Binet, Inc. v Chancellor, N.Y. State Dept. of Educ.
2007 NY Slip Op 34493(U)
April 23, 2007
Supreme Court, New York County
Docket Number: 103707/06
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17
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BINET, INC.,

Petitioner, Index No. 103707/06

-against-

CHANCELLOR, NEW YORK STATE DEPARTMENT OF EDUCATION and DEAF AND HARD OF HEARING INTERPRETING SERVICES, INC.,

Respondents.
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EMILY JANE GOODMAN, J.S.C.:

Pursuant to Decision and Order, dated July 13, 2006 ("Decision"), the Court held the Petition and cross motions in abeyance pending receipt additional papers (affidavits and memorandum of law), within 20 days, regarding the issue of whether certain information should be protected from FOIL disclosure as trade secrets.[1] The Petition sought to prevent New York State Department of Education (DOE) from releasing the names of Petitioner's sign language employees, disclosed in its proposal RFP#1C116, to Petitioner's competitor, Deaf and Hard of Hearing Interpreting Services, Inc. (DHHIS). Because DOE did not intend to release the employee's addresses, telephone numbers, licenses numbers or social security numbers, the Court confined its Decision solely to whether Petitioner's employees' names were exempt from disclosure. Petitioner had

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[1]Although the Court did not specify that the additional submissions should also address whether disclosure of the information would "cause substantial injury to the competitive position of the subject enterprise," a ground for exemption under Chancellor's Regulation D-110, Paragraph 16 of the Petition raised the argument, and it is therefore, it is addressed here.

argued that the names were confidential and protected as trade secrets under FOIL (Public Officers Law § 87 (2) [d]) and under Regulation of the Chancellor, Number D-110, issued 1/9/03 (Regulation D-110), containing identical language. The Court previously decided that whether Public Officers Law 87 (2) (d) applies to DOE is of no import because DOE itself notes that the Regulation D-110 tracks the same language as FOIL.

Discussion

DOE argues, through its attorney, that the names of all Certified Sign Language Interpreters are available from on the internet at www.rid.org, a Registry of Interpreters for the Deaf, which certifies the proficiency of the interpreters. Further, DOE points out that Petitioner itself admitted in a letter to DOE that the employees in question are listed on that database. DOE also maintains that there is no evidence that Petitioner's sign interpreters possess special skills apart from any other individual listed on the registry. Therefore, DOE argues that Petitioner has not demonstrated that its list would be of value to Petitioner's competitors. DOE concludes that because the registry yields approximately 100 sign interpreters in the New York area, the effort to reach Petitioner's employees would not be so extraordinary as to entitle the names to protection, citing Leo Slifen, Inc.v Cream (29 NY2d 387 [1972] [trade secrets status attaches to names which are "not known in the trade or discoverable only be extraordinary effort"]). DOE also maintains that absent extraordinary circumstances, not present here, the public has the right to know the names of individuals supplying special education services to New York

City.

DHHIS similarly argues that the names of all Certified Sign Language Interpreters are available from on the internet at www.rid.org.[2] Thus, DHHIS maintains that the names of those interpreters could be ascertained "at virtually no cost" by narrowing the candidates geographically and telephoning each one, which DHHIS claims is about 100 in the New York area. Further, it argues that the names of the interpreters are not a trade secret, citing Three Dots, Inc. v Lonny Wardrobe, Inc. (292 AD2d 309 [1st Dept 2002] [suppliers of trademarked merchandise are not a trade secret because the information is not a "formula, pattern, device or compilation of information," and because there was no evidence of the efforts expended in developing the secret, nor evidence that information would be valuable to a competitor]); and Starlight Limousine Serv., Inc. v Cucinella, 275 AD2d 704 [2d Dept 2000] [customer lists are not a trade secret because plaintiffs failed to take measures to guard the secrecy of the lists and, notwithstanding plaintiffs' expenditure of time and money in compiling the lists, the information could "be acquired with no extraordinary effort from nonconfidential sources"]).

In its submissions, Petitioner, through the Affidavit of its President, reiterates that its employees (which include bilingual psychologists, social workers, and guidance counselors not at issue here) and its sign language interpreters, are limited in number and

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[2]The Court disregards DHHIS's improper attempt to reargue the Decision regarding the issue of timeliness, in a Supplemental Affirmation. No motion to reargue was filed, and therefore those arguments are not addressed.

difficult to find and, that Petitioner spent approximately $350,000 in finding and training them (for advertising, recruitment, commissions, and continuing education courses). Petitioner also refers to the cost of compiling its employee list and guarding its secrecy. Petitioner maintains that it has confidentiality agreements with all its staff to protect against disclosure of these confidential names to its competitors. Petitioner further argues that not all of its sign language employees are from the New York area (but does not state the number of sign language employees who are not from the area), that the registry has a nationwide membership of over 5,000 individuals, that some individuals on the registry may opt to exclude certain information according to the website's policy, that there are other registries which list sign language interpreters, and that test results for social workers, psychologists and guidance counselors (not at issue here) are not listed in any registry.

As noted in the Decision, "[a] party claiming exemption from disclosure of a particular document requested pursuant to FOIL bears the burden of proving entitlement to the exemption" and therefore, "the normal CPLR Article 78 'arbitrary and capricious' standard of review' does not apply (see Bahnken v New York City Fire Department, 17 AD3d 228, 229 [1st Dept 2005]). Further, as previously noted in the Decision, both Section 87 (2) (d) and Regulation D-110 exempt from disclosure trade secrets submitted to an agency by a commercial enterprise which "if disclosed would cause substantial injury to the competitive position of the subject enterprise." Whether such injury exists

turns on "the commercial value of the requested information to competitors and the cost of acquiring it through other means" (Matter of Encore College Bookstores, Inc. v Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410, 419 [1995]). Names are not protected as trade secrets if they are "readily ascertainable from nonconfidential sources by reference to, among other publications, local telephone listings" (Freeman v Zhu, 209 AD2d 213 [1st Dept 1994]).

DOE correctly determined that Petitioner has not demonstrated that the names of its sign language interpreters, listed in proposal RFP#1C116, are trade secrets, nor that the release of such information would "cause substantial injury to the competitive position" of Petitioner. Although Petitioner has demonstrated that it has taken measures to guard the secrecy of the names of its staff, it has failed to demonstrate how much time and money it expended in developing the information sought here, lumping together the costs of hiring and training all its employees, as opposed to segregating the costs. Petitioner has further failed to demonstrate that the information is discoverable only through extraordinary effort as Petitioner admits that the names of the sign language interpreters at issue are available, among other names, at a public website www.rid.org. Thus, Petitioner does not dispute that, by searching the website, and then contacting the individuals directly, one could create a list of available sign language interpreters. The fact that Petitioner might send its employees to continuing education courses, or believes that it has the eye to identify superior employees, or has spent "countless employee-

hours" recruiting and training, does not transform the information sought into a trade secret. Nor does Petitioner demonstrate how releasing such information would provide an advantage to a competitor, who might disagree with Petitioner's conclusion that its employees are more qualified than others, as a result of Petitioner's "very exacting standards." Accordingly, movant has not established that the information is valuable based on its conclusion that the list would give a competitor a "pre-screened, quality list of professionals." There is also a distinction between the cases cited by Petitioner, involving protection of customer lists and the issue here. The value of a customer list is known (i.e., based on the customer's prior purchase history). However, the value of the employees' names sought here (who are not shown to be extraordinary in their field) are not. Thus, although it is possible than an employee list might constitute a trade secret under the proper circumstances (the Court has found one federal court case outside of New York which has so held), such a demonstration was not made here.

It is hereby

ORDERED AND ADJUDGED the Petition is denied; the cross motions are granted and the proceeding is dismissed.

This constitutes the Decision, Order and Judgment of the Court.

Dated: April 23, 2007

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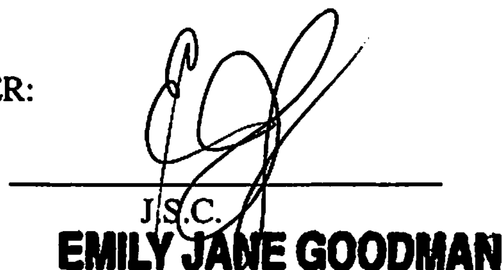

J.S.C.

EMILY JANE GOODMAN