

**XL Diamonds LLC v Rosen**

2020 NY Slip Op 30436(U)

February 14, 2020

Supreme Court, New York County

Docket Number: 656102/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

XL DIAMONDS LLC,

Plaintiff,

- v -

CHARLES ROSEN, E.M.DIAM., INC.

Defendant.

-----X

INDEX NO. 656102/2019
MOTION DATE 10/24/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 20, 23, 30, 31, 32, 33, 34, 35

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, and for the reasons set forth below, XL Diamonds LLC (the Plaintiff) s motion for a preliminary injunction is denied because any alleged damages are compensable by monetary relief.

The Relevant Facts and Circumstances

Reference is made to (i) a Covenant Not to Compete (the Covenant Not to Compete) and (ii) a Confidentiality Agreement (the Confidentiality Agreement; the Covenant Not to Compete, together with the Confidentiality Agreement, collectively, hereinafter the Agreements), each by and between XL Diamonds and Charles Rosen and dated August 20, 2019, (NYSCEF Doc. No. 2), pursuant to which Mr. Rosen was hired by the Plaintiff.

Pursuant to the Covenant Not to Compete, Mr. Rosen agreed not to work for any competitor of the Plaintiff:

... Employee covenants and agrees that during the term of this agreement, and for a period of one (1) year following the termination of employee's employment, employee will not, either directly or indirectly, engage in/or acquire an interest in (as an individual, partner, stockholder, director, officer, principal, agent, employee, lender of money, or any relation or capacity whatsoever) any business that is competitive with the business of employer. A business shall be deemed competitive for purposes of this provision if it performs services or conducts business similar to the service and business of employer, which is the wholesale diamond business via sales by the internet and/or phone and is conducted within the territory of the United States (the "Covenant Area"). Employee is free to perform services or conduct business in any and all other areas not involved in diamond wholesaling. (*Id.*).

The Confidentiality Agreement provided that Mr. Rosen would not disclose any trade secret or confidential information of the Plaintiff:

5. Non-disclosure. Employee agrees that employee will not, either directly or indirectly, for competitive or other purposes, disclose or cause to be disclosed or make or cause any unauthorized use of any trade secret or confidential Information of employer as above described, either during employee's employment or at any time thereafter. Employee also agrees that all such trade secrets and confidential information, and any copy, extract, or summary thereof, whether originated or prepared by or for employee or otherwise coming into employee's knowledge, possession or control, shall be and remain the exclusive property of employer. (*Id.*).

Mr. Rosen was also prohibited from soliciting any of the Plaintiff's clients or employees for one year after his employment came to an end:

7. Protection of clients and other relationships. Employee agrees that during the term of employee's employment by employer, and for a period of one year (1) thereafter, Employee shall not, either directly or indirectly, attempt to or actually call on, solicit, or take away or assist to be called on, solicited, or taken away, any of the clients or other employees of employer, either for employees own benefit, for any existing or potential competitor, or for the benefit of any other person, firm, or corporation.

8. Non-interference. During the period of employee's employment and for a period of one year following termination, employee shall not disrupt, damage, impair, or interfere with the business of employer in any manner, including, without limitation, inducing any employee to leave the employ of employer or inducing any client to sever that person's relationship with employer. (*Id.*).

Significantly, the Confidentiality Agreement provides that if Sections 7 and 8 were breached, then Mr. Rosen would pay liquidated damages to the Plaintiff:

10. Liquidated damages. In the event of a breach by employee of the provisions of sections 7 and 8 of this agreement, which results in the loss of a customer of employer, and in addition to any other rights or remedies; Employee shall pay to employer a sum of liquidated damages equal to the amount of the fee that employer earned from such customer during the most recent one year period during which employer provided services to the client. **If services were not provided to the client for a full year, liquidated damages shall equal the annualized value of the fees actually charged for services that were provided.** Employer and employee both agree that the amount established hereunder as liquidated damages is reasonable under the circumstances existing at the time of execution of this agreement. (*Id.* [emphasis added]).

The Plaintiff filed its summons and complaint on October 18, 2019 and asserted claims for (1) breach of covenant not to compete, (2) breach of confidentiality agreement, (3) tortious interference with covenant not to compete and confidentiality agreement, and (4) theft of trade secrets (NYSCEF Doc. No. 1, the **Complaint**). In sum and substance, the Plaintiff alleges it hired Mr. Rosen on August 20, 2019 but after approximately three and a half weeks with the Plaintiff, Mr. Rosen returned to work for his former employer E.M.Diam., Inc., in breach of the Agreements (NYSCEF Doc. No. 1, ¶¶ 20-26). On October 22, 2019, the Plaintiff moved by order to show cause for this preliminary injunction to enjoin Mr. Rosen from working for E.M.Diam., Inc., aka EMD Diamonds.

### **Discussion**

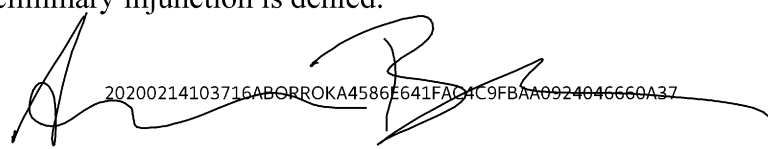
In order to obtain a preliminary injunction, a party must demonstrate a probability of success on the merits, irreparable injury in the absence of an injunction, and a balance of equities in its favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). It is well settled that

there can be no irreparable harm where the Plaintiff can be compensated by money damages  
(*Daley v Related Cos.*, 179 AD2d 55, 60 [1st Dept 1992]).

Significantly, inasmuch as Section 10 of the Confidentiality Agreement provides for compensation, the Plaintiff's damages are compensable by money and cannot be irreparable (*see SportsChannel Am. Assoc. v Natl. Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]) and the injunction must be denied.

Accordingly, it is

ORDERED that the Plaintiff's motion for a preliminary injunction is denied.



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2/14/2020  
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		SUBMIT ORDER	<input type="checkbox"/>
				FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE