

Clark Dodge & Co., Inc. v Parakhneivich

2012 NY Slip Op 30319(U)

January 23, 2012

Supreme Court, Nassau County

Docket Number: 017190-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
CLARK DODGE & COMPANY, INC.,

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Plaintiff,

**Index No: 017190-11
Motion Seq. No: 1
Submission Date: 1/12/12**

-against-

**SERGE PARAKHNEVICH, BRETT GOLDSTEIN
and JOHN THOMAS FINANCIAL, INC.,**

Defendants.

-----x

Papers Read on this Motion:

- Order to Show Cause, Emergency Affidavit,
Affidavits and Affirmation in Support.....x**
- Affirmation in Opposition, Affidavits in Opposition and Exhibit.....x**

This matter is before the court on the Order to Show Cause filed by Plaintiff Clark Dodge & Company, Inc. ("Clark Dodge" or "Plaintiff") on December 8, 2011 and submitted on January 12, 2012. For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause in its entirety and vacates the temporary restraining order issued on December 8, 2011.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order 1) for a Preliminary Injunction directing Defendants Serge Parakhnevich ("Serge") and Brett Goldstein ("Brett") to cease and desist from contacting, or continuing to have contact with, any and all customers ("Customers") of Plaintiff for the purpose of soliciting such Customers to have them change their account representative from Plaintiff to

Serge or Brett and/or to Defendant John Thomas Financial Inc. (“John Thomas”) or any other company in the securities industry or any company with whom they become affiliated; and 2) for a Preliminary Injunction directing Defendants Serge and Brett to cease and desist from using, distributing, giving and/or sharing any information from Plaintiff, whether in writing or electronic form, including but not limited to client lists and records.

Defendants oppose Plaintiff’s application

B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. C to DiMauro Emerg. Aff.), dated December 8, 2011, alleges as follows:

Clark Dodge is engaged in the securities business. Serge and Brett (“Individual Defendants”) have been employed by Clark Dodge as securities brokers for the last year, and last eight months, respectively. When they joined Clark Dodge, they did not have their own business or clients, and Clark Dodge provided them with lists of potential clients, cold callers to generate clients, and existing clients when other brokers left Clark Dodge. All clients that they generated during their employment (“Employment”) were obtained through the use of Plaintiff’s resources.

During their employment, the Individual Defendants signed employee agreements (“Agreements”) (Exs. A and B to DiMauro Emerg. Aff.) which contain restrictive covenants (“Restrictive Covenants”). Paragraph 6 of the Serge Agreement and Paragraph 18 of the Brett Agreement also contain provisions stating that, notwithstanding the language mandating the arbitration of disputes under the Agreements, Plaintiff is entitled to seek injunctive relief in a court of law. Section 6 of the Serge Agreement provides, in pertinent part, as follows:

Notwithstanding the foregoing [language regarding mandatory arbitration], nothing herein shall prevent [Plaintiff] from seeking immediate injunctive relief in a court of law to enforce the provisions of paragraphs 6 and 7 herein to the extent permitted by the FINRA [Financial Industry Regulatory Authority] Rules.

Section 18(d) of the Brett Agreement provides as follows:

Both [Plaintiff] and [Brett] agree and acknowledge that the failure of either to abide by their respective obligations under this Section 18 [titled “Confidential Information and Non-Solicitation”] would cause irreparable harm, which harm cannot be fully redressed by the payment of damages. Therefore, the party seeking redress shall be entitled in addition to any other right or remedy it may have, at law or in equity, to a temporary restraining order, injunction, specific performance and such other equitable relief as may be deemed appropriate to enjoin or restrain any violation of this Section 18, without posting any bond or security.

In the Complaint, Plaintiff allege that on December 2, 2011, the Individual Defendants resigned from their Employment at Clark Dodge (“Resignation”). That same day, the Individual Defendants were seen removing company documents from Plaintiff and Plaintiff subsequently learned that the Individual Defendants had joined John Thomas, and were attempting to transfer Clark Dodge’s clients to John Thomas. The Complaint contains causes of action for breach of fiduciary duty, breach of contract and unfair competition, and includes a request for injunctive relief.

Plaintiff provides supporting affidavits of Joseph DiMauro (“DiMauro”), the CEO and controlling shareholder of Plaintiff, and Melissa Sepulveda and Don Torrillo, employees of Plaintiff. They affirm the truth of the allegations in the Complaint regarding the Agreements, the Individual Defendants’ Employment, and Defendants’ allegedly improper efforts to transfer Plaintiff’s clients to John Thomas. DiMauro includes a copy of the lists of “all the Clark Dodge clients that have been brought into the firm by the Defendants and who I believe that are being solicited” (DiMauro Emerg. Aff. at ¶ 17 and Ex. D) (“Client Lists”).

Plaintiff’s counsel affirms that a FINRA proceeding will be started within a day, and submits that the purpose of the instant application is “for immediate temporary relief to prevent the Defendants from violating the terms of the [Agreements] and stealing clients and assets from the Plaintiff” (Davis Aff. in Supp. at ¶ 2).

In opposition, Serge affirms that the only clients of Clark Dodge that he has contacted since his Resignation were clients that he either originated or directly serviced, including but not limited to the clients on the Client Lists. Serge notes that Clark Dodge admits that, following his Resignation, Serge is permitted to compete with Plaintiff for clients that Serge originated and serviced directly. The Restrictive Covenant in the Serge Agreement reads as follows:

In the event of termination of [Serge’s] association with [Plaintiff] at any time, regardless of the reason, for the one year period following the termination of [Serge’s] association with [Plaintiff], [Serge] agrees not to:

(a) solicit any customer account which was serviced by [Plaintiff] or any of its representatives during the three (3) year period immediately prior to the termination of [Serge’s] association with [Plaintiff] except those clients which were brought to [Plaintiff] by [Serge] or serviced directly by [Serge];

(b) contact, divert or take away from [Plaintiff] any of its registered representatives, or contact, communicate with or solicit any registered representative of [Plaintiff] with the intent of inducing or encouraging such registered representative to leave his or her employment or association with [Plaintiff] or to breach his or her employment agreement with or obligations to [Plaintiff];

(c) be financially affiliated with (as principal, shareholder, member, partner, employer officer, director, financier, registered representative, agent, representative, customer or otherwise) any person or entity, either directly or indirectly, that engages in the activities set forth in subparagraphs (a) and (b) above or otherwise directly or indirectly assist any person or entity in so doing[.]

Thus, Serge submits, Plaintiff is attempting to “**re-write** its agreement with me by arrogating to itself **greater protections than Clark Dodge sought in the contract it had me sign** - a contract which was drafted solely by it” (Serge Aff. in Opp. at ¶ 5) (emphasis in original). Serge disputes many of Plaintiff’s allegations and affirms that 1) contrary to Plaintiff’s claims (DeMauro Emerg. Aff. at ¶ 5), Serge was not a W-2 employee but rather an independent contractor, as reflected by Section 3(ii) of his Agreement in which Serge “acknowledges” that he is an independent contractor and is responsible for paying all taxes required to be paid by an independent contractor; 2) with respect to his allegedly improper removal of items from Plaintiff’s office, Plaintiff sent him a text message after his Resignation inviting him to retrieve his “stuff” (Serge Aff. in Opp. at ¶ 13), which included lead lists for which he paid and which belonged to him; and 3) he originated numerous accounts at Clark Dodge, including the “overwhelming majority” on the Client Lists (*id.* at ¶ 17).

Serge affirms, further, that Plaintiff was required to commence an arbitration at the time it filed this action but failed to do so. He contends, further, that the Court should deny injunctive relief, and vacate the temporary restraining order (“TRO”) issued by the Court (Mahon, J.) on December 8, 2011 in light of 1) public policy considerations promoting free commerce and Serge’s right to earn a living, 2) Plaintiff’s failure to commence an arbitration proceeding regarding this dispute, and 3) Plaintiff’s failure to demonstrate that Serge violated his obligations under the Agreement.

In opposition, Brett also notes that Plaintiff concedes that Brett is permitted to compete,

post-Resignation, for clients that he originated and serviced while employed by Plaintiff. Brett affirms that, since his Resignation, he has not called any clients who had accounts with Plaintiff even though he is permitted to solicit clients with whom he had a prior relationship. He also affirms that, contrary to Plaintiff's claims, he was an independent contractor and not a W-2 employee.

Brett also affirms that 1) he did not take any Clark Dodge records with him after his Resignation; 2) Plaintiff failed to commence an arbitration proceeding as required by the Brett Agreement; and 3) injunctive relief is inappropriate in light of public policy considerations, Plaintiff's failure to commence an arbitration provision and Plaintiff's failure to demonstrate that Brett breached his Agreement.

Counsel for Defendants submits that, in violation of the arbitration provisions in the Agreements, Plaintiff has failed to commence an arbitration proceeding. Defendants' counsel cites Rule 13804 of FINRA's Industry Code of Arbitration Procedure which provides as follows at subdivision (2):

A party seeking a temporary injunctive order from a court with respect to an industry or clearing dispute required to be submitted to arbitration under the Code must, at the same time, file with the Director a statement of claim requesting permanent injunctive and all other relief on all other parties in the same manner and at the same time as the statement of claim is filed with the Director.

Defendants' counsel affirms that more than a month has passed since Plaintiff commenced this action and Plaintiff has still not commenced the required arbitration procedure. Thus, he argues, Plaintiff is seeking equitable relief although it has failed to comply with its own obligations.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the requested injunctive relief by 1) demonstrating that the Individual Defendants breached their Agreements by soliciting clients serviced by Plaintiff, which Agreements include language authorizing Plaintiff to seek immediate injunctive relief in the event of an alleged breach; and 2) establishing irreparable harm and a balancing of the equities in its favor by virtue of the Individual Defendants' attempts to transfer clients to John Thomas, a competing company, which will result in Plaintiff's loss of clients who provide commissions and referrals of future business, and in light of the Individual Defendants'

alleged misappropriation of Plaintiff's Client Lists which constitute trade secrets.

Defendants oppose Plaintiff's application submitting that 1) Plaintiff has not demonstrated a likelihood of success on the merits in light of the fact that a) the Agreements permit the Individual Defendants to compete for clients they originated or directly serviced, which is what the Individual Defendants affirm they have done since their Resignation; b) Defendants deny removing Plaintiff's property and Plaintiff has provided no specificity regarding its allegations in this regard; c) Defendants have established the inaccuracy of certain of Plaintiff's assertions, *e.g.* Plaintiff's claim that Serge was a W-2 employee, which is belied by the terms of his Agreement; and d) the Restrictive Covenants are overly broad, particularly in light of the public policy issues involved; 2) Plaintiff cannot demonstrate a danger of irreparable harm, particularly in light of Defendants' affirmations that they have complied with the terms of the Agreements and originated the majority of the clients on the Client Lists; and 3) the equities do not favor Plaintiff in light of Plaintiff's failure to commence the arbitration as required, and in consideration of the adverse effect that an injunction will have on the Individual Defendants' ability to earn a living.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485

(2d Dept. 2006).

B. Restrictive Covenants

Powerful considerations of public policy militate against sanctioning the loss of a person's livelihood. *Post v. Merrill Lynch*, 48 N.Y.2d 84, 86 (1979), citing *Purchasing Assoc. v. Weitz*, 13 N.Y.2d 267, 272 (1963). This policy is so potent that covenants tending to restrain anyone from engaging in any lawful vocation are almost uniformly disfavored, and are sustained only to the extent that they are reasonably necessary to protect the legitimate interests of the employer, and are not unduly harsh or burdensome to the one restrained. *Id.* at 87, citing, *inter alia*, *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499 (1977). Restrictive covenants contained in employment contracts are disfavored by the courts and are to be enforced only if reasonably limited temporally and geographically, and to the extent necessary to protect the employer's use of trade secrets or confidential customer information. *Gilman & Ciocia, Inc. v. Randello*, 55 A.D.3d 871, 872 (2d Dept. 2008).

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's Order to Show Cause in its entirety and vacates the TRO based on the Court's conclusions that 1) Plaintiff has not established a likelihood of success on the merits in light of the parties' disputes as to whether Defendants engaged in solicitation of Plaintiff's clients in violation of the Agreements, and in consideration of documentary evidence refuting some of Plaintiff's claims, *e.g.*, that Serge was a W-2 employee notwithstanding language in the Agreement stating that he was an independent contractor; 2) Plaintiff has not established irreparable harm without the requested injunctive relief, notwithstanding the language in the Brett Agreement stating that Brett's failure to abide by his obligations would cause irreparable harm, in light of Plaintiff's failure to provide specificity and detail regarding the clients allegedly solicited improperly by Defendants; and 3) Plaintiff has not demonstrated that a balancing of the equities favors Plaintiff, in light of Plaintiff's failure to commence the arbitration with the filing of this action and in consideration of the public policy considerations requiring scrutiny of restrictive covenants that affect an individual's ability to earn a livelihood.

In light of the foregoing, the Court denies Plaintiff's Order to Show Cause in its entirety and vacates the TRO.

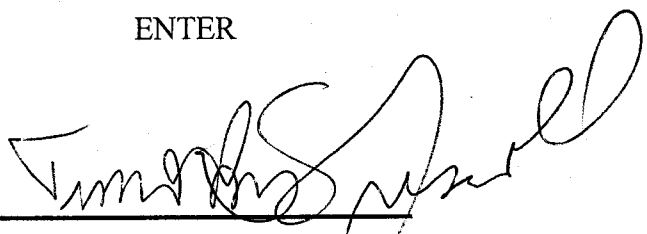
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a conference on February 24, 2012 at 9:30 a.m. at which time counsel for the parties shall advise the Court whether this matter is proceeding to arbitration.

ENTER

DATED: Mineola, NY
January 23, 2012



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JAN 30 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE