

Imperial Capital, LLC v Broadpoint Sec. Group, Inc.

2008 NY Slip Op 30386(U)

February 6, 2008

Supreme Court, New York County

Docket Number: 0102054/2008

Judge: Eileen A. Rakower

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

PRESENT: Rakower
Justice

PART 5

Imperial Capital, LLC

INDEX NO. 102054/08

MOTION DATE _____

- v -

Broadpoint Securities Group, Inc., Tim O'Connor, Greg Ethridge, and Gary Shaw

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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
<u>1, 2, 3, 4, 5</u>
<u>6</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

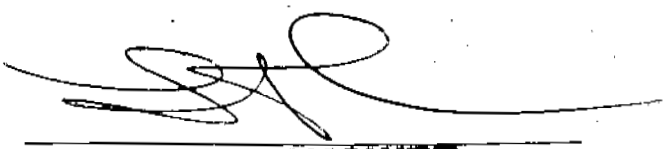
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

FEB 11 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: February 6, 2008



EILEEN A. RAKOWER J.S.C.
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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
IMPERIAL CAPITAL, LLC,

Petitioner,
- against -

Index No.
102053-08

BROADPOINT SECURITIES GROUP, INC., TIM
O'CONNOR, GREG ETHRIDGE and MARY SHAW,

Decision
and Order

Respondents

-----X
HON. EILEEN A. RAKOWER:

Petitioner brings this application for a temporary restraining order enjoining respondents from 1) using or disclosing petitioner's confidential and proprietary information (Confidential Information), 2) violating the individual respondents' post-employment covenants regarding the hiring or solicitation of petitioner's employees or assisting the corporate respondent in doing so, and 3) violating the individual respondents' post employment covenants regarding solicitation or acceptance of business from petitioner's clients or assisting the corporate respondent from doing so.

Respondent Tim O'Connor (O'Connor) was the head of petitioner Imperial Capital's, (Imperial) corporate finance and restructuring group until approximately two weeks ago when he resigned. Since then he has been in negotiations with respondent Broadpoint Securities Group, Inc. (Broadpoint), which pblically announced it was going to hire O'Connor to head its newly acquired corporate restructuring unit. Within the last week, respondents Greg Ethridge (Ethridge) and Mary Shaw (Shaw), along with eight other Imperial employees, resigned and are now employed by Broadpoint. As part of its employment contract, Imperial requires its employees to sign restrictive covenants which govern their relationship with Imperial after they leave the corporation and pertain to restrictions on the use Confidential Information and recruiting or assisting others in recruiting Imperial employees. Upon the departure of its employees to Broadpoint, Imperial discovered that its former employees had violated rules in its employee handbook regarding the proper use of e-mail and, in violation of their employment contracts, had appropriated confidential information, deleted large quantities of electronic documents and discarded hard

copies of many documents. It is Imperial's belief that Broadpoint and O'Connor were complicit in its former employees' actions, both by encouraging them to leave Imperial and join Broadpoint, and in the appropriation of Confidential Information.

Imperial states that O'Connor and his group were extremely successful in 2007, generating approximately eighteen million dollars worth of business for it, and that they had the capacity to generate even more business for Imperial in the future. Imperial believes that, without O'Connor's help, it would have been impossible for Broadpoint to raid its corporate restructuring group. Imperial argues that the malicious intent of Broadpoint and Imperial's former employees is demonstrated by both the electronic trail that was left behind when e-mails were both forwarded to private accounts and deleted, and its own security videos which show its former employees, late at night, throwing away Imperial's documents. It avers that there is no legitimate explanation for this conduct, which was designed to impede Imperial's ability to continue to serve its clients.

Petitioner has commenced an arbitration proceeding before the Financial Industry Regulatory Authority (FINRA) seeking a permanent injunction prohibiting respondents from, *inter alia*, 1) using or making available to others Imperial's client information, confidential data or trade secrets, 2) using that information and requiring the return of Imperial's confidential information and documents, 3) recruiting or hiring any present Imperial employee or anyone who has been employed by it in the last six months, 4) seeking, accepting or helping others to seek or accept any of Imperial's present clients or any client who has been Imperial's client within the last six months. Additionally, Imperial seeks compensatory damages, punitive damages, costs and attorney's fees. Imperial argues that pending the hearing and determination of this matter before FINRA, a temporary restraining order is necessary to enforce clear contractual rights, maintain the status quo and protect it from irreparable harm.

To obtain a preliminary injunction the moving party must demonstrate the "likelihood of success on the merits, irreparable injury in the absence of the relief sought, and a balance of the equities in its favor." (CPLR § 6313; *Manhattan Real Estate Equities Group, LLC v. Pine Equity, NY, Inc.*, 16 AD3d 292 [1st Dept. 2005] citation omitted).

Imperial has made a prima facie showing that it will succeed on the merits by demonstrating that the individual respondents have breached their contractual obligations to it when, under cover of night, they forwarded confidential information,

client information and corporate documents to their private e-mail accounts and discarded hard copies of documents. The "Terms of Employment" document that each former employee signed states:

NO RECRUITING OF EMPLOYEES OR CLIENTS. To meet the demands of our clients, we invest a lot of time and resources in hiring and training quality employees, and in finding and building relationships with our clients. In recognition of our investment, you agree that while you are employed by us and for three years after that:

1. You will not recruit or hire (or even help anyone else recruit or hire) any person who is then one of our employees or who has been one of our employees in the prior six months.
2. You will not take or use any information about our clients, and
3. You will not seek or accept as a client (or even help anyone else seek or accept as a client) any investor who is then one of our clients or who has been one of our clients in the prior six months, except for institutional investors and clients for whom you have served as a registered representative prior to your departure.

The mass departure of Imperial's corporate restructuring group one week after O'Connor's resignation also indicates the likelihood of his involvement in Broadpoint's hiring of those same employees. (*Terrellv. Terrell* 279 AD2d 301 [1st Dept. 2001]). Additionally, were Broadpoint and Imperial's former employees permitted to use Imperial's proprietary and confidential information regarding its clients and business transactions before the arbitration proceeding is decided, there is no doubt that Imperial would be immediately and irreparably harmed. (CPLR§ 6313). Lastly, a balance of the equities here requires that the status quo be maintained pending a determination of injunctive relief by FINRA.

Accordingly, after oral argument and due deliberation having been had, and it appearing to this court that a cause of action exists in favor of the petitioner and against respondent, and that petitioner is entitled to a temporary restraining order against respondents on the ground that respondents threaten or are about to do, or are doing or procuring or suffering to be done, an act or acts in violation of the

petitioner's rights respecting the subject of this action and tending to render the judgment ineffectual, the petitioner has demanded and would be entitled to a judgment restraining respondents from the commission or continuance of such acts, which, if committed or continued during the pendency of the arbitration, would produce injury to the petitioner, it is hereby

ORDERED that pending the decision of FINRA regarding injunctive relief, respondents, their agents, and representatives, and persons under their direction or control, and all persons in active concert with them, are hereby enjoined from directly or indirectly using or disclosing in any way the Confidential Information; and it is further

ORDERED that pending the decision of FINRA regarding injunctive relief, respondents, their agents, and representatives, and persons under their direction or control, and all persons in active concert with them, are hereby enjoined from destroying or discarding, directly or indirectly, Confidential Information in their possession, custody or control; and it is further

ORDERED that pending the decision of FINRA regarding injunctive relief, respondents, their agents, and representatives, and persons under their direction or control, and all persons in active concert with them, are hereby enjoined from directly or indirectly recruiting, soliciting or offering to employ, or helping any other person or entity recruit, solicit or offer to employ, any person who is currently an employee of Imperial, or who has been an employee of Imperial in the six months prior to the date of this order; and it is further

ORDERED that pending the decision of FINRA regarding injunctive relief, respondents, their agents, and representatives, and persons under their direction or control, and all persons in active concert with them, are hereby enjoined from directly or indirectly (i) hiring any person who is currently an employee of Imperial, or who has been an employee of Imperial in the six months prior to the date of this order, and (ii) had not accepted an offer of employment from Broadpoint prior to the close of business on Tuesday, February 5, 2008; and it is further

ORDERED that pending the decision of FINRA regarding injunctive relief, respondents, their agents, and representatives, and persons under their direction or control, and all persons in active concert with them, are hereby enjoined from directly or indirectly soliciting or accepting as a client for corporate finance or restructuring

services, or helping any other person or entity solicit or accept as a client for corporate finance or restructuring services, any person or entity who is a client of Imperial, or which has been a client in the six months prior to the former employee's departure except for the institutional investors and clients for whom the Imperial employee, now with Broadpoint, has served as a registered representative prior to his or her departure from Imperial.

This constitutes the decision and order of the court.

Dated: February 6, 2008



EILEEN A. RAKOWER, J.S.C.

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