

It Techstop, Inc. v Amidon

2011 NY Slip Op 32479(U)

September 21, 2011

Supreme Court, Albany County

Docket Number: 5815-11

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

IT TECHSTOP, INC.,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 5815-11
RJI NO. 01-11-104808

JUSTIN AMIDON,

Defendant.

Supreme Court Albany County All Purpose Term, September 13, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Peterson Law Firm
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TERESI, J.:

On November 30, 2009 Plaintiff, an information technology corporation, hired Justin Amidon (hereinafter "Amidon") as a Network Engineer. Upon his hiring, Amidon executed a "Nonsolicitation of Customer/Clients" agreement (hereinafter "Nonsolicitation Agreement"). After almost two years, Mr. Amidon's employment was terminated on August 15, 2011.

Plaintiff commenced this action to enforce the Nonsolicitation Agreement, and now moves for a preliminary injunction compelling Amidon's compliance with it during the pendency of this action. Amidon opposes the motion. Because Plaintiff demonstrated its entitlement to a preliminary injunction, its motion is granted.

“To obtain a preliminary injunction, plaintiff [is] required to establish the likelihood of ultimate success on the merits, irreparable injury and a balancing of equities in [its] favor.” (Confidential Brokerage Services, Inc. v. Confidential Planning Corp., 85 AD3d 1268, 1269 [3d Dept. 2011], quoting Ulster Home Care Inc. v. Vacco, 255 AD2d 73 [3d Dept. 1999]; Battenkill Veterinary Equine P.C. v. Cangelosi, 1 AD3d 856 [3d Dept. 2003]; Frank May Associates Inc. v. Boughton, 281 AD2d 673 [3d Dept. 2001]; Bollengier v. Gulati, 233 AD2d 721 [3d Dept. 1996]; Doe v. Axelrod, 73 NY2d 748 [1988]; CPLR § 6301).

On this record, Plaintiff established its likelihood of success on the merits.

Plaintiff first demonstrated the viability of the Nonsolicitation Agreement. Being a covenant not to compete, the Nonsolicitation Agreement “will be enforced if reasonably limited as to time, geographic area and scope, [is] necessary to protect the employer's interests, not harmful to the public, and not unduly burdensome.” (Battenkill Veterinary Equine P.C. v. Cangelosi, supra 857).

The Nonsolicitation Agreement states that Amidon, “for that 24 months after [he is] no longer an employee of [Plaintiff,] will not directly or indirectly solicit, agree to perform or perform services of any type that [Plaintiff] can render (‘Services’) for any person or entity who paid or engaged [Plaintiff] for Services, or who received the benefit of [Plaintiff’s] Services, or with whom [Amidon] had any substantial dealing while being an employee of [Plaintiff.]” Although its geographic area is not restricted, its scope is reasonably limited to apply only to Plaintiff’s relatively small customer base (approximately 15 according to Amidon). Importantly, it does not limit Amidon from performing information technology services for the vast number of firms that were not Plaintiff’s customers. (Confidential Brokerage Services, Inc. v. Confidential

Planning Corp., supra; Battenkill Veterinary Equine P.C. v. Cangelosi, supra). This restriction is not overly burdensome nor will the public be harmed by it. In this context, the applicable two year time period is reasonable and necessary to protect Plaintiff's interests. (Battenkill Veterinary Equine P.C. v. Cangelosi, supra; Gelder Med. Group v. Webber, 41 NY2d 680 [1977]; Uniform Rental Div. v Moreno, 83 AD2d 629 [2d Dept. 1981]; Bollengier v. Gulati, supra). On this record, Plaintiff established its likelihood of success on the merits because the Nonsolicitation Agreement is reasonable and enforceable, it prohibits Amidon from performing "Services" for two years after he is no longer an employee of Plaintiff and Amidon is no longer Plaintiff's employee.

In opposition, Amidon failed to refute Plaintiff's "likelihood" showing. Amidon neither challenges the reasonableness of the Nonsolicitation Agreement's restrictions nor his agreement to same. Rather, he claims that because he was terminated without cause, the Nonsolicitation Agreement's restrictions are unenforceable. However, he failed to proffer sufficient evidentiary proof to support such claim. His unsupported and conclusory allegations about Plaintiff's praise of his work¹ are utterly refuted by Plaintiff's Vice President's specific allegations. She recounted, and provided supporting documentation for, the numerous times Plaintiff disciplined Amidon. She also detailed Amidon's non-performance of a major assignment, his poor record-keeping and his disloyalty. Moreover, contrary to Amidon's contention, he was not terminated solely upon his refusal to execute a new restrictive covenant. On this record, despite the potential issue of fact raised (Frank May Associates Inc. v. Boughton, supra; CPLR § 6312[c]), Plaintiff sufficiently established its likelihood of success on the merits.

¹ He references a single e-mail, but does not attach same.

Plaintiff similarly demonstrated irreparable harm. Plaintiff's Vice President alleged, without contradiction, that two of her clients, with whom Amidon was intimately familiar, severed their relationship with Plaintiff when Amidon was terminated. It is well settled, as is applicable here, that "[t]he loss of clients and goodwill could create irreparable harm."

(Confidential Brokerage Services, Inc. v. Confidential Planning Corp., supra 1269; Alside Div. of Associated Materials v. Leclair, 295 AD2d 873 [2002]; Battenkill Veterinary Equine P.C. v. Cangelosi, supra).

Lastly, Plaintiff established that the equities balance in its favor. The Nonsolicitation Agreement only restricts Amidon from soliciting, agreeing to work for or working for one of Plaintiff's clients. As set forth above, the list of clients is modest as is its related restriction on Amidon's potential future employment. He is simply not being significantly deprived of his livelihood. (Battenkill Veterinary Equine P.C. v. Cangelosi, supra). Moreover, the restriction lasts only two years. In contrast, the effect of Amidon's solicitation of, or working for, Plaintiff's clients could devastate Plaintiff's business. Already, with the alleged loss of two clients, its client base has decreased 13%. When comparing the proposed preliminary injunction's relatively slight impact upon Amidon, with the potentially disastrous effects Plaintiff would suffer if the preliminary injunction were denied, the equities clearly balance in Plaintiff's favor.

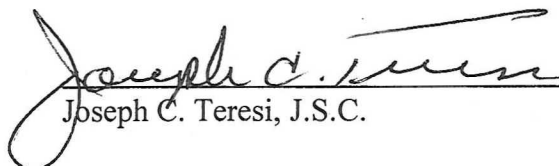
Accordingly, Plaintiff's motion is granted. However, in accord with CPLR §6312, this Decision and Order is stayed pending Plaintiff's filing, in admissible form, proof of the damages and costs Amidon will suffer "if it is finally determined that [Plaintiff] was not entitled to [this] injunction." Plaintiff shall file and serve such proof within seven days of the date of this Decision and Order. Within seven days of receiving same, Amidon shall file and serve

opposition papers, if any. No reply will be accepted. In the event Plaintiff fails to comply with the above, this motion for a preliminary injunction is denied. In the event Amidon fails to timely submit opposition papers, Plaintiff's submission will be considered unopposed. Upon the above submissions, this Court will direct the filing of an undertaking in accord with CPLR §6312.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
September 21, 2011


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated September 1, 2011; Affidavit of Melissa Fitzgerald, dated August 30, 2011, with attached Exhibits A-C; Affirmation of Scott Peterson, dated August 30, 2011, with attached Exhibits B.
2. Affidavit of Stephen Parker, dated September 1, 2011; Affidavit of Justin Amidon, dated September 1, 2011.
3. Affidavit of Melissa Fitzgerald, dated September 8, 2011, with attached Exhibits A-F; Affirmation of Scott Peterson, dated September 7, 2011.