRS desk for Latin America at GFI as well as Giardina's former manager.

The undisputed facts are as follows: Giardina was employed by GFI, on the company's NDF desk, in the emerging markets area. The NDF desk brokers products called "non-deliverable forwards," which are a currency-based product. The Agreement between Giardina and GFI provided that Giardina's Initial Employment Term would run through January 31, 2007. (Agreement §2A). On October 20, 2006, Giardina sent a Notice of Termination, informing GFI that he intended to renegotiate his contract with the company. After negotiations, GFI and Giardina had still not reached a new agreement as of February 1, 2007. Both sides identified the amount of Giardina's guaranteed minimum bonus as the major point of contention, with Giardina unwilling to accept a number below \$450,000 and GFI unwilling to guarantee an amount above \$350,000.

It is also undisputed that, on January 31, 2007, and again on February 1, 2007, Giardina accompanied Forwood to McGee's, a bar next to GFI and, on both occasions, they discussed whether Giardina intended to sign a new contract with GFI. On January 31st, Forwood told Giardina that he could take 24 hours to consider his options, and on February 1st, Giardina told Forwood that he did not intend to sign the new contract offered him by GFI. While the witnesses' accounts of subsequent events differ sharply, it is agreed that Giardina turned in his employee access card and corporate credit card February 1st. (April 10, Tr. p. 77). It is also not contested that Giardina received a letter from GFI, referring to his resignation and reminding him of the post-termination restraints detailed in §5(E) of the Agreement. (Plaintiff's Memorandum of Law p. 6).<sup>1</sup> Finally, both sides agree that Giardina returned to the GFI offices on February 5th and 6th and attempted to resume his duties at the NDF desk.

To obtain a preliminary injunction, pursuant to CPLR 6301, the party seeking injunctive relief must show “(1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted and (3) that the equities are in his favor.” (*Preston Corp. v. Fabrication Enters.*, 68 NY2d 397, 406 [1986].)

In order to prevail on the first prong, Plaintiffs must demonstrate that the six month non-compete provision is enforceable. It is well settled that, subject to exceptions, New York courts will enforce a non-compete covenant when the restriction reasonable in scope

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1

Section 5(E) prohibits Giardina, for six months after his employment with GFI from doing business with GFI customers he serviced while employed by GFI. (Agreement §5(E)[i] and [ii]).

geographically and temporally. (*BDO Seidman v. Hirshberg* 93 N.Y.2d 382, 388-389 [1999]); *Reed, Roberts Associates, Inc. v. Strauman* 40 N.Y. 2d 303, 307 [1976]). Here, the scope of the restrictive covenant is not at issue.<sup>2</sup> Instead, the covenant's enforceability depends on: (a) whether GFI terminated Giardina and (b) whether Giardina's services qualify as 'unique' or 'extraordinary.'<sup>3</sup>

As a threshold matter, it is necessary that I determine whether Giardina was terminated. While New York law will impose "limited restraints on an employee's employment mobility where a mutuality of obligation is freely bargained for by the parties," it disfavors enforcement of restrictive covenants against former employees who were terminated without cause. (*Post v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 48 N.Y.2d 84, 89 [1979]). In *Merrill*, the Court of Appeals noted, with regard to the mutuality of

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Defense counsel asserted at oral argument, that, if I were to enforce the restrictive covenant, that I should exercise my discretion to shorten the time period because GFI failed to mitigate damages by not beginning a search for a replacement when Giardina gave notice. However, GFI has not argued that the covenant is, on its face, unreasonable in scope. (April 11, Tr. p. 36).

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Even if the court determines that a restrictive covenant is reasonable in scope, it is also necessary that the restrictive covenant does not impose an undue hardship on the employee and is not harmful to the general public - neither of which is at issue in the matter at hand. (*BDO Seidman* at 391-92; *Reed* at 307). When a court determines that a restrictive covenant is geographically and temporally reasonable, the next inquiry is as follows: Where a covenant is reasonable in scope, New York courts will grant enforcement of restrictive covenants, to the extent necessary to protect the employer from unfair competition, "(1) to prevent an employee's solicitation or disclosure of trade secrets, (2) to prevent an employee's release of confidential information regarding the employer's customers, or (3) in those cases where the employee's services to the employer are deemed special or unique." (*Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 [2d Cir. 1999], applying New York law; *Am. Broad. Co., Inc. v. Wolf*, 52 N.Y.2d 394, 403 [1981]). As agreed to by the attorneys, at oral argument, the only issues are whether the covenant should be enforced, whether Giardina's services were unique, and whether GFI terminated him.

obligation, that “[a]n essential aspect of that relationship, however, is the employer's continued willingness to employ the party covenanting not to compete.” The Court deemed this limitation necessary to prohibit an employer from “us[ing] offensively an anticompetition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services.” (*Id.* at 89).

Giardina asserts that I should decline to enforce the restrictive covenant because GFI forced him out and contends that GFI's refusal to accept him as an at-will employee was tantamount to having terminated his employment.

GFI argues that Giardina terminated his employment with GFI; furthermore, it alleges that Giardina's return to the company's offices was an afterthought and a transparent attempt to force GFI to terminate Giardina and thus call the enforceability of the restrictive covenant into question.

From the undisputed facts and from Giardina's own testimony, it is clear to me that GFI did not terminate Giardina. Even if I accept as credible his assertion that he hoped and intended to remain at GFI, which is doubtful, this would not constitute his termination without cause. Instead, aware that his contract with GFI was nearing its end, Giardina entered into negotiations with GFI for new employment terms rather than allowing his contract to roll automatically into a successive period. Giardina gave notice to GFI on October 20, 2007 that he wanted to renegotiate his contract. He also began discussing employment opportunities with one of GFI's competitors, Tradition (North America Inc.) (“Tradition”), around the first week of December. That Giardina received a contract from Tradition on the very day he returned again to GFI's office asserting that he wished to remain

as an at will employee, buttresses my conclusion that Giardina negotiated unsuccessfully for a more favorable employment contract with GFI, knowing that he planned to leave GFI if he did not find the new proposed terms satisfactory. Indeed, it is undisputed that GFI offered Giardina renewed employment, albeit on terms he did not care to accept.

Additionally, I find credible Brown and Forwood's testimony, that they attempted to reach an agreement with Giardina to retain him as an employee. The fact that Giardina did not find GFI's offer adequate, does not convert the expiration of Giardina's previous contract and the failed negotiations for a subsequent contract into a termination by the company. Giardina ultimately chose not to renew his employment with GFI and cannot now recharacterize his decision to part ways with GFI as a firing.

Moreover, I find that the facts of Giardina's February 1, 2007 departure from the office plainly indicate that his employment with GFI ended that day. The Agreement, as amended, provided for Giardina's Initial Term of employment to run through January 31, 2007. Giardina testified that Forwood informed him that he needed to either sign the deal "as is" or part ways with GFI and that he then told Forwood he had decided not to sign the renewal contract. He also testified that he then went upstairs to the GFI office, turned in his building access card and corporate credit card. He admitted to speaking with Lisa Macaluso, Brown's secretary, who gave him a letter and "[m]entioned something about COBRA." I reject Giardina's testimony of the day's events and find Brown's and Forwood's to be credible: given a choice between signing the final contract offered by GFI or ending his employment with the company, Giardina decided not to renew his employment and turned in his cards with the understanding that he was no longer an employee.

Giardina argues that he reasonably understood himself to have been terminated from GFI, even though he was not formally fired. (See *Chertkova v. Conn. Gen. Life Ins.*, (92 F.3d 81, 88 [2nd Cir 1996]; See also Defendant's Memorandum of Law, p.5). While *Chertkova*, an employment discrimination case, stands for the unexceptional proposition that formal words of firing need not be spoken for a termination to have occurred, it is distinguishable here, where I find that it is not credible for Giardina to claim that he believed he had been fired, after he refused to sign the new contract offered to him

I also conclude that GFI was not obligated to offer Giardina at-will employment under the circumstances, where he was known to have been negotiating with other potential employers and where Giardina, himself, admitted that his relationship with management was strained. It is also preposterous to contend that GFI "terminated" a former employee because the company prohibited him from working when he returned on February 5th and 6th and attempted to resume his previous duties after having already refused to sign the renewal contract and turned in his building access and corporate credit cards the previous week. For the foregoing reasons, I find that GFI did not terminate Giardina.

I now turn to the question of whether Giardina's services were of a "unique" or "extraordinary" nature. (*Purchasing Associates, Inc. v. Weitz* 13 N.Y.2d 267, 274 [1963]). Where a covenant is reasonable in scope, New York courts will grant enforcement of restrictive covenants "(1) to prevent an employee's solicitation or disclosure of trade secrets, (2) to prevent an employee's release of confidential information regarding the employer's customers, or (3) [as at issue here] in those cases where the employee's services to the employer are deemed special or unique." (*Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 [2d

Cir. 1999)). To enforce a restrictive covenant on the basis that an employee's skills are unique or extraordinary, an employer must show more than that the employee excels at his or her work or that the employee's performance is of a high value to the employer. It must also appear that the employee's services are of such a character as to (1) make his replacement impossible or (2) that the loss of such services would cause the employer irreparable injury. (*Id.*; See also *Purchasing* at 274). Furthermore, "it is not necessary that the employee should be the only 'star' of his employer, or that the business will grind to a halt if the employee leaves." (*Ticor* supra at 71). Instead, the uniqueness inquiry focuses "more on the employee's relationship to the employer's business than on the individual person of the employee." (*Id.*).

GFI argues that Giardina's services are unique and that the loss of his services caused the company irreparable injury primarily because, at the expense and encouragement of the company, Giardina developed valuable relationships with GFI clients. GFI further asserts that these relationships between a broker and the company's clients are crucial to the firm's success. New York courts have recognized as unique services provided by interdealer brokers such as Giardina. (*Maltby v. Harlow Meyer Savage, Inc.*, 166 Misc. 2d 481, 486 [Sup. Ct. N.Y. County, 1995]); *Ticor* 173 F.3d 63, 71). While a former employee's familiarity with a company's customs and business methods, has not been found "unique," relationships with a former employer's customers have been considered unique in certain circumstances. (*Maltby* at 486).

In *Ticor*, the Second Circuit, applying New York law, evaluated whether a former employee's relationships with customers qualified as unique. In determining that the court

below did not err in enforcing a restrictive covenant, the Court relied on various facts including: (1) that all of the former employee's clients came to him during his time with the company; (2) that these relationships developed, in part, at the company's expense; (3) that half of the former employee's clients were inherited from former salespersons; and (4) that competition for the business [in *Ticor*, the title insurance business] relied heavily on personal relationships because (a) the costs and terms of the product were fixed, so relationships were key to sales and (b) potential clients were limited and well known in the industry, so maintaining current clients from this established group was crucial. (173 F.3d 63, 71).<sup>4</sup>

Here, all but the third of these factors discussed in *Ticor* apply, and applying them leads to my concluding (a) that Giardina's services to GFI were unique because of the special relationship the company enabled him to develop with customers and (b) that his immediate availability at a competitor would cause irreparable injury to GFI.

Giardina testified that he came to GFI without any prior experience in nondeliverable forward trades ("NDFs"), which he learned at GFI and, more importantly, that he "did not know any customers going into GFI." GFI invested considerable resources in enabling Giardina to develop a relationship with GFI clients. The company provided Giardina with significant monies to entertain firm clients, reimbursing his travel and entertainment expenses based on the brokerage that he brought into the company, which amounted to

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*Ticor*, also discussed that, the court below had considered whether an individual was represented by counsel in signing a non-compete clause. It should be noted, that, while Giardina was not advised by counsel when he entered into the contract with GFI, he later signed the Tradition contract, containing a nearly identical non-compete clause and similar language identifying his services as "unique," and he was represented by counsel at that point.

approximately \$75,000.00 a year. Moreover, GFI held several client events for the purpose of allowing GFI brokers to further their relationships with their clients. Additionally, GFI assisted Giardina in obtaining the trust and confidence of GFI clients. Giardina worked on a strong desk with eleven to twelve other brokers to help plan liquidity, and, as Giardina's counsel acknowledged, other brokers at GFI assisted him in providing pricing to his clients. Restrictive covenants, appropriate to protect a former employer's relationships with customers in situations such as here, have been upheld because of the expense and effort the company put into forging a strong relationship between customers and the former employee, and because the company requires time to renew relationships with its customers and allow new brokers to form client ties similar to those the former employee built or strengthened by using the company's resources. (*Maltby* at 486; See also *Natsource LLC v. Paribello* 151 F.Supp.2d 465, 473-474 [S.D.N.Y. 2001]).

Also, as in *Ticor*, Giardina and GFI are engaged in a business where customer relationships are a key component of sales. I find credible Brown's testimony that customer relationships are of the utmost importance to GFI's business. GFI clients did business with Giardina as a result of both the personal relationships he had developed with the clients and of the professional trust he had obtained by providing effective execution. Here, costs and terms of the product were fixed, and, as Brown explained, there are "basically five or so interdealer brokers", all of whom provide essentially the same product, *i.e.* NDFs. However, an important component of the broker/customer relationship, as it affects a customer's willingness to do business with a particular company, is the professional comfort level a customer obtains from having done business with a particular broker and seeing that that

broker can “execute business in a way that doesn't move the market away from [the customer.]”

Finally, Brown testified that several major customers, including the Royal Bank of Scotland, Merrill Lynch, Morgan Stanley and ABN Chicago Merrill, comprised nearly ninety percent of GFI's business. These customers are “limited and well known in the industry.”

For the foregoing reasons, I believe that Giardina's services to GFI were unique, primarily as a result of the customer relationships he developed while at GFI and at its expense.

As discussed in *Ticor*, “[a]n employer has sufficient interest in retaining present customers to support an employee covenant where the employee's relationship with the customers is such that there is a substantial risk that the employee may be able to divert all or part of the business.” (*Ticor* at 72). In *Maltby*, Justice Cahn noted, as significant, that the former employees had signed an employment contract with a clause acknowledging that their services were unique. (*Maltby* at 483). That is precisely what Giardina signed here. Indeed, his new contract with Tradition includes a nearly identical noncompete clause, again specifically identifying his skills as unique. (Defendant's Memorandum of Law p. 11, FN5; Agreement p. 1 §6, Exhibit A to Brown Aff.; Ex. P at ¶13).

I believe that Giardina's departure caused GFI irreparable injury. Giardina was responsible for approximately 25% of the business on the NDF desk, while he was employed at GFI, and, subsequent to his departure from GFI, business was down approximately 50% on the lines Giardina covered. Moreover, Giardina's departure from the desk affected the ability of other brokers on the NDF desk to effectively conduct business, including managing

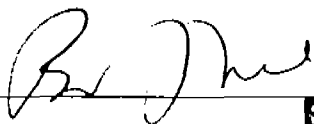
the flow of customer orders and offering competitive pricing. This damage caused to GFI cannot be readily calculated.<sup>5</sup> Consequently, since Giardina's services are unique, the second prong of the test for whether a preliminary injunction should issue has been satisfied.

Finally, the equities favor the plaintiff. In addition to specifying a restriction that is reasonable in scope and identifying Giardina's services as unique, the GFI contract also provided that Giardina continue to be paid by GFI during the six months the restriction is in place. GFI paid Giardina in accordance with the terms of the contract. While Giardina returned the payments several weeks later, this is not sufficient to shift the balance of equities.

For the foregoing reasons, Plaintiff's request for preliminary injunctive relief is GRANTED; and it is further

ORDERED that this preliminary injunction is conditioned upon GFI posting an undertaking of \$1.5 million.

DATED: 4/20/07

  
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J.S.C.

**BERNARD J. FRIED**  
**J.S.C.**

**FILED**  
APR 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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Counsel for Giardina has argued that, because the contract contained a liquidated damages clause, that monetary damages should adequately compensate GFI. However, the Agreement also preserves the right of GFI to seek injunctive relief, and, I am satisfied that the liquidated damages provision does not preclude the relief sought here.