

<b>Sunrise Broadcasting of N.Y., Inc. v Zadorin</b>
2017 NY Slip Op 33248(U)
November 1, 2017
Supreme Court, Orange County
Docket Number: EF007518/17
Judge: Robert A. Onofry
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SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X  
SUNRISE BROADCASTING OF NEW YORK, INC.,  
Plaintiff,

- against -

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF007518/17

DEMIAN ZADORIN,

Defendant.

DECISION AND ORDER

-----X

The following papers numbered 1 to 7 were read and considered on a motion by the Plaintiff for a preliminary injunction in an action, *inter alia*, to enforce a non-compete agreement.

Notice of Motion - Pugielle Affirmation - DeFelice Affidavit- Exhibits A-C .....	1-4
Affirmation in Opposition- Duvall .....	5
Affidavit in Opposition- Zadorin .....	6
Affirmation in Reply- Waye .....	7

Upon the foregoing papers, it is hereby,

ORDERED, that a preliminary injunction is granted to the extent set forth herein and otherwise denied.

**Procedural/Factual Background**

The Plaintiff Sunrise Broadcasting of New York, Inc. operates radio stations throughout the mid-Hudson Valley area.

The Defendant Demian Zadorin worked for the Plaintiff from August 15, 2012, to August 31, 2017.

On August 15, 2012, the Defendant signed an Employee Non-Disclosure/Non-Compete

Agreement (hereinafter "Agreement") (Motion, Exhibit A).

Pursuant to the same, the Defendant agreed, *inter alia*, not to disclose trade secrets, confidential information or proprietary information learned during his employment.

Further, the Defendant agreed that, if he voluntarily terminated his employment, he would not compete, directly or indirectly with the Plaintiff, or work for another employer that was a direct or indirect competitor of the Plaintiff, within the geographic area of his activities at the time of his termination for a period of six months.

Finally, the Defendant agreed that, upon termination, he would return all documents and other company property to the Plaintiff, including, *inter alia*, reports, manuals, customer lists, and computer programs.

The Plaintiff commenced this action, *inter alia*, to enforce the Agreement and to recover damages for breaches thereof.

As a first cause of action, the Plaintiff seeks to enjoin the Defendant from disclosing or using any trade secrets and confidential information he obtained during his employment with the Plaintiff in any new position, and from working for any competitor.

As second through seventh causes of action, the Plaintiffs seeks damages for breach of the Agreement; misappropriation of confidential information and trade secrets; unfair competition; unjust enrichment; breach of fiduciary duty; and interference with business relations, respectively.

The Plaintiff moves for a preliminary injunction (1) prohibiting the Defendant from disclosing any trade secrets or confidential information of the Plaintiff to any third party; and (2) prohibiting him from working for his new employer, Digital Radio Broadcasting, Inc. (hereinafter "DRB"), a direct competitor, or any other competitor within the mid-Hudson Valley area.

In support of the motion, the Plaintiff submits an affidavit from Robert DeFelice, a market manager.

DeFelice avers that his duties include supervising sales managers and sales representatives of the Plaintiff.

During the last several decades, he asserts, the Plaintiff had invested significant time, effort and expense in cultivating and preserving confidential information and trade secrets needed to maintain and grow its business in radio broadcasting. This included developing confidential technical information (e.g., methods, processes, formulae, machines, etc.) and confidential business information (e.g., customer lists, pricing data, sources of supply, financial data, etc.).

DeFelice asserts that radio broadcasting is a highly competitive business and that the Plaintiff relies on preserving confidential information to maintain a competitive advantage. That is why the Plaintiff requires employees to sign non-disclosure and non-compete agreements, such as the Agreement at bar.

Here, he contends, the Plaintiff's Agreement with the Defendant was necessary because the Defendant had access to a "plethora of Confidential Information" in his capacity as a sales representative/sales manager for the Plaintiff. Further, DeFelice argues, the Agreement is reasonable in both duration and scope, to wit: It is limited to six months and the geographical area of the mid-Hudson Valley.

On August 31, 2017, DeFelice asserts, during a meeting in his office, the Defendant advised him that he was resigning from the Plaintiff, effective immediately, and that he was considering four job offers—two within the Plaintiff's market area, and two outside the same. The Defendant refused to provide two-weeks notice, as required by the employee manual.

DeFelice asserts that, after the Defendant resigned, he checked the Defendant’s work computer and learned that the Defendant, without consent or permission, had emailed Confidential Information to his home computer, and then deleted the emails. DeFelice avers that the Confidential Information “misappropriated” included, but was not limited to, the Plaintiff’s entire customer database, its entire account activity record database, its master account list, and information pertaining to audio commercials and contract documents. In addition, DeFelice asserts, the Defendant took his own sales records, and those for all other sales representatives.

DeFelice avers that, when he spoke to the Defendant on September 1, 2017, the Defendant assured him that he had not accepted another position. However, that on September 5, 2017, he learned that the Defendant is employed by DRB, who is a direct competitor of the Plaintiff. Further, that he was told by a customer that the Defendant was soliciting the Plaintiff’s customers.

Thus, DeFelice argues, the requested injunctive relief should granted.

In opposition to the motion, the Defendant Demian Zadorin asserts that he sold advertising time on several channels while at the Plaintiff, and was not limited to a particular geographical area. Further, he avers, he did not have direct access to ratings data, but received the same from the Market Manager.

The Defendant denies that he had exclusive rights to any area, or to any particular client or type of client. Rather, he asserts, there were usually three or four persons selling advertising to any client within the listening area.

Further, he avers, there was nothing secret about the rates charged by the Plaintiff for advertising. Rather, rates in the industry were fairly standard, and rates were discussed at meetings and sent out with media kits. Indeed, he asserts, trying to undercut the competition would lead to

a “race to the bottom,” which had collateral effects, to wit: The FCC requires radio stations to sell air time for political advertisements at the lowest rate charged within the last 12 months. Thus, if a radio station was not careful to maintain a minimum advertisement rate, it might be compelled during an election season to sell all available advertising space at the lowest rate. This rate information was also disclosed to third-party auditors. Thus, the Defendant asserts, it is “absurd” for the Defendant to argue that its pricing structure is confidential.

In addition, he avers, when he heard a potential customer advertising on a different station, he would call up the same and inquire about what rates they were paying. Often the potential customer would provide the same in writing. Indeed, he notes, he cannot recall a time when such a request was refused. Thus, he argues, it is absurd for the Plaintiff to argue that its pricing structure is confidential.

Further, the Defendant argues, the identities of the Plaintiff’s clients are obviously not confidential, as they can be discerned by merely listening to the radio. Indeed, the Defendant asserts, part of his job at the Plaintiff was listening to competing radio stations to hear who was advertising on the same.

In any event, the Defendant avers, he is not soliciting clients of the Plaintiff. Indeed, he asserts, he spent the last five or more years convincing customers that the Plaintiff was the right fit for their products and services, and brought in more than a \$1 million in revenue to the Plaintiff. Thus, he opines, to solicit those same customers for a new station would be, in effect, to admit that he was lying when he told them that they were a good fit with the Plaintiff. Further, he notes, he would be asking them to abandon sometimes multi-year relationships with the Plaintiff merely because he had a new employer. The Defendant avers that he has no interest in soliciting former

clients, and has no confidential information concerning the same. Indeed, he notes, he offered the Plaintiff the following “covenant”—for a period of six months, he will not solicit any advertiser who was a customer of the Plaintiff as of August 31, 2017.

The Defendant also denies the allegation that he took a mass of information when he left the Plaintiff. Indeed, he asserts, he does not have such information. Moreover, he avers, he has not signed up even one advertiser of the Plaintiff for his new company.

Finally, he asserts, although he did forward some emails of customers to himself, he did so to inform them that he was leaving the Plaintiff and that someone else would be taking over their accounts. However, he avers, he only made it part way through the list, as he ceased all such activity after the Plaintiff sent the Agreement to his new employer. He notes that he did invite one former client to a golfing event, but they did not discuss business. Indeed, he asserts, although he may run into former clients, he has “no problem” with not soliciting their business for his new company.

The Defendant notes that he is married with children, and argues that enjoining him from working with his current employer would deprive him of a livelihood. He notes that his new employer operates a station out of Stroudsburg, Pennsylvania, which is not in the Plaintiff’s broadcast area.

However, he asserts, if an injunction is granted, the Plaintiff should be ordered to file a bond in the amount of \$70,000.00, which is base salary.

Indeed, he argues, contrary to the Plaintiff’s contention that it will suffer irreparable harm, any damages he causes may be readily calculated in money damages, to wit: The Plaintiff knows what revenue it is making off any client it loses to him. However, he notes, he has no intention of taking business from the Plaintiff.

In reply, DeFelice asserts that, although the Defendant denies that he took confidential materials from the Plaintiff, that he is lying and took over 13,000 records, which is essentially the Plaintiff's entire data base. The information taken included, *inter alia*, the entire customer base and contact information, *e.g.*, telephone numbers, email addresses, the identity of persons in charge of making decisions, etc. Further, it included detailed notes about customer preferences, past expenditures, anticipated expenditures, and the status of active negotiations. Contrary to the contention of the Defendant, DeFelice argues, this information cannot be gleaned by merely listening to the radio. Indeed, he asserts, if it could, then the Defendant would not have needed to take the materials. Based on such information, he argues, the Defendant and his new employer can engage in unfair competition.

Finally, DeFelice notes, the Defendant claims that he works for Neversink Radio, LLC, not DRB. However, he asserts, both are owned by the same person— Charles Williamson, who owns several stations in the Plaintiff's listening area. Indeed, DeFelice notes, the station at issue is operated out of an office in Port Jervis, New York. Thus, DeFelice argues, regardless of which office the Defendant is working out of, he can still provide confidential information to Williamson that Williamson can use to unfairly compete with the Plaintiff. Thus, he asserts, the Defendant should be restrained from working for Williamson or any station owned by him.

#### Discussion/Legal Analysis

In general, the remedy of a preliminary injunction is to preserve the status quo pending a trial, and is considered a drastic remedy that should be used sparingly. To obtain a preliminary injunction, a movant must establish, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the

movant's favor. *Armanida Realty Corp. v. Town of Oyster Bay*, 126 A.D.3d 894 [2<sup>nd</sup> Dept. 2015]; *In re Rice*, 105 A.D.3d 962 [2<sup>nd</sup> Dept. 2013]; *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 [2<sup>nd</sup> Dept. 2008]; *CPLR 6301, CPLR 6311*. An economic loss, which is compensable by money damages, does not constitute irreparable harm. Thus, where a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue. *Alayoff v. Alayoff*, 112 A.D.3d 564 [2<sup>nd</sup> Dept. 2013]; *In re Rice*, 105 A.D.3d 962 [2<sup>nd</sup> Dept. 2013]; *EdCia Corp. v McCormack*, 44 A.D.3d 991 [2<sup>nd</sup> Dept. 2007]. The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court. *Armanida Realty Corp. v. Town of Oyster Bay*, 126 A.D.3d 894 [2<sup>nd</sup> Dept. 2015].

The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 [2<sup>nd</sup> Dept. 2008]; *Ying Fung Moy v Hoho Umeki*, 10 A.D.3d 604 [2<sup>nd</sup> Dept. 2004]. Thus, even if the evidence of the likelihood of success on the merits is less than compelling, injunctive relief may still be granted if a plaintiff demonstrates both irreparable harm and that the balancing of the equities are in his or her favor. *Schlosser v. United Presbyterian Home at Syosset, Inc.*, 56 A.D.2d 615 [2<sup>nd</sup> Dept. 1977]; *see also, Suffolk County Ass'n of Mun. Employees, Inc. v. County of Suffolk*, 163 A.D.2d 469 [2<sup>nd</sup> Dept 1990]. The demonstration of a prima facie case suffices to demonstrate a likelihood of success on the merits on a given cause of action. *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 A.D.2d 165 [2<sup>nd</sup> Dept. 1986]. Issues arising from widely divergent allegations, issues of credibility, and the actual proof in the case, may be deferred to further court proceedings. *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 A.D.2d 165 [2<sup>nd</sup> Dept. 1986].

With exceptions not here relevant, "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction \* \* \*." *CPLR 6312 (b)*; *Ying Fung Moy v Hoho Umeki*, 10 A.D.3d 604 [2nd Dept. 2004]. The amount of the undertaking, which is fixed in the court's discretion, must be rationally related to the amount of potential damages that might be sustained. *S.P.Q.R. Co., Inc. v United Rockland Stairs, Inc.*, 57 A.D.3d 642 [2nd Dept. 2008].

Relevant to the case at bar, in general, any form of employee anti-competitive agreement that will be carefully scrutinized by the courts. *BDO Seidman v. Hirshberg*. 93 N.Y.2d 382 (1999); *Marshall & Sterling, Inc. v. Southard*, 148 A.D.3d 1009 [2<sup>nd</sup> Dept. 2017].

The modern, prevailing common-law standard of reasonableness for employee agreements not to compete applies a three-pronged test. A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. *BDO Seidman v. Hirshberg*. 93 N.Y.2d 382 (1999); *Marshall & Sterling, Inc. v. Southard*, 148 A.D.3d 1009 [2<sup>nd</sup> Dept. 2017]. A violation of any prong renders the covenant invalid. *BDO Seidman v. Hirshberg*. 93 N.Y.2d 382 (1999); *Marshall & Sterling, Inc. v. Southard*, 148 A.D.3d 1009 [2<sup>nd</sup> Dept. 2017].

The application of the test of reasonableness of employee restrictive covenants focuses on the particular facts and circumstances giving context to the agreement. *BDO Seidman v. Hirshberg*. 93 N.Y.2d 382 (1999); *Marshall & Sterling, Inc. v. Southard*, 148 A.D.3d 1009 [2<sup>nd</sup> Dept. 2017]. The covenant must be no more restrictive than is necessary to protect the legitimate interests of the

employer. *BDO Seidman v. Hirshberg*. 93 N.Y.2d 382 (1999); *Marshall & Sterling, Inc. v. Southard*, 148 A.D.3d 1009 [2<sup>nd</sup> Dept. 2017].

In general, the Courts have strictly applied the test to limit enforcement of broad restraints on competition. Thus, the Courts have limited the cognizable employer interests under the first prong of the common-law rule to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary. *BDO Seidman v. Hirshberg*. 93 N.Y.2d 382 (1999); *Marshall & Sterling, Inc. v. Southard*, 148 A.D.3d 1009 [2<sup>nd</sup> Dept. 2017].

The legitimate purpose of an employer in connection with employee restraints is to prevent competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment. *BDO Seidman v. Hirshberg*. 93 N.Y.2d 382 (1999); *Marshall & Sterling, Inc. v. Southard*, 148 A.D.3d 1009 [2<sup>nd</sup> Dept. 2017]. Thus, protection of customer relationships that the employee acquired in the course of employment may indeed be a legitimate interest. *BDO Seidman v. Hirshberg*. 93 N.Y.2d 382 (1999); *Marshall & Sterling, Inc. v. Southard*, 148 A.D.3d 1009 [2<sup>nd</sup> Dept. 2017]. The risk to the employer reaches a maximum in situations in which the employee must work closely with the client or customer over a long period of time, especially when his services are a significant part of the total transaction. Then, the employee has been enabled to share in the goodwill of a client or customer which the employer's over-all efforts and expenditures created. The employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment. *BDO Seidman v. Hirshberg*. 93 N.Y.2d 382 (1999).

By contrast, extending the anti-competitive covenant to clients with whom a relationship with the employee did not develop through assignments to perform direct, substantive services to the client would violate the first prong of the common-law rule, as it would constitute a restraint greater than is needed to protect the employer's legitimate interests. That is, because the goodwill of such clients was not acquired through the expenditure of the employer's resources, the employer has no legitimate interest in preventing employee from competing for their patronage. Indeed, enforcement of a restrictive covenant as to an employee's personal clients would permit the employer to appropriate goodwill created and maintained through a former employee's efforts. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999). However, in general, an employee's recollection of information pertaining to specific needs and business habits of particular customers is not confidential. *Natural Organics, Inc. v Kirkendall*, 52 A.D.3d 488 [2<sup>nd</sup> Dept. 2008].

The Courts also have the power to sever and grant partial enforcement for an overbroad employee restrictive covenant, where the unenforceable portion is not an essential part of the agreed exchange. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999); *Marshall & Sterling, Inc. v. Southard*, 148 A.D.3d 1009 [2<sup>nd</sup> Dept. 2017]. The Court should conduct a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement. Under this approach, if the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing, partial enforcement may be justified. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999); *Marshall & Sterling, Inc. v. Southard*, 148 A.D.3d 1009 [2<sup>nd</sup> Dept. 2017].

Here, the Agreement, on its face, appears to impose a restraint no greater than is required for the protection of the legitimate interests of the Plaintiff, to wit: It is limited in duration to six months, and precludes the Defendant only from working for a direct or indirect competitor within the geographic area of the Defendant's activities at the time of his termination (here, the mid-Hudson Valley), and from disclosing the Plaintiff's trade secrets and confidential customer lists.

Further, and significantly so, the Defendant consents to, or does not oppose, several aspects of the Plaintiff's request for injunctive relief, to wit: The Defendant denies that he took, is in possession of, or has disclosed or will disclose, any trade secrets or confidential information of the Plaintiff, or that he has or will solicit any clients of the Plaintiff as of the date of his termination (August 31, 2017) for a period of six months.

Thus, the Court orders that the Defendant is enjoined from soliciting any customers of the Plaintiff as of the date of his termination (August 31, 2017) for a period of six months from the date of his termination. Further, if he possesses any materials containing the Plaintiff's trade secrets or confidential information, he is to return it immediately. Further, he is not to disclose such materials to any person or entity, and is not to use the same for any purpose.

However, the Defendant is not enjoined from working for Charles Williamson or any station he owns. This is clearly overbroad. However, the Defendant is ordered, as he agreed, and as is consistent with the Agreement, not to solicit customers for Williamson, or any other employer, for stations broadcasting in the mid-Hudson Valley area, for a period of six months from the date of his termination.

Given the above, the potential damages, if any, to the Defendant that might arise from the granted preliminary relief appear nominal. Thus, the Plaintiff is directed to post an undertaking in

the amount of \$2,000.00.

Accordingly, and for the reasons cited herein, it is hereby,

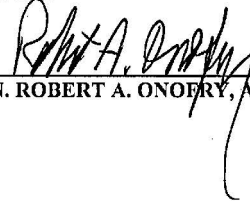
ORDERED, that a preliminary injunction is granted to the extent set forth herein and otherwise denied; and it is further,

ORDERED, that the parties are directed to appear, through respective counsel, for a conference on Wednesday, November 29, 2017, at 9:15 A.M., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: November 1, 2017  
Goshen, New York

ENTER

  
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