Eastmore Mgt., LLC v Gunta
2019 NY Slip Op 32040(U)
July 5, 2019
Supreme Court, New York County
Docket Number: 653592/2018
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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EASTMORE MANAGEMENT, LLC

Plaintiff,

- v -

SUMAN GUNTA,

Defendant.

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INDEX NO. 653592/2018

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

Masley, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 41, 42, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

In motion sequence number 003, plaintiff Eastmore Management, LLC (Eastmore) moves pursuant to CPLR 6301 for a preliminary injunction restraining defendant Suman Gunta from (1) using, disclosing, or transferring any of Eastmore's confidential information, (2) destroying any evidence or materials relating to the present action, and (3) violating the confidentiality requirements set out in an employment agreement (Employment Agreement) entered into by Gunta and Eastmore. (NYSCEF Doc. No. 22.) Gunta cross-moves pursuant to CPLR 3211 (a)(1) and (a) (7) to dismiss the complaint.[1]

[1] To the extent the cross-motion asserts arguments to seal certain documents, the cross-motion is either moot pursuant to this court's order filed on NYSCEF Doc. No. 69, or in contravention of this court's part rules, and denied.

Background

Eastmore, a securities investment firm, specializes in quantitative trading strategies involving futures and electronically traded funds. (NYSCEF Doc. No. 1 at ¶ 1.) Eastmore uses proprietary trading strategies to analyze data it accumulates to determine the optimal time of day to buy and sell securities. (*Id.*) On July 1, 2016, Eastmore hired Gunta as a Senior Quantitative Trader, and the parties entered into the Employment Agreement. (*Id.* at ¶ 9.) In the event that Gunta violated any of the provisions contained in the Employment Agreement, section 10(i) indicated that Eastmore may be entitled to seek injunctive relief. (*Id.* at ¶ 19.)

Although Eastmore originally hired Gunta to implement "Strategy A," Gunta's attempts failed, and subsequently, Eastmore transitioned Gunta into a new role. (*Id.* at ¶ 22.) In that role, Gunta assisted in the development of supporting technology for one of Eastmore's core trading strategies, specifically relating to the trading of electronically traded funds and futures. (*Id.*) Accordingly, Eastmore gave Gunta access to Eastmore's confidential and proprietary trading strategies. (*Id.* at ¶ 24.) Gunta allegedly failed to perform to Eastmore's satisfaction, and subsequently, Eastmore terminated Gunta "for cause" once Gunta declined Eastmore's offer to become an independent contractor. (NYSCEF Doc. No. 61 at ¶¶ 16-19.) Upon terminating Gunta on March 12, 2018, Eastmore allegedly reminded Gunta that the Employment Agreement remained effective. (NYSCEF Doc. No. 1 at ¶ 30.)

On July 12, 2018, Eastmore received word from Boothbay Management, another securities firm, that Gunta was marketing his ability to implement Eastmore's trading strategy there. (*Id.* at ¶ 34; NYSCEF Doc. No. 61 at ¶ 21.) Accordingly, Eastmore commenced this action on July 19, 2018, alleging breach of the Employment

Agreement, misappropriation of trade secrets, and disgorgement. (NYSCEF Doc. No. 1 at ¶¶ 38, 46, 51.) On August 16, 2018 Gunta filed a Notice of Removal in the United States District Court for the Southern District of New York. (NYSCEF Doc. Nos. 17.) On September 12, 2018, the case was remanded back to this Court. (NYSCEF Doc. No. 21.)

Eastmore then filed this motion for a preliminary injunction to prevent Gunta from using Eastmore's trade secrets and confidential and proprietary information at competing securities investment firms. (NYSCEF Doc. No. 22.)

Discussion

A party seeking a preliminary injunction must demonstrate the following three elements: "(1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balance of the equities in its favor." (*Invesco Inst. (N.A.), Inc. v Deutsche Inv. Mgt. Ams., Inc.*, 74 AD3d 696, 697 [1st Dept. 2010][citation omitted].)

Likelihood of Success on the Merits

Eastmore argues that it is likely to succeed in its misappropriation of trade secrets claim because (1) Eastmore's trading strategy and the proprietary database constitute a trade secret, and (2) Gunta summarized and described Eastmore's trading strategy in his resume and "Strategy Approach/Performance document," before disbursing these documents to potential employers after his termination. Specifically, Eastmore contends that it uses an algorithm that analyzes compiled data to make trading decisions in a manner that is unique to Eastmore. At oral argument on the record, Eastmore clarified,

"It is the algorithm, whatever the software is that's used to

> manipulate that data and tell you or have the computer tell you what orders to place and the amounts and so on. And [Gunta's] telling an employer I can do this without further research and these are the amounts of money I need and this is the profit I can make. And he's saying this is what I did at Eastmore." (NYSCEF Doc. No. 68 at 38:15-21.)

Eastmore asserts that this algorithm constitutes a trade secret because Eastmore developed the program, it is not widely known outside of the firm, and is protected by Eastmore "with vigilance." (NYSCEF Doc. No. 60 at 6-7.)

Eastmore also describes the various measures it takes to protect this information. For instance, Eastmore points to section 10 of its Employment Agreement, and its requirement that every employee enter into this contract, as the clearest evidence that Eastmore endeavors to conceal its trading strategy from its competitors. Indeed, Section 10 explicitly states that all work completed for Eastmore constitutes confidential information that cannot be disclosed outside of Eastmore.

Eastmore further argues that Gunta's simulation and associated "Strategy Approach/Performance document," is evidence that Gunta either wrongfully retained components of Eastmore's algorithm, or that Gunta used the skills and knowledge he gained while in Eastmore's employ to reverse engineer Eastmore's trading strategy.

Gunta opposes, arguing that Eastmore fails to allege anything beyond conclusory statements to show that it possesses a trade secret, or that Gunta was marketing this trade secret to Eastmore's competitors. Gunta contends that Steven Newman, Eastmore's Chief Administrative Officer, whose affidavit Eastmore submitted in support of this motion, lacks the specialized knowledge to demonstrate what, exactly, constitutes Eastmore's trade secret.

Additionally, Gunta contends that he created a simulation following his termination by Eastmore, and used publicly available data to demonstrate his knowledge and skills to potential employers. (NYSCEF Doc. No. 46 at ¶ 11.) Gunta states that the simulation was "based on a strategy and code that [he] had prepared from scratch ... that was intended to be representative of the risk profile and profitability of the strategy that [he] worked on" for Eastmore. (*Id.* at ¶ 44.) Gunta additionally posits that the simulation cannot reflect Eastmore's strategy because Gunta returned all of Eastmore's material following his termination. (*Id.* at ¶ 35-36.)

"It is well settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive." (*Four Times Sq. Assoc. v Cigna Invs.*, 306 AD2d 4,5 [1st Dept 2003].) To demonstrate that Gunta misappropriated its trade secret, Eastmore must show that: "(1) it possessed a trade secret, and (2) the defendant used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means." (*Schroeder v. Pinterest, Inc.*, 133 AD3d 12, 27 [1st Dept 2015][internal quotation marks and citations omitted].)

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 how or use it." (*Ashland Management v. Janien*, 82 NY2d 395, 407 [1993][internal quotation marks and citations omitted].) Additionally, the following six factors are weighed to determine whether information constitutes a trade secret: (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 business, (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, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." (*Id.* [internal quotation marks and citations omitted].) For purposes of this discussion each factor will be addressed in turn below.

Here, Eastmore has sufficiently demonstrated a likelihood of success that it possesses a trade secret, and that Gunta misappropriated that trade secret. The extent to which the information is known outside the business factor weighs in favor of Eastmore who's Chief Administrative Officer, Newman, states, "I have never heard mention anywhere of a similar strategy." (NYSCEF Doc. No. 66 at ¶ 5.) He adds, "Based on this fact and the trading itself, I am convinced that Eastmore is a unique player in the market." (*Id.*) At oral argument, Gunta did not argue to the contrary that other firms use this algorithm, and as Newman notes, Gunta "cites no example of such a firm, nor any public report of that strategy." (*Id.; see also* NYSCEF Doc. No. 68 at 10:25-26 ["[W]e're not aware of any. He hasn't cited any."] The second factor concerning the extent to which the information is known by employees and others in the business weighs against Eastmore because Eastmore fails to provide any information as to how many employees know about this algorithm/strategy. The third factor concerning the extent of measures taken to guard the secrecy of the strategy/algorithm weighs in favor of Eastmore because Eastmore requires employees like Gunta to enter into confidentiality agreements like the one at issue here. (*See also* NYSCEF Doc. No. 68 at 33:18-20 ["We don't have a website, we don't tell anybody what we're doing. There's no way anyone would know what we're doing ... ."].) The fourth factor concerning the value of the information to Eastmore and its competitors weighs in favor

of Eastmore because Newman states, "This core proprietary information is highly valuable and would enable another firm to accomplish in hours what took Eastmore years, at a cost of over a million dollars." (NYSCEF Doc. No. 61 at ¶ 4.) Newman adds that "another firm would be anxious to adopt" Eastmore's core strategy. (NYSCEF Doc. No. 28 at 4.) The fifth factor concerning the amount of effort or money expended in developing the information weighs in favor of Eastmore because Eastmore's CAO states that it has "devoted substantial resources over several years to develop and refine its core trading strategy." (NYSCEF Doc. No. 28 at ¶ 6.) Indeed, at oral argument, Eastmore noted, "[W]e developed this on our own, strictly with our own ... hard work for the last four, five years." (NYSCEF Doc. No. 68 at 11:5-7.) The last factor concerning the ease or difficulty with which the information could be properly acquired or duplicated weighs against Eastmore who has not provided sufficient information on this point. Since a majority of these factors weigh in favor of Eastmore, Eastmore has shown a likelihood of success on the merits insofar as it possesses a trade secret.

Additionally, Eastmore indicated that Gunta could have only created his simulation by either using Eastmore's algorithm or by reverse engineering it, either of which violate the Employment Agreement. (NYSCEF Doc. NO. 28 at 3 ["Gunta received sufficient technical information so that he could today reverse engineer the strategy"]; *see also* NYSCEF Doc. No. 68 at 14:20-22 "[Gunta] could not be doing that unless he had our algorithms, our information and our data"].) Gunta's "Strategy 1" document outlines the amount of capital needed, the returns expected, and the risk adjuster returns that are allegedly known only to Eastmore. (*See* NYSCEF Doc. No. 28 at 3.) Consequently, Eastmore has shown a likelihood of success on the merits insofar as

Gunta's use of this information appears to violate section 10 of the Employment Agreement.

Irreparable Harm

Eastmore argues that the development of trading strategies is highly proprietary, and it spent several years and millions of dollars refining a trading strategy that it believes is unique in the industry. Eastmore further contends that this strategy will only work when one firm is trading on that specific characteristic while a large number of firms using it may alter the market itself and render the strategy useless. Additionally, Eastmore argues that its competitors would be given an unfair advantage if they could gain access without having to incur the time and expense to develop Eastmore's strategy. Lastly, Eastmore cites to its own Employment Agreement with Gunta insofar as it states that should Gunta disclose any of Eastmore's confidential information, Eastmore would suffer irreparable harm as a result.

Gunta contends that Eastmore has not demonstrated the danger of irreparable harm because its complaint does not articulate any actual harm. Additionally, Gunta notes that he has been out of work pending the resolution of this case, and that granting Eastmore's motion would "create a judicial noncompete lasting the duration of this litigation and compound the harm" that Gunta has already suffered. (NYSCEF Doc. No. 58 at 17.)

Irreparable harm may be "'established where there is a danger that, unless enjoined, a misappropriator of trade secrets will disseminate those secrets to a wider audience or otherwise irreparably impair the value of those secrets.'" (*Invesco Inst. (N.A.), Inc.*, 74 AD3d at 697.) Because the algorithm bears the earmarks of a trade secret, Gunta's disclosure of it would cause Eastmore irreparable harm insofar as

Eastmore "would likely sustain a loss of business impossible, or very difficult, to quantify." (*Id.*) Should Gunta provide other firms with Easmore's algorithm, Eastmore would lose its competitive edge.

Balance of the Equities

Eastmore argues that it is not attempting to prevent Gunta from seeking employment as a quantitative trader. Rather, it is trying to prevent him from using Eastmore's algorithms. Indeed, at oral argument on the record, Eastmore stated, "[w]e're seeking a very narrow injunction to protect our algorithms, our code, our business sources, and also to prevent [Gunta] from using those through reverse engineering." (*Id.* at 15:2-4.) In opposition, Gunta argues that he has already been harmed as a result of this action, specifically, that he has been out of work for an additional six months following the expiration his non-compete clause. (*See* NYSCEF Doc. 58 at 17.) Gunta contends that "the very existence of this lawsuit is a dark cloud over [his] head," and he has "exhausted ... [his] professional network" searching for jobs. (NYSCEF Doc. No. 46 at ¶ 40.)

With respect to the third factor of balancing the equities, "the harm to plaintiff from denial of the injunction as against the harm to defendant from granting it" must "tip in plaintiff's favor" for an injunction to issue. (*Edgeworth Food Corp. v Stephenson*, 53 AD2d 588, 588 [1st Dept 1976].) Here, Gunta is well educated and he himself admits to possessing a "highly technical skill set" from over a decade of experience working in the quantitative trading industry. (NYSCEF Doc. 46 at ¶ 17.) In fact, Gunta held two quantitative trading jobs at Blackbox Group and Diamondback Capital, prior to working at Eastmore. (NYSCEF Doc. No. 31 [Gunta's resume].) Given his extensive background in the securities industry and skill-set, Gunta should be able to secure

employment without using Eastmore's algorithm as his primary pitch. Therefore, the equities balance in favor of Eastmore, a company that stands to lose business in the event that its algorithm is further disseminated.

Undertaking

"CPLR 6312(b) provides that 'prior to the granting of a preliminary injunction, the plaintiff *shall* give an undertaking in an amount to be fixed by the court ... .' (*Scotto v Mei*, 219 AD2d 181, 185 [1st Dept 1996].) "The undertaking should reflect those damages defendant may incur if the court determines that the preliminary injunction was erroneously granted." (*Visual Equities v Sotheby's, Inc.*, 199 AD2d 59, 59 [1st Dept 1993][citations omitted].) Here, any damage that Gunta might incur is connected to his inability to secure a position as a result of being restrained from speaking to the extent he wishes about Eastmore's algorithm. Therefore, the effectuation of this preliminary injunction is conditioned upon Eastmore posting an undertaking for the amount equivalent to 10% of Gunta's monthly salary at Eastmore at the time of Gunta's termination multiplied by 13 months, the standard duration for a case commenced in the Commercial Division. (*Matter of G Bldrs. IV, LLC v Madison Park Owner, LLC*, 84 AD3d 694, 695 [1st Dept 2011].)

Destruction of Evidence

Eastmore is also seeking to enjoin Gunta from destroying evidence. An obligation to preserve relevant evidence arises when a party "reasonably anticipates litigation" meaning a party "is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 43 [1st Dept 2012][internal quotation marks and citations omitted].) The

law already imposes an obligation on Gunta to preserve evidence related to this litigation. Because Eastmore presented no evidence that Gunta actually destroyed anything in contravention of this obligation, this Court declines to enjoin Gunta from destroying evidence. Accordingly, this prong of relief requested in Eastmore's application is denied.

Cross-Motion To Dismiss

Gunta contends that the first cause of action for breach of the Employment Agreement should be dismissed because it is "a thinly (if not barely) veiled covenant not to compete, and the verified complaint does not contain allegations to show that it is a reasonable - and therefore enforceable - restrictive covenant under New York law." (NYSCEF Doc. No. 58 at 2.) Gunta also asserts that the second cause of action for misappropriation of trade secrets should be dismissed because it is based on "wholly unsubstantiated and conclusory allegations." (*Id.* at 4.) Gunta further argues that the third cause of action for disgorgement should be dismissed because disgorgement is a remedy, not an independent cause of action. Eastmore opposes, asserting that it adequately states the first two causes of action in the complaint, and is permitted to plead the third in the alternative.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) However, factual allegations "that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence"

cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; *see also* CPLR 3211 [a] [1].)

Here, Eastmore adequately states a claim for breach of the Employment Agreement. The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009][citation omitted].) The complaint alleges that the parties entered into the Employment Agreement, Eastmore hired Gunta, Gunta breached Section 10 of the Agreement by disseminating and disclosing confidential information, and now Eastmore is suffering irreparable injury. Even if the complaint does not state the word "reasonable" in regard to the restrictive covenant, Eastmore is only seeking to enforce Section 10 as it prohibits Gunta's use of Eastmore's trade secrets. It is well settled, as a matter of law, that an employer has a legitimate interest in entering a restrictive covenant to protect against misappropriation of its trade secrets. (*BDO Seidman v Hirschberg*, 93 NY2d 382, 389 [1999].) Moreover, the court is empowered to sever any unreasonable provisions and grant partial enforcement if warranted. (*Id.* at 395 ["[T]o reject partial enforcement based solely on the extent of necessary revision of the contract resembles the now-discredited doctrine that invalidation of an entire restrictive covenant is required unless the invalid portion was so divisible that it could be mechanically severed, as with a 'judicial blue pencil'].) At this juncture, Gunta has neither shown a defense based on documentary evidence or that Eastmore has failed to state a claim for breach of the Employment Agreement. Accordingly, the claim survives this motion to dismiss, and the parties are entitled to engage in discovery.

Eastmore also adequately states the second cause of action for misappropriation of trade secrets because Eastmore alleges that it has a trade secret that Gunta used in breach of the Employment Agreement. (NYSCEF Doc. No. 24 at ¶¶ 44, 46.) Lastly, the third cause of action for disgorgement is dismissed because "disgorgement in this context is a remedy, not a cause of action." (*NVM Capital, LLC v Scharfman*, 144 AD3d 414, 415 [1st Dept 2016].)

Accordingly,

Due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of the plaintiff and against the defendant and that the plaintiff is entitled to a preliminary injunction on the ground 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, as set forth in the aforesaid decision 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, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in a sum set in accordance with this order conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendant, his agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under

the supervision or control of defendant or otherwise, any of the following acts: using, disclosing, or transferring Eastmore's algorithms; and it is further

ORDERED that plaintiff Eastmore shall file within 5 days of this order's filing on NYSCEF an affirmation and documentary evidence indicating Suman Gunta's salary at the time of his termination together with Eastmore's calculation of the undertaking; and it is further

ORDERED that the cross-motion of defendant Suman Gunta to dismiss the complaint is granted insofar as only the third cause of action for disgorgement of the complaint is dismissed; and it is further

ORDERED that defendant Suman Gupta file his Answer within thirty days of this order's filing on NYSCEF; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 242, 60 Centre Street, New York, New York, on August 29, 2019 at 11:30 A.M.

7/5/19
DATE

HON. ANDREA MASLEY
ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED		DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE