

Hudson Ins. Co. v Axis Ins. Co.

2014 NY Slip Op 31614(U)

June 23, 2014

Supreme Court, State of New York

Docket Number: 650597/2014

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

HUDSON INSURANCE CO. and HUDSON
SPECIALTY INSURANCE CO.,

Plaintiffs,

- against -

AXIS INSURANCE CO., AXIS SPECIALTY U.S.
SERVICES, INC., AXIS CAPITAL HOLDINGS
LTD., KIMBER LANTRY, JEFFREY
MCDONALD, GLENNA SENELICK, KENNETH
J. HOPPE, JULIE MCDONALD, and SEAN
MOFFAT,

Defendants.

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DECISION/ORDER

Motion Seq. 001

In this action alleging misappropriation of trade secrets, plaintiffs Hudson Insurance Co. and Hudson Specialty Insurance Co. (Hudson) seek to enjoin their former employees Kimber Lantry, Jeffrey McDonald, Glenna Senelick, Kenneth J. Hoppe, Julie McDonald, and Sean Moffat (the Individual Defendants), and their new employer Axis Insurance Co. and its related affiliate entities (Axis) from using or disclosing plaintiffs’ misappropriated confidential and proprietary information, quoting or soliciting any of plaintiffs’ insureds, and spoliating evidence.

Facts

Hudson and Axis are both in the business of providing specialty insurance services to clients in a variety of industries. Prior to the commencement of this action, Axis did not offer healthcare liability insurance. Hudson established its healthcare liability insurance unit in 2003

pursuant to a \$7.5 million dollar Asset Purchase Agreement (APA) between Hudson and TIG Insurance Company. (Compl., ¶ 18.) Under the APA, Hudson obtained the right to renew TIG's healthcare liability policies, the historical information underlying those accounts, and the right to employ the Individual Defendants who were previously the employees of TIG. (Id., ¶¶ 18-19, 27.) Hudson subsequently spent "significant resources building and expanding upon" the confidential information they purchased from TIG over the next ten years. (Id., ¶ 27.)

As stated in the complaint, the Individual Defendants, who departed en-masse to join Axis, were all members of Hudson's healthcare liability insurance unit. The Individual Defendants held the following roles in Hudson's healthcare liability unit: executive vice president in charge of Hudson's healthcare business and officer of Hudson Specialty (Lantry); vice president of underwriting for Hudson's healthcare liability department and officer of Hudson Specialty (McDonald); vice president and chief actuary in the healthcare liability department (Hoppe); chief financial officer and senior vice president in the healthcare liability department (Moffat); vice president and officer of Hudson (Senelick); and assistant vice president (McDonald). (Id., ¶¶ 10-14.)

It is undisputed that the Individual Defendants were hired by Axis to launch a new healthcare liability unit at Axis which will directly and indirectly compete with plaintiffs. (Id., ¶ 38.) It is also undisputed that in the midst of leaving of Hudson some or all of the Individual Defendants misappropriated Hudson's information. (Id., ¶¶ 45-48.)

Standard

It is well settled that a preliminary injunction is an extraordinary provisional remedy that will be granted "only where the movant shows a likelihood of success on the merits, the potential

for irreparable injury if the injunction is not granted and a balance of equities in the movant's favor." (Grant Co. v Srogi, 52 NY2d 496, 517 [1981]; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606 [2d Dept 1986]; Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996]; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005].) The proponent of a motion for a preliminary injunction must meet its burden by clear and convincing evidence. (Delta Enterp. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012].)

As to likelihood of success on the merits, "the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action. While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, [a] party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers. Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." (1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23 [1st Dept 2011] [internal citations and quotation marks omitted].) The mere existence of an issue of fact does not require a denial of a preliminary injunction. (Bell & Co., P.C. v Rosen, 114 AD3d 411, 411 [1st Dept 2014].) Where, however, "the facts are in such sharp dispute that it cannot be said that the [movant] established a clear right to preliminary injunctive relief," the motion will be denied. (Omakaze Sushi Restaurant, Inc., v Lee, 57 AD3d 497 [2d Dept 2008].)

Likelihood Of Success On The Merits

Plaintiffs make a prima facie showing that the Individual Defendants, who have failed to appear in this action, misappropriated plaintiffs' information. It is undisputed on this record that at least three of the Individual Defendants, at the time of their resignation, copied large volumes of plaintiffs' electronic files to personal USB devices. (See Aff. of Bryan Rose [Defendants' Forensic Investigator] [Rose Aff.], ¶¶ 6, 10, 15.) It is also undisputed that the files downloaded by the Individual Defendants contain, among other things, "a premium and experience rating tool Hudson developed for hospitals and physicians; data allowing Hudson to determine premiums based on varying deductibles; the rate change history for each and every Hudson insured . . . and Hudson's underwriting guidelines, developed over years, analyzing exposure differences." (Ps.' Reply Memo at 7.) The files also contained a "Master File" which included a spreadsheet with "over 8,000 thousands [sic] of rows and over 50 columns of 'historical' data for every Hudson insured, that includes the type of coverage, policy limits, premium charged, compensation paid to the agent, Hudson's planned future rating actions for the insured, policy inception and expiration, and other non-public information." (Aff. of Christopher T. Suarez [Executive Vice President and Chief Underwriting Officer of Hudson] In Reply [Suarez Reply Aff.], ¶ 8.) The "Master File" also contained a database of "actuarially forecasted loss reserves for each Hudson healthcare liability insured." (Id., ¶ 9.)

Plaintiffs further make a prima facie showing that this information is confidential and proprietary, and that Hudson went to extensive lengths to develop the information and guard its secrecy. In his detailed affidavit, plaintiffs' Executive Vice President attests that this information is confidential because medical malpractice liability insurance is generally "written on a 'surplus lines' or 'nonadmitted' basis." (Suarez Reply Aff., ¶ 11.) According to Suarez,

where insurance is written in this manner, no “rate or form filings” are publicly filed, and the historical data underlying the policies is also not publicly disclosed. There is therefore “no publicly available meaningful data” to be used by a carrier seeking to enter this line of business. (Id.) Suarez further attests that this information is confidential because the files reveal Hudson’s work product in the form of actuarial and underwriting analyses, pricing models, and rating tools, and because “Axis could never replicate an exact copy” of this work product. (Id., ¶ 9.)

In opposing Hudson’s motion, Axis contends that Hudson has not specifically identified the information that it claims is confidential. Axis also argues that the information at issue is not confidential because it was originally the property of the insureds. (Ds.’ Memo In Opp at 9-10.)

The court rejects Axis’ first argument based on the detailed Suarez affidavit discussed above. Axis’ second argument is based on the affirmation of Gregory Serio, the former New York State Superintendent of Insurance, who opines that plaintiffs’ information should not be considered confidential because much, if not all, of the information can in fact be compiled from responses that prospective insureds supply to a carrier’s underwriting inquiries and is the property of the insureds. (Id.; Aff. of Gregory V. Serio [Serio Aff.], ¶¶ 17-21.) Serio affirms that information regarding claims asserted, payments made on those claims, types of coverage bought, and premiums paid is information that belongs to the policyholder, not the plaintiffs. (Id.) He acknowledges, however, that “proposed rates and draft forms” are sometimes considered to be confidential and that “special actuarial models or other unique mechanisms used by an insurer actually to underwrite or rate a specific risk may” also be considered proprietary and confidential. (Id., ¶ 20.)

Axis' argument ignores that Hudson's confidential information is not any single piece of information that may belong to an insured, but Hudson's voluminous compilation of such information, which was made over the course of a decade for all of Hudson's customers, at significant expense. (See TBA Global, LLC v Proscenium Events, LLC, 114 AD3d 571, 573 [1st Dept 2014] [finding triable issue of fact as to whether defendant employee breached restrictive covenant where record contained evidence that employee "forwarded to his personal email account confidential and proprietary" information, consisting of "pricing and customer information, including internal TBA reports detailing comprehensive information about TBA customers such as revenue figures, project pricing and the status of projects"]; Marcone APW, LLC v Servall Co., 85 AD3d 1693, 1694-1696 [4th Dept 2011] [finding preliminary injunction warranted on the ground of employees' misappropriation of trade secrets or, alternatively, proprietary information, where misappropriated documents included a compilation of "customer names and contact information, credit terms, sales data and rankings, pricing information, profit margins, accounts receivable information, sales notes, and warranty records"]; Advanced Magnification Instruments of Oneonta, N.Y., Ltd. v Minuteman Optical Corp., 135 AD2d 889, [3d Dept 1987] [finding actionable claim of unfair competition, based on showing of misappropriation of confidential information that included a "master list of customers, a list of accounts receivable and at least 150 customer information cards"].)

Plaintiffs also produce un rebutted evidence that they treated their customer information as confidential and "carefully safeguarded" the information. (Ps.' Reply Memo at 7.) Specifically, plaintiffs submit evidence that they required the Individual Defendants to certify on an annual basis that they were aware of, and in compliance with, plaintiffs' Code of Business

Conduct and Ethics in particular, Section 8(b) which governed the obligation to protect assets including proprietary information, and Section 9 which governed the confidentiality of non-public information. (Suarez Aff., Ex. C.; Suarez Reply Aff., Ex. D.)

On this record, the court holds that plaintiffs succeed in showing a likelihood of success on the merits on their claim that the Individual Defendants misappropriated Hudson's confidential information.

The court further holds that plaintiffs make a showing of likelihood of success on the merits on their claim that the misappropriated information contains trade secrets. It is well settled that a trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." (Ashland Mgt. v Janien, 82 NY2d 395, 407 [1993] [citing section 757 of the Restatement of Torts].) The Court of Appeals has held that the following factors should be considered in determining whether a trade secret exists:

"(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

(Id. [citing Restatement of Torts §757, comment b].)

For the reasons discussed above, the court finds that with respect to the first, third, fifth, and sixth Ashland factors, the plaintiffs make a prima facie showing that their compilation and work product is not known outside of its business; that they went to extensive lengths to guard the secrecy of this information; that they made extensive efforts in developing the information;

and that their compilation and work product would be difficult to duplicate or acquire through proper means. With respect to the fourth factor, Axis asserts that the information at issue is not valuable to it, that it sought to prohibit the Individual Defendants from bringing Hudson's information with them, and that it seeks to return the information now. (See Aff. of Andrew Weissert [General Counsel Axis Insurance Co.], Ex. 1; Ds.' Memo In Opp. At 11-12.) Notwithstanding Axis' assertions to the contrary, Axis fails to make any showing that Hudson's information, which has been in its possession since its hiring of Hudson's employees, will not be useful in setting up a competing business.

The court accordingly concludes that the Ashland factors support Hudson's claim that the misappropriated information constitutes trade secrets. (See USI Ins. Servs. LLC v Miner, 801 F Supp 2d 175, 195-196 [SD NY 2011] [applying the Ashland factors and finding that the appropriated information was subject to protection as a trade secret, where the information "consist[ed] of, amount other things, documents purportedly containing lists of [plaintiff's] clients and revenue associated with [plaintiff's] clients . . . and documents concerning [plaintiff's] clients' coverage and insurance policies".])

Remaining Elements Of The Injunction

The court also holds that plaintiffs will be irreparably harmed if the Individual Defendants and Axis are allowed to use and disclose their confidential information and/or trade secrets while in direct competition with plaintiffs. In the absence of an injunction prohibiting such use, in the solicitation of customers or otherwise, plaintiffs "would likely sustain a loss of business impossible, or very difficult, to quantify." (See Willis of N.Y., Inc. v DeFelice, 299

AD2d 240, 242 [1st Dept 2002]; see BDO Seidman v Hirshberg, 93 NY2d 382, 396 [1999].)

Under these circumstances, the balance of the equities also tips in plaintiffs favor.

In so holding, the court notes that the Individual Defendants are not subject to restrictive covenants. The Courts have, however, enjoined use of customer lists and other information, even in the absence of a restrictive covenant, where such information rises to the level of a trade secret or confidential information, or has been misappropriated by the employee. (See Samuel-Rozenbaum USA, Inc. v Felcher, 292 AD2d 214, 215 [1st Dept 2002] [citing Town & Country House & Home Serv. v Newbery, 3 NY2d 554, 560 [1958] for the proposition that “an injunction to protect trade secrets or confidential information will, on occasion, be granted, even, where as here, there is no agreement protecting such material”]; Eastern Business Syst., Inc. v Specialty Business Solutions, LLC, 292 AD2d 336, 338 [2d Dept 2002]; Hecht Foods v Sherman, 43 AD2d 850, 850-851 [2d Dept 1974] [enjoining use of customer list held to be protected as trade secret, in absence of restrictive covenant]; see also Marietta Corp. v Fairhurst, 301 AD2d 734, 735-737 [3d Dept 2003].)


It is undisputed that at least three of the Individual Defendants misappropriated the potentially protectable confidential information or trade secrets. (Rose Aff., ¶ 5.) It is also undisputed that the remaining Individual Defendants were high level employees who had access to such information. (Compl., ¶¶ 10-14.) Therefore, an injunction against the latter employees is proper even in the absence of a showing of “actual misappropriation or exploitation” of such information. (Willis of N.Y., 299 AD2d at 242.) The injunction will also be imposed against Axis, as a cause of action for aiding and abetting the Individual Defendants’ breach of fiduciary duty is interposed against Axis, and plaintiffs make a sufficient showing on this record that Axis,

through the Individual Defendants, has been in possession of the misappropriated information, notwithstanding its assertion that it does not intend to use such information.

In imposing restraints on an employee's competition with his or her former employer, the restraint should be "no greater than is required for the protection of the legitimate interest of the employer." (BDO Seidman, 93 NY2d at 388.) As the preliminary injunction will restrain use, for solicitation of clients or otherwise, of confidential information or trade secrets, it will not restrict the defendants from pursuing their livelihood, and is therefore no greater than required for the protection of Hudson's interests. The restraint will not preclude the defendants from (1) doing business with any clients of Hudson who moved their business to Axis prior to the date of this order; or (2) soliciting clients or customers who came to Axis solely to avail themselves of the Individual Defendants' services and only as a result of said Individual Defendants' independent recruitment efforts which Hudson neither subsidized nor otherwise financially supported as a part of a program of client development. (Id., at 393.)

This constitutes the decision of the court. A separate order will be entered.

Dated: New York, New York
June 23, 2014



MARCY FRIEDMAN, J.S.C.