SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

----------X

CHAOS COMMERCE, INC.,

Plaintiff,

Index No. 650012/14

-against-

SUREN KHAIMOV and DAILYSALE, LLC,

Defendants.

----------X

Hon. Charles E. Ramos, J.S.C.:

This dispute arises out of the alleged theft of trade secrets and the breach of a restrictive covenant contained in an employment agreement.

Plaintiff, Chaos Commerce, Inc. (Chaos Commerce) moves for a preliminary injunction pursuant to CPLR 6301, to enforce non-competition, non-disclosure, and non-solicitation covenants against defendants Suren Khaimov (Khaimov) and Daily Sale, LLC (Daily Sale) (together, defendants).

Background

The facts set forth herein are taken from the pleadings and the parties' affidavits.

Chaos Commerce is an online store that sells bargain priced goods via its website, www.dailysteals.com. Khaimov is a former employee of Wholesale Plus Wireless, LLC (Wholesale Plus), Chaos Commerce's predecessor. Khaimov is currently employed by Daily Sales, a supplier of goods to Chaos Commerce, as a consultant.

Chaos Commerce alleges that when Khaimov terminated his

employment, he stole a list of Chaos Commerce's suppliers and is now using the supplier list at Daily Sales in violation of his employment agreement. Chaos Commerce also maintains that Khaimov is in breach of the non-compete provision contained in that agreement by working for Daily Sales, which is a direct competitor of Chaos Commerce.

Khaimov previously worked at Wholesale Plus for approximately one and a half years from the period of May 2012 to December 2013. While employed at Wholesale Plus, Khaimov worked as a buyer, which Chaos Commerce claims is an integral part of its business. Buyers are trained in market research of products, price points, and sales channels. In this capacity, Khaimov contacted suppliers to obtain products for sale to customers, using his employer's supply list.

Chaos Commerce maintains that its suppliers' identity and contact information is not publicly available, and that it expended resources to develop that information. Chaos Commerce insists that it takes steps to safeguard its supplier list with secure logins and does not authorize its buyers to have access to the entire list.

At the commencement of his employment at Wholesale Plus, Khaimov signed a non-disclosure agreement. The agreement contains a "Confidential Information" clause, defined as "all of the trade secrets, know-how, ideas, business plans, pricing

information, the identity of and any information concerning customers or suppliers, computer programs." Khaimov covenanted elsewhere in the agreement to "use the Confidential Information only in the performance of [his] duties for the Company," that he would not disclose any Confidential Information, and would return or destroy all materials upon termination of his employment.

The agreement provides that for one year after his employment terminates, Khaimov could not solicit or interfere with Chaos Commerce's customers or suppliers, and also could not "engage, invest or participate in any Competitor Business or Planned New Business" in the United States.

In its complaint, Chaos Commerce alleges that Khaimov misappropriated its trade secrets by stealing its supplier list. On the day of his resignation, Khaimov admits that he forwarded the supplier list to his personal email account, but that he has since deleted it. For its part, Daily Sales submits an affidavit representing that it has never seen the supplier list.

In addition to Khaimov's alleged misappropriation of the customer list, Chaos Commerce also alleges that Khaimov's employment at Daily Sales violates the non-compete clause of his agreement.

Chaos Commerce moves for a preliminary injunction to enjoin the defendants from: (1) soliciting business from or entering into any business relationship with any of its suppliers; (2)

using any confidential information belonging to Chaos Commerce; (3) ordering the immediate return of any of the Chaos Commerce's documents taken by the defendants; and (4) ordering defendant Khaimov to delay employment or to desist from working for Daily Sale or other competitors of Chaos Commerce.

Discussion

In order to obtain a preliminary injunction, the movant must show: (1) a likelihood of success on the merits; (2) irreparable injury if injunctive relief is not granted; and (3) a balance of equities in favor of the moving party (*J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 406 [1986]). A preliminary injunction is a drastic remedy because it forces a party to refrain from certain conduct before that conduct is fully adjudicated and deemed unlawful in a final judgment (*Uniformed Firefighters Assoc. of Greater New York v City of New York*, 79 NY2d 246, 241 [1992]). Therefore, a preliminary injunction "should be issued cautiously and in accordance with appropriate procedural safeguards" (*Id.*).

I. A Likelihood Of Success On The Merits

To satisfy the first element of a preliminary injunction, a likelihood of success on the merits of the action, the movant must present evidence that illustrates a clear right to relief (*Faberge Intl. Inc. v Di Pino*, 109 AD2d 235, 240 [1st Dept 1985]). While a mere dispute over issues of fact alone will not

warrant a denial, the motion for a preliminary injunction should not be granted where the issues undermine the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief (*Milbrandt & Co., Inc. v Griffin*, 1 AD3d 327, 328, [2d Dept 2003]).

The parties dispute whether the supplier list constitutes "confidential information" under the terms of the agreement, and the enforceability of the restrictive covenant.

Under New York law "negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness" (*Reed, Roberts Associates, Inc. v Strauman*, 40 NY2d 303, 307 [1976]). In order to be enforceable, a covenant's terms must be reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee (*Id.*).

In *Reed, Roberts Associates, Inc.* (40 NY2d 303), the Court of Appeals interpreted the "reasonableness" standard, and determined that a restrictive covenant will only be enforceable if it serves a legitimate interest of the employer: (1) to the extent necessary to prevent the disclosure or use of trade secrets or confidential information, or (2) where an employee's services are unique or extraordinary (*Id.* at 309).

In *Reed, Roberts Associates, Inc.* (*Id.*), the Court denied injunctive relief to an employer complaining of the theft of a customer list because it failed to demonstrate that the restrictive covenant at issue served a legitimate interest of the employer. The Court reasoned that the contact information of current and potential customers that is easily ascertainable from public sources is not a protectable trade secret (*compare Purchasing Assocs. v Weitz*, 13 NY2d 267, 272-73 [1963] [A covenant is enforceable only to prevent an employee's solicitation or disclosure of trade secrets, or to prevent an employee's release of confidential information regarding the employer's customers]).

"[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 Mgmt. Inc. v Janien*, 82 NY2d 395, 407 [1993], quoting Restatement [First] of Torts § 757 [1939]). The courts consider the following factors:

> "(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" (Restatement [First] of Torts § 757 [1939] [comment b]).

Defendants argue that the supplier list does not contain confidential information, and that Chaos Commerce has not demonstrated that Khaimov has or will use or disclose any information to his new employer Daily Sale. Khaimov represents that the supplier list contains contact information that is readily available in public sources such as the internet. According to Khaimov, the same information is obtainable by Googling various items to purchase, searching for potential sources for those respective items, and then contacting the various companies found in the search to inquire about the products offered that he can then sell on the website (Khaimov Aff., 6). Khaimov also states that the supplier list at issue only contains the name of the supplier without any contact information (Khaimov Aff., 10).

Customer lists that are "readily ascertainable" from sources outside an employer's business do not qualify for trade secret protection, and thus, Khaimov's forwarding of the list to his home email address likely does not constitute misappropriation of trade secrets. Under the first prong of the Reed standard, Chaos Commerce fails to persuade that the restrictive covenant serves any legitimate interest.

A court may still enjoin solicitation of customers where there has been a physical taking in breach of an agreement, even if the information does not qualify as a trade secret (*Leo*

Silfen, Inc. v Cream, 29 NY2d 387, 392 [1972]). Here, issues of fact exist as to the circumstances surrounding the act of forwarding the customer list to Khaimov's email and the alleged subsequent deletion, and whether this constitutes a breach of the agreement.

As to the second prong, competition, Chaos Commerce must demonstrate that Khaimov's skills were "of such a character as to make replacement impossible," or that the loss of Khaimov's services has caused it irreparable injury (*see Purchasing Assoc. v Weitz*, 13 NY2d 267, 273-74 [1963]).

Khaimov's professional services are neither unique or extraordinary. Khaimov states, and Chaos fails to persuade otherwise, that he is a relative novice in the industry, and was employed by Chaos Commerce as simply a buyer of goods for a little over a year. Although Khaimov covenanted not to disclose any information regarding Chaos Commerce's suppliers, there is no evidence in the record that defendants have contacted any of the suppliers on the list and Khaimov swears that he has since deleted the supplier lists from his email account and did not retain a copy of it (Khaimov Aff., 9).

Chaos Commerce fails to establish the confidential nature of the supplier list, or that Khaimov was wrongfully soliciting its suppliers in breach of the agreement. At most, an issue of fact remains as to whether Khaimov breached the agreement by emailing

himself the supplier list.

For these reasons, Chaos Commerce has failed to demonstrate that the restrictive covenant furthers any legitimate interest, and has not shown that it is likely to prevail on the merits (*see Arnold K. Davis & Co., Inc. v Ludemann*, 160 AD2d 614, 616 [1st Dept 1990]; *Primo Enter. v Bachner*, 148 AD2d 350, 352 [1st Dept.1989]).

II. Irreparable Harm

To satisfy the second element for obtaining injunctive relief, a movant must demonstrate that it is likely to suffer irreparable harm if equitable relief is denied, by affidavits or other proof supplying evidentiary detail (*see e.g. Forty-Seventh-Fifth Co. v Nekatlov*, 225 AD2d 343 [1st Dept 1996]; *Park South Assoc. v Blackmer*, 171 AD2d 468, 469 [1st Dept 1991]).

Here, Chaos Commerce fails to submit proof, by affidavit or otherwise, that it will suffer irreparable harm absent injunctive relief as there is no evidence trade secrets have been misappropriated nor is there proof of inevitable disclosure (*Payment Alliance Intl. v Ferraira*, 530 F Supp2d 477, 480-81 [SDNY 2007]).

III. Balance of the Equities

Finally, the movant must establish that the equities balance in its favor by showing that the burden caused to defendant through imposition of an injunction is less than the harm caused

to plaintiff by defendant's activities (CPLR § 6301).

In the absence of evidence demonstrating that the restrictive covenant furthers a legitimate interest of Chaos Commerce or that Khaimov has engaged in actual wrongdoing, it would be inequitable to restrain Khaimov from earning a living and deprive him of the opportunity to be successful at his new job (*compare Willis of New York, Inc. v DeFelice*, 299 AD2d 240, 242 [1st Dept 2002]).

Accordingly, it is

ORDERED that defendants' motion (002) to vacate this Court's 1/9/14 order, issued on default, is granted; and plaintiff's motion (003) for a preliminary injunction is denied.

Dated: August 21, 2014

J.S.C.

HON. CHARLES E. RAMOS