Devlinhair Prods., Inc. v Pinder
2020 NY Slip Op 33745(U)
November 10, 2020
Supreme Court, New York County
Docket Number: 652098/2020
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

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DEVLINHAIR PRODUCTIONS, INC.

Plaintiff,

- v -

KATHARYN PINDER,

Defendant.

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INDEX NO. 652098/2020

MOTION DATE 10/28/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18

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

Upon the foregoing documents, plaintiff's motions seeking a preliminary injunction and temporary restraining order are decided as follows:

Plaintiff, Devlinhair Productions, Inc ("DHP") is a business which, *inter alia*, produces meetings and events for large corporate clients. In December, 2016, Katharyn Pinder ("Pinder") and DHP entered into an employment agreement for Pinder to serve as Vice-President of Business Development of DHP. Said employment agreement was effective December 7, 2016 and renewable annually following a performance review. Said employment agreement also required Pinder to keep all trade secrets of DHP strictly confidential and prohibited Pinder from engaging in any competitive activity while an employee of DHP and for six months thereafter. Negotiations relating to the most recent contract term, to begin December 7, 2019, commenced in March, 2019 and did not result in a new contract. Pinder sent a "Good Reason" notice of resignation on March 22, 2020, alleging that DHP's negotiations for a contract renewal amounted to material breaches

of her employment agreement. On March 24, 2020, DHP terminated Pinder's employment "for cause." Plaintiff alleges that since that time, Pinder has been soliciting business in violation of the non-compete/non-solicitation clauses. Plaintiff commenced the instant action by the filing of a summons with notice on May 28, 2020, seeking injunctive relief, and alleging breach of contract, breach of the implied duty of good faith and fair dealing, and injury by intentional tort. Plaintiff now seeks a preliminary injunction preventing Pinder from contacting or soliciting existing clients of DHP for any business relating to services provided by DHP.

A preliminary injunction is appropriate when the party seeking injunctive relief establishes: (1) likelihood of ultimate success on the merits; (2) irreparable injury if the injunction is not granted; and (3) a balancing of the equities in its favor. *See Four Times Square Assocs., L.L.C. v. Cigna Investments, Inc.*, 306 A.D.2d 4, 5 (1st Dep't 2003) (citing *Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981)); CPLR §§ 6301, 6311. The elements to be satisfied must be demonstrated by clear and convincing evidence. *Liotta v. Mattone,* 71 A.D.3d 741 (2nd Dep't, 2010). However, the moving party is only required to make a *prima facie* showing of its entitlement to a preliminary injunction, not prove the entirety of its case on the merits. The decision to grant a motion for a preliminary injunction "is committed to the sound discretion of the trial court." *N.Y. Cnty. Lawyers' Ass'n v. State,* 192 Misc. 2d 424, 428-29 (Sup. Ct. N.Y. Cnty. 2002); *see also Terrell v. Terrell*, 279 A.D.2d 301, 304 (1st Dep't 2001).

In support of the instant motions, plaintiff submits the affidavits of Catherine O'Neal, a Managing Director and the Client Innovation Officer of plaintiff, the affidavit of Barbara Hair, a co-founder of DHP, the 2016 employment agreement and a website screen capture and domain name registration for Pinder's new company, Whistle Communications. Ms. O'Neal's affidavit alleges that an unnamed contact at "Client X" contacted her in March, 2020 to inform her that

Pinder had contacted them and that an unnamed contact at "Client X" contacted her on June 25, 2020, informed her that Pinder was already working on a project for "Client X." The affidavit contains no supporting documentation and utterly fails to establish the affiant's personal knowledge that Pinder had in fact solicited "Client X." Ms. Hair's affidavit summarizes the employment history of defendant through the most recent contract negotiations and confirms that DHP received Pinder's "good reason" resignation on March 22 and that same was rejected and Pinder terminated "for cause" March 24. The Court notes that plaintiff fails to submit a copy of Pinder's resignation, DHP's rejection of that resignation, or any admissible documentation that Pinder is in breach of her employment contract and as such, have failed to establish a likelihood of success on the merits, which requires denial of the motion. Plaintiff establishes solely that Pinder built a website and registered a domain name prior to her termination from DHP.

Furthermore, in opposition, defendant submits an affidavit detailing numerous alleged breaches of the employment contract by DHP, copies of emails between counsel for DHP and Pinder about the contract negotiations, an email from DHP's counsel presenting Pinder a non-negotiable contract with terms that are significantly less favorable to Pinder as compared to the 2016 contract. Based upon same, Pinder's submission of her "good reason" letter at a minimum creates an issue of fact as to whether she has been released from the clauses of her contract that DHP alleges that defendant violated. Specifically, Pinder's letter put DHP on notice of their alleged breach of the employment contract and demanded that the breach be rectified within thirty days as required by the contract. The Court further notes that Ms. Hair's affidavit specifically alleged that Pinder's letter did not include a demand to cure, which is inaccurate. It is undisputed that plaintiff made no attempt to cure the alleged breaches, but instead terminated defendant's employment.

Plaintiff's motions are hereby DENIED in their entirety.

11/10/2020
DATE

LAURENCE L. LOVE, J.S.C.

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