Stone Source, LLC v Hubbard
2020 NY Slip Op 30941(U)
April 13, 2020
Supreme Court, New York County
Docket Number: 657224/2019
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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STONE SOURCE, LLC,

Plaintiff,

- v -

JENNIFER HUBBARD, SOHO STUDIO LLC A/K/A TILEBAR

Defendant.

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INDEX NO. 657224/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 20, 21, 22, 23, 24, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Jennifer Hubbard and Soho Studio LLC a/k/a Tilebar's (together, the **Defendants**) motion to dismiss the Complaint (hereinafter defined) pursuant to CPLR § 3211 (a)(7) is granted solely to the extent of dismissing (i) the first cause of action for a permanent injunction regarding enforcement of the Non-Compete Clause and Non-Solicitation Clause (hereinafter defined) and (ii) the second cause of action for tortious interference, but denied as to that branch of the first cause of action for a permanent injunction regarding enforcement of the Non-Disclosure Clause.

The Relevant Facts and Circumstances

Stone Source, LLC (**Stone Source**) obtains, distributes, and sells porcelain tile and natural stone, primarily through an international network of suppliers, architects, and designers who specify

Stone Source's products after one of the its sales representative familiarizes those network members with these products (NYSCEF Doc. No. 1, ¶ 57).

Ms. Hubbard is a former Stone Source employee. Stone Source alleges that Ms. Hubbard breached certain restrictive covenants in her employment agreement with Stone Source after she left to work for Soho Studio LLC a/k/a Tilebar (**TileBar**). In addition, Stone Source asserts a claim against TileBar for tortious interference with contract based on its employment agreements with Ms. Hubbard and another former employee, Matthew Waas.

A. Stone Source Employment Agreement with Jennifer Hubbard

Reference is made to (i) a letter of employment (NYSCEF Doc. No. 2, the **Letter of Employment**), dated October 30, 2015 and (ii) a Stone Source LLC Employee Non-Disclosure, Non-Competition, Non-Solicitation and Inventions Assignment Agreement (NYSCEF Doc. No. 3, the **Hubbard Agreement**), dated November 1, 2015, each by and between Jennifer Hubbard and Stone Source LLC, pursuant to which Ms. Hubbard began working on November 16, 2015 as a full-time customer service representative in the Washington, D.C. office while reporting to the Mid-Atlantic Regional Manager, Max Lestz.

The Hubbard Agreement provides that Ms. Hubbard is prohibited, both during and after her employment with Stone Source, from disclosing certain "Confidential Information" as follows:

> 2. Confidential Information.
>
> (a) Existence of Confidential Information. I acknowledge that the Company owns and has developed and compiled, and will develop and compile, certain proprietary techniques and confidential information which have great value to its business

(collectively, "Confidential Information"). Confidential Information includes not only information disclosed by the Company to me, but also information about or related to the Company and its actual and anticipated business that I develop or learn during the course or as a result of my employment with the Company. Such information is the property of the Company. Confidential Information includes all information that has or could have commercial value or other utility in the business in which the Company is engaged or anticipates engaging, and all information of which the unauthorized disclosure could be detrimental to the interests of the Company, whether or not such information is specifically labeled as Confidential Information by the Company. By way of example and without limitation, Confidential Information includes information developed, obtained, licensed by or to or owned by the Company concerning trade secrets, techniques and know-how (including designs, plans, procedures, manufacturing and processing, merchandising, marketing, distribution and warehousing plans, techniques and know-how, research records, vendors, product names, customer and customer prospect lists), software, computer programs, and any other intellectual property created, used or sold (through a license or otherwise) by the Company, electronic data, innovations, discoveries and improvements, research and development information, test results, reports, specifications and data, business plans, strategies and forecasts, unpublished financial information, orders, agreements and other forms of documents, price and cost information, merchandising opportunities, expansion plans. store plans. budgets, projections, customer, supplier, licensee, licensor and subcontractor identities, characteristics, agreements and operating procedures, and salary, staffing and employment information. The term "Confidential Information" does not include information generally available to the public or information that is or becomes available to me on a non-confidential basis from a source other than the Company or the Company's shareholders, principals, directors, officers, employees or agents (other than as a result of any breach of any obligation of confidentiality). I may disclose Confidential information to the extent that such disclosure is required by law as evidenced by interrogatories, requests for information or documents, investigative demand or other process or compulsion. I will tell the Company of' any such requirement so that it may seek a protective order to prevent disclosure of confidential material.

(b) Protection of Confidential Information. I acknowledge that in the performance of my duties hereunder the Company will disclose to and entrust me with Confidential Information which is the exclusive property of the Company and which I may possess or use only in the performance of my duties for the Company. I am aware that the unauthorized disclosure of Confidential Information, among other things, may be prejudicial to the Company's interests, an invasion of privacy and an improper disclosure of trade secrets. I will not directly or indirectly, use, make available, sell, disclose or otherwise communicate to any individual, corporation, partnership, or other entity (collectively, "person"'), other than in the course of my assigned duties and for the benefit of the Company, any Confidential Information, either during the time I am employed by the Company or thereafter.

(*Id.* at 2-3, the **Non-Disclosure Clause**).

The Hubbard Agreement also includes a non-compete clause (the **Non-Compete Clause**) whereby Stone Source could elect to pay Ms. Hubbard's salary for up to one year after her period of employment to prohibit her from engaging in or with any competing business:

> 4. Non-Competition and Non-Solicitation.
>
> (a) During the period of my employment and ***for such additional period, after the period of my employment, not to exceed one year, as the Company may elect, so long as the Company continues to pay me my base salary during such additional period, I shall not,*** directly or indirectly, own, manage, control, participate in, consult with, render services for, whether as an agent, employee, consultant, advisor, representative, stockholder, partner or joint venturer, or in any manner whatsoever ***engage in any business within any Restricted Territory (as defined below) that competes with the business of the Company***, including any business that produces improvements and replacements for the Company's products, or with any business that produces other products or services which are used to perform the same function as the services or products of the Company or a business developing any product or service which is used to perform the same function as the services or products of the Company. The Company's business is being conducted throughout the United States and Canada. As used in this Agreement, the term "Restricted Territory" means (i) any state in the continental United States; (ii) Alaska and Hawaii; (iii) any other territory or possession of the United States; (iv) the province of Ontario and Quebec and (v) each other province in Canada.

(*Id.* at 3 [emphasis added]).

In addition, the Hubbard Agreement provides for a non-solicitation clause (the **Non-Solicitation Clause**) pursuant to paragraph 4(b) as follows:

> (b) During the Non-Compete Period, I shall not assist any person to, or directly, or indirectly through another person, (i) solicit any employee of the Company to leave the employ of the Company, or in any way interfere with the relationship between the Company, on the one hand, and any employee thereof, on the other hand; (ii) hire any individual who was an employee of the Company until two (2) months after such individual's employment relationship with the Company has been terminated or (iii) induce or attempt to induce any customer, supplier, consultant, licensee or other business relation of the Company to cease doing business with the Company, or in any way interfere with the relationship between any such customer, supplier, consultant, licensee or business relation, on the one hand, and the Company, on the other hand. "Non-

> Compete Period" means the period beginning on the date hereof and ending after the termination of my employment by the Company.
>
> (*Id.* at 3).

In its opposition papers, however, Stone Source states that it makes no claim pursuant to the Non-Solicitation Clause (NYSCEF Doc. No. 42, at 20).

B. Stone Source Confidentiality Agreement with Matthew Waas

Reference is also made to a Stone Source Agreement Regarding Confidential Information (NYSCEF Doc. No. 45, the **Waas Agreement**), dated October 20, 2010, by and between Stone Source and Matthew Waas, pursuant to which Mr. Waas agreed not to use or disclose certain "Confidential Information" during and after his employment with the Plaintiff. The Waas Agreement did not contain a non-compete or non-solicitation clause. Mr. Waas was employed as a sales representative with Stone Source from 2007 to August 30, 2019, during which time he worked with Ms. Hubbard (NYSCEF Doc. No. 1, ¶¶ 15, 17).

C. Mr. Waas and Ms. Hubbard leave Stone Source to join TileBar

On or after August 30, 2019, Mr. Waas left Stone Source to work for TileBar (*id.*, ¶¶ 17, 22). On October 11, 2019 Ms. Hubbard provided Stone Source with two weeks' notice of her decision to leave her employment to join TileBar (NYSCEF Doc. No. 5).

By letter, dated October 16, 2019 (NYSCEF Doc. No. 6), counsel for Stone Source wrote to TileBar, Mr. Waas, another former Stone Source employee, Erica Puccio, and a recruiting firm, Michael Page International Inc., to advise that it believed that Ms. Puccio and Mr. Waas were in

breach of their post-employment contractual duties to not disclose confidential information. Stone Source's counsel further advised that it believed that Ms. Puccio and Mr. Waas used Stone Source confidential information to assist TileBar in soliciting other employees to leave Stone Source and join TileBar (*id.*).

By letter, dated October 24, 2019, Stone Source made Ms. Hubbard a new offer of employment that matched her new salary at TileBar (NYSCEF Doc. No. 43, ¶¶ 14-15; NYSCEF Doc. No. 44). On the same date, Mr. Lestz reminded Ms. Hubbard of the Non-Compete Clause in her employment agreement (NYSCEF Doc. No. 43, ¶ 16). On October 25, 2019, Ms. Hubbard advised that she would turn down Stone Source's offer in favor of working at TileBar (*id.*, ¶ 17). In turn, Mr. Lestz advised Ms. Hubbard that Stone Source would exercise its rights pursuant to the Non-Compete Clause (*id.*, ¶ 18).

By letter, dated October 28, 2019, from Stone Source to Ms. Hubbard, Stone Source advised that it intended to exercise the Non-Compete Clause as follows:

> ***In keeping with your November 1, 2015 agreement, the Company is electing to continue your current base salary for a period that will not exceed one year.*** The base salary payments will continue for up to one year or such earlier time, if any, as the Company in writing may notify you it no longer will pay your base salary.
>
> As a result of the Company exercising this right, the November 2015 agreement precludes you during the period of payment of your base salary from working for a Stone Source competitor, including Soho Studio (a/k/a TileBar).

(NYSCEF Doc. No. 5 [emphasis added]).

On or around October 30, 2019, Stone Source received an email chain between Mr. Waas as Executive VP of Business Development for TileBar and Piergiorgio Mazzetta, Director of North America Sales and Operations at Laminam, a stone supplier (NYSCEF Doc. No. 46). In an email, dated October 29, 2019, from Mr. Waas to Mr. Mazzetta, Mr. Waas referred to a "capital one hotel project" and stated, "I want Laminam and you to WIN this!!!! It's about 15-20,000 SF" (*id.* at 4). One day later, Mr. Mazzetta wrote to Mr. Waas by email, dated October 30, 2019, regarding the same project:

> Matt, here we have a very large and serious problem. This is the same materials for which Stonesource has placed a pre-order already … That material is exclusive to Stonesource … When you told me about a project, I thought was [sic] a new project and not something that was already in the books for Stonesource … At this point this is a project that we can't seriously pursue in my opinion.

(*id.* 1-2).

On December 5, 2019, Stone Source commenced this action for: (i) a permanent injunction to enjoin Ms. Hubbard from (a) competing with it for nine-months, (b) from engaging in other contractually prohibited activities for one year, and (c) to refrain from disclosing confidential information, and (ii) tortious interference by Tile Bar in connection with the Hubbard Agreement and the Waas Agreement (NYSCEF Doc. No. 1, the **Complaint**).

Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

A. First Cause of Action (Permanent Injunction)

The remedy of permanent injunctive relief is dependent on the merits of the substantive claims asserted against a defendant (*Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 59 [1st Dept 2012] [citations omitted]).

In its Complaint, Stone Source alleges that Ms. Hubbard breached the Non-Compete Clause, Non-Solicitation Clause, and Non-Disclosure Clause in the Hubbard Agreement. As a result, Stone Source seeks to permanently enjoin Ms. Hubbard from any further breach of the Hubbard Agreement. However, the Defendants argue that the Hubbard Agreement is unenforceable such that the first cause of action for a permanent injunction must be dismissed.

1. The Non-Compete Clause

A restrictive covenant will only be upheld to the extent that it is "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" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 389 [1999] [citation omitted]).

The Defendants primarily argue that the Non-Compete Clause is unenforceable because it contains no definitive term during which Ms. Hubbard would be restricted from competing with Stone Source. In their opposition papers, Stone Source argues that it is not required to specify a

precise time period for Ms. Hubbard's leave, as long as such time does not exceed the Hubbard Agreement's one-year limitation for such leave and Stone Source continues to pay Ms. Hubbard during this time.

A one year restrictive covenant has been held to be reasonable (*see Crown It Servs., Inc. v. Koval-Olsen*, 11 AD3d 263, 264 [1st Dept 2004] [finding that a restrictive covenant limited to twelve months after employee termination was reasonable in time]). It is simply of no moment that the Non-Compete Clause is "not to exceed one year" and not one year because the Hubbard Agreement provides sufficient notice of the restrictive period. The Defendants' arguments to the contrary are simply unavailing. This is particularly so because Ms. Hubbard is being paid her salary as long as the Non-Compete Clause applies. To wit, courts have upheld similar non-compete provisions that restrict an employee from working post-employment while the employee is compensated for their forbearance (*see Eagle Energy Brokers, LLC v Stanton*, 2017 NY Slip Op 30834[U] [Sup Ct, NY County 2017] [holding that a restrictive covenant prohibiting the defendant from working for a competing firm for three months post-employment while the defendant was paid a base salary was reasonable and enforceable]; *Evolution Mkts., Inc. v Penny*, 2009 NY Slip Op 51019[U] [Sup Ct, Westchester County 2009] [enforcing a restrictive covenant lasting six months where the defendant employee was prohibited from working for any competing business, among other things, in exchange for payment of her base salary]; *Alliancebernstein, L.P. v Clements*, 2011 NY Slip Op 50995[U] [Sup Ct, NY County 2011] [enforcing a restrictive covenant that restrained defendant employee from joining a competitor for 60 days post-employment while he continued to receive his salary]).

However, the critical issue which torpedoes the Non-Compete Clause is that its geographic scope is unreasonable and unenforceable – i.e., the Restricted Territory (throughout the United States and Canada) (NYSCEF Doc. No. 3, ¶ 4[a]) is broader than the area that she covered during her employment. In other words, the problem is that that by having the Restricted Territory cover *all* of the United States and Canada, a territory which is undeniably beyond the area she covered during her active employment period, Ms. Hubbard is not being compensated for this amount of forbearance. Stone Source simply is not paying her for the restriction as it relates to areas she never worked in. Hence, the restriction is overbroad, unreasonable and not enforceable. Put another way, Stone Source can pay Ms. Hubbard to prevent her from doing a job closely approximating the job she was doing, but they cannot use a garden leave provision to stop her from doing every job (*see also Good Energy, L.P. v Kosachuk*, 49 AD3d 331, 332 [1st Dept 2008] [holding that a restrictive covenant was unreasonable, in part, because it covered the entire United States but the plaintiff employer operated out of eight states and the covenant attempted to prohibit defendant employee from dealing with all of the employer's clients, including those that were not served by the employee]). Accordingly, the branch of the Defendants' motion to dismiss the permanent injunction as it relates to the Non-Compete Clause is granted.

2. The Non-Disclosure Clause

The Defendants argue that the Complaint fails to state a claim for any underlying breach of the Non-Disclosure Clause because Stone Source makes only conclusory allegations that Ms. Hubbard possessed and will inevitably disclose certain confidential information.

Stone Source has pled that Ms. Hubbard obtained confidential information while she was an employee, including knowledge of trade secrets (NYSCEF Doc. No. 1, ¶¶ 25-26, 90). Although the question of what constitutes a trade secret remains an issue for discovery, Stone Source has sufficiently alleged that it paid sales representatives to develop and vet its private business network of suppliers, architects, and designers such that these clients constitute a trade secret for the purpose of this motion to dismiss (NYSCEF Doc. No. 1, ¶¶ 58-65; *see Town & Country House & Home Serv., Inc. v Newbery*, 3 NY2d 554, 558 [1958] [explaining that a client list may constitute a trade secret where clients have been secured by years of business effort and the expenditure of time and money]).

In addition, Stone Source alleges that as part of the TileBar team, Ms. Hubbard will inevitably deal with "key Stone Source confidential relationships" and that while employed at TileBar, she either has used, or will use and disclose Stone Source's confidential information (*id.*, ¶¶ 91, 108). Taking the allegations as true as the court must on a motion to dismiss, Stone Source has adequately pled an underlying breach of the Non-Disclosure Clause.

To the extent that the Defendants assert that Ms. Hubbard has not yet disclosed any of Stone Source's confidential information, the Court of Appeals has held that restrictive covenants are enforceable as necessary to prevent the disclosure or use of trade secrets or confidential customer information (*Reed, Roberts Assoc., Inc. v Strauman*, 40 NY2d 303, 308 [1976], citing *Carpenter & Hughes v De Joseph*, 10 NY2d 925 [1961] [ultimately affirming the Special Term's finding that a restrictive covenant to refrain from engaging in ophthalmic dispensing in Syracuse for five years was unenforceable, but that the defendant would be restrained from revealing the identity

of ophthalmic dispensing customers although there was no proof defendant had disclosed any customer information to anyone]). Accordingly, the branch of the Defendants' motion to dismiss the permanent injunction as it relates to the Non-Disclosure Clause is denied.

B. Second Cause of Action (Tortious Interference)

Stone Source alleges that TileBar tortuously interfered with the Hubbard Agreement and the Waas Agreement. To establish a claim of tortious interference with contract, "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 402 [1st Dept 2014]).

The Defendants argue that the claim for tortious interference should be dismissed because, among other things, Stone Source does not allege any damages, whether in the form of lost clients or otherwise. The court agrees.

Stone Source fails to allege any facts to support a claim for damages resulting from TileBar's alleged interference with the Hubbard Agreement and any purported breach of the Non-Disclosure Clause. Stone Source also fails to plead any damages in connection with TileBar's alleged tortious interference with respect to the Waas Agreement. Although Stone Source adduces an email chain that indicates Mr. Waas was in contact with Mr. Mazzetta, a supplier for Stone Source, the emails do not demonstrate that Stone Source lost any business as a result of such contact (NYSCEF Doc. No. 46). The emails indicate that Mr. Mazzetta actually declined to pursue a project with Mr. Waas and TileBar in favor of maintaining exclusivity with Stone

Source (*id.*). Accordingly, the Defendants' motion to dismiss the second cause of action for tortious interference against TileBar is granted.

Accordingly, it is

ORDERED that the Defendants' motion to dismiss is granted solely to the extent of (i) the first cause of action for a permanent injunction regarding enforcement of the Non-Compete Clause and Non-Solicitation Clause and (ii) the second cause of action for tortious interference, but denied as to the branch of the first cause of action for a permanent injunction regarding enforcement of the Non-Disclosure Clause; and it is further

ORDERED that Ms. Hubbard shall file a response to the Complaint by May 8, 2020.

Dated: April 13, 2020