

Greystone Staffing, Inc. v Kawas

2012 NY Slip Op 31514(U)

May 29, 2012

Sup Ct, Nassau County

Docket Number: 004358-12

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

GREYSTONE STAFFING, INC.,

Decision and Order

Plaintiff,

MOTION SUBMITTED:

May 11, 2012

-against-

MOTION SEQUENCE:)1

INDEX NO.: 004358-12

**ELAINE KAWAS a/k/a ELAINE
MENDONEZ KAWAS,**

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affidavit in Opposition	2
Memorandum of Law in Opposition	3

In this action, *inter alia*, to recover damages for breach of contract, the Plaintiff moves pursuant to CPLR 6301 for a preliminary injunction enjoining Defendant Elaine Kawas a/k/a Elaine Mendonez Kawas from:

- (a) soliciting and/or doing business with any current or former customers of Plaintiff, GREYSTONE STAFFING, INC.;
- (b) disclosing, or using any Confidential Information of the Plaintiff, GREYSTONE STAFFING, INC., to any person and/or entity, for any purpose;
- (c) contacting, directly or indirectly, any person, firm, corporation, employer, client or applicant, who was at any time prior a customer or client or prospective customer or client of Plaintiff;
- (d) interfering directly or indirectly with any such business of Plaintiff;
- (e) directly or indirectly soliciting or accepting business or employment, whether an

employee or independent contractor from any person or entity who was any time within one (1) year to the termination of employment with Plaintiff, a customer of Plaintiff, to provide services similar to or the same as any of the services provided by Plaintiff; (f) offering or attempting to offer employment to any employee, consultant, or independent contractor of Plaintiff, or otherwise inducing or attempting to induce any employee of Plaintiff to leave the employ thereof; (g) transferring, selling or otherwise disposing of any Confidential Information belonging to the Plaintiff, GREYSTONE STAFFING, INC.; and (h) from continuing her employment with Green Key Resources.

It is hereby ordered that the motion is granted, except that branch (h) of the injunctive relief sought is denied, the Defendant's employment at Green Key Resources having terminated on March 25, 2012. The preliminary injunction shall be effective upon the posting of an undertaking in accordance with this order.

Background

The Defendant was employed by the Plaintiff, a business entity engaged in "recruiting and providing personnel on a temporary and/or permanent basis to its customers and/or clients" (Affidavit in Support of Motion at p. 2), as a placement counselor from April 19, 2011 to January 13, 2012.

Prior to commencing employment with the Plaintiff, the Defendant executed an employment contract which contains the following relevant provisions:

5. EMPLOYER'S BUSINESS: The parties to this Agreement acknowledge and agree that:

a) The Employer and its affiliates or subsidiaries are engaged in furnishing consulting, temporary and permanent personnel services, including facility staff management services, to various business and organizations.

b) The lists of the customers of the Employer and of the regular, temporary and permanent employees furnished by the Employer, and the Internet and computer data, software and files, and Employer's financial information and data have all been established as a result of substantial efforts and expenditures by the Employer, and such lists and information are Trade Secrets and Confidential Information of the Employer which are not in the public domain.

c) Once the Employer establishes a business relationship with a

customer, such relationship usually continues for an extended period of time.

d) During the term of employment, Employee is likely to learn information regarding the characteristics of many of the Employer's customers, including their criteria for long term staffing, temporary and permanent staffing and consultants, the various types of services required by them, the amounts paid by them to the Employer, the frequency with which they request the Employer to furnish them with services, and numerous other matters.

e) The Employer's knowledge of the characteristics of its customers and their business methods and procedures, constitutes a significant portion of the employer's good will and is one of the Employer's principal assets.

f) In order to obtain and retain its customers, the Employer has developed valuable training techniques, advertising techniques, interviewing techniques, manuals, systems, forms, and lists of persons willing to be employed by the Employer for assignment to the Employer's customers.

6. CONFIDENTIAL INFORMATION:

a) The Employee acknowledges that during the course of their employment as outlined herein, the Employee shall be furnished with substantial and significant Trade Secret and Confidential Information relating to the Employer and/or to its customers and to the special needs of various customers of the Employer, including but not limited to customer lists, characteristics of Employer's customers and their requirements, and Internet and computer data, software and files, and Employer's financial information and data as referred to in paragraph 5 hereof. The Employee further acknowledges that this information, if made available to competitors or potential competitors of the Employer, would do serious and irreparable harm to the Employer and greatly damage good will which the Employer has developed within its own special field of activities. Therefore, Employee agrees to never disclose or use, whether during employment or after termination of employment for any reason, all information of a confidential and proprietary nature belonging to Employer or its clients (customers) including the Employer's or its clients' list of employer-employee contacts, customers and employees, its advertising or interviewing techniques, its manuals, or its forms, or its Internet and computer data, all of which constitute the Employer's Trade Secrets and confidential Information, and shall not disclose or use any other information about the business of the Employer acquired as a result of Employee's employment by the Employer.

b) Employee further agrees that all business data relating to the

business of Employer's customers is highly confidential, and shall remain proprietary to such customer and the exclusive property of such customer. Employee agrees never to reveal any business methods or secrets of the Employer or the Employer's customers to anyone other than authorized Employer or customer personnel.

c) In consideration of the mutual promises of Employee by Employer, and free of any obligation on Employer to pay supplemental compensation therefore, Employee agrees to assign and does hereby assign to Employer, its successors and assigns, any and all inventions, software packages, or improvements, whether patentable or unpatentable, relating to the current business of Employer, which are conceived, made or otherwise acquired by Employee, whether alone or jointly with others during the terms of this agreement, and Employee agrees that all such inventions or improvements shall be and remain the sole and exclusive property of Employer.

7. RESTRICTIVE COVENANT FOLLOWING EMPLOYMENT:

Employee hereby agrees that the services to be rendered under this Agreement by the employee are special and unique and may be performed only after special training and instruction by the Employer and are of a confidential nature and that for a period of one (1) year the termination of their employment hereunder for any reason whatsoever, with or without cause, the Employee

a) Will not, directly or indirectly, as a principal, agent, stockholder, director, officer, investor, manager, trustee, representative, employee, counselor, or in any other relation or capacity whatsoever engage in the same business of Employer, namely, a similar type of employment agency and/or temporary help service and staffing business and/or leasing agency or any similar function (management consulting and/or recruiting) endeavoring to place temporary help on a permanent or non-permanent basis or project basis, or leasing employees on a permanent or non-permanent basis, or placing people on a permanent basis, anywhere within a radius of fifty (50) miles from any offices of Employer (or from the offices of Employer's customers or clients which Employee has been assigned to service at or on the customer's or clients' premises); and

b) Will not contact directly or indirectly any person, firm corporation, employer, client or applicant, who were at any time prior thereto, a customer or client or prospective customer or client of Employer; and

c) Will not interfere directly or indirectly with such business of Employer; and

d) Will not directly or indirectly solicit or accept business or

employment; whether as an employee or an independent contractor, from any person or entity who was at any time within one (1) year prior to the termination

of Employee's employment, a customer of the Employer, to provide services similar to or the same as any of the services provided by the Employer.

e) Will not offer or attempt to offer employment to any employee, consultant, or independent contractor of Employer, or otherwise induce or attempt to induce any employee of Employer to leave the employ thereof.

f) The Employee further agrees that the Employee will not make or permit the making of any public announcement or statement of any kind that are negative about the Employer or that the Employee was formerly employed or connected with the Employer which has a purpose, directly or indirectly, the intent of which is to violate the provisions of this paragraph.

The covenants set forth in this paragraph 7 on the part of Employee shall be construed as agreements independent of any other provisions in this Agreement; and the existence of any claim or action by Employee against the Employer, whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement by the Employer of these covenants. In the event any of the foregoing restrictions are violated, the one (1) year period of restriction shall be extended by the same period of time as the violation continued.

The Defendant was terminated by the Plaintiff because of alleged breaches of the employment agreement, although the basis for the termination and the timing of the alleged breaches is not entirely clear.

The Court's Determination

Pursuant to CPLR 6301, "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

In *Winter v Brown* (49 AD3d 526, 528 [2d Dept 2008]), the Second Department stated that:

A party seeking relief under this provision must also make a showing of the traditional equitable criteria for the granting of temporary relief under CPLR article 63 (see *Matter of K.W.F. Realty Corp. v Kaufman*, 16 AD3d 688, 689-690, 793 NYS2d 67 [2005]). A party may obtain temporary injunctive relief only upon a demonstration of (1) irreparable injury absent the grant of such relief, (2) a likelihood of success on the merits, and (3) a balancing of the equities in that party's favor (see *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517, 420 NE2d 953, 438 NYS2d 761 [1981]; *New York City Off-Track Betting Corp. v New York Racing Assn.*, 250 AD2d 437, 441, 673 NYS2d 387 [1998]).

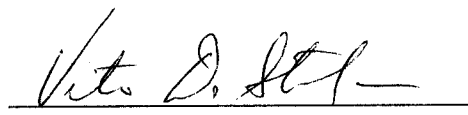
At bar, the movant has met its burden of establishing entitlement to a preliminary injunction. In this regard, regarding the first two prongs—likelihood of success on the merits and irreparable injury, it is undisputed that following her employment with the Plaintiff, Defendant began working at a competitor recruiting and placement firm, in violation of her employment agreement with the Defendant. Moreover, exhibit “B” annexed to the motion contains an e-mail communication which contains correspondence from the Defendant to a former client of the Plaintiff, appearing to solicit a continuing business relationship, again in apparent violation of the employment agreement (see *Shannon Stables Holding Co. v Bacon* 135 AD2d 804 [2d Dept 1987] [discussing requirement of likelihood of success on the merits]; *Tucker v Toia*, 54 AD2d 322 [4th Dept 1976]). That Plaintiff had accepted employment at a competitive firm and contacted a former client for the apparent purpose of soliciting business, provides support for the contention that Defendant impermissibly used confidential information gained from her prior employment. The use of confidential information, and, in fact, even the threatened use of such information, has been cited by courts in support of a finding of “irreparable harm” (e.g. *McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co.*, 114 AD2d 165 [2d Dept 1986]; see also *Greystone Staffing Inc. v Goehringer*, 14 Misc 3d 1209A [Supreme Court Nassau county 2006] (Austin, J.)).

Finally, a balancing of the equities favors granting the Preliminary Injunction. Notwithstanding the general disfavor with which restrictive covenants are viewed (see *Family Affair Haircutters, Inc. v Delting*, 110 AD2d 745 [2d Dept 1985]), such covenants will be enforced if they are temporally and geographically limited and necessary to protect the employer from the employee's use of confidential information (*Id.* at 748). The restrictive covenant at bar, which restricts employment for a period of one year within the geographic limitations of Plaintiff's business (50 miles), is reasonable. The Defendant's assertion that she is presently unemployed and will be unable to work in the “recruiting” business within the Tri-State area does not tip the equities in her favor.

Accordingly, the motion is granted to the extent indicated herein. Plaintiff is directed to post an undertaking in the amount of \$25,000.00 forthwith (CPLR 6312[b]).

This constitutes the decision and order of the court.

Dated: May 29, 2012



Hon. Vito M. DeStefano, J.S.C.

ENTERED
JUN 01 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE