Statista Inc. v Gordon
2022 NY Slip Op 31505(U)
April 12, 2022
Supreme Court, New York County
Docket Number: Index No. 655547/2021
Judge: Verna L. Saunders

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC **PART** 36
Justice

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STATISTA INC.,
Plaintiff,

- v -

KYLE GORDON and GLOBAL DATA PUBLICATIONS INC.,
Defendants.

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INDEX NO. 655547/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 14, 15, 25, 26, 27, 28 were read on this motion to/for **INJUNCTION/RESTRAINING ORDER**.

In September 2021, plaintiff commenced this action against defendants by summons and verified complaint, seeking injunctive relief enjoining (1) defendant GLOBAL DATA PUBLICATIONS INC.'s ("Global") employment of KYLE GORDON ("Gordon") for eighteen (18) months; or (ii) otherwise violating the non-compete provisions of the employment agreement between Gordon and plaintiff (first cause of action); and (2) compensatory damages, consequential damages, punitive damages against defendants, jointly and severally, based on its breach of contract (against Gordon) and tortious interference with contract (against Global) claims (second and third causes of action), in an amount to be determined at trial. In its complaint, plaintiff alleges that, on or about December 20, 2014, it hired Gordon in the position of salesperson. Gordon was later promoted to several other positions, including Senior Key Account Manager, Group Director, and Sales Director. Upon employment, Gordon allegedly signed an employment agreement with a non-compete provision providing that, for a period of eighteen (18) months following cessation or termination of his employment with plaintiff, Gordon would not perform "restrictive services" for any person or entity, including any of plaintiff's direct competitors, including Global. The agreement defined restricted services as "any services that both (x) include or consist of any services that are the same or similar to any of the services that you performed for [plaintiff] during your employment by the Company and (y) are being or will be performed as part of the same business or similar business being engaged in, or being planned or proposed by, such person (including you) or entity." (NYSCEF Doc. No. 5 ¶ 16, *employment agreement*). Gordon was also required to provide three (3) months written notice prior to termination of the employment agreement.

On or about August 3, 2021, Gordon notified plaintiff that he intended to resign and that he was accepting employment at Global. Plaintiff reminded Gordon of his obligations under the employment agreement, to wit; the non-compete clause. On September 3, 2021, Gordon responded that the job he accepted was different from his prior position with plaintiff. This action then ensued. (NYSCEF Doc. No. 1, *summons and verified complaint*).

Plaintiff now moves, by order to show cause, pursuant to CPLR 6301 & 6311, for an order enjoining Global's employment of Gordon for eighteen (18) months and any violation of the non-compete provisions of the employment agreement between Gordon and plaintiff. Plaintiff also requested a temporary restraining order, which was resolved pursuant to this court's decision and order dated December 10, 2021 (NYSCEF Doc. No. 24, *decision and order Mot. Seq. 002*).

By memorandum of law, plaintiff contends that it has established the requisite elements for entitlement to a preliminary injunction. Specifically, plaintiff maintains that it has established a likelihood of success on the merits as the non-compete clause is reasonable and enforceable under New York law, insofar as the restrictions on subsequent employment, limited only to eighteen (18) months and a thirty (30) mile radius, are reasonable and necessary to protect plaintiff's interest. Plaintiff argues that if Gordon's knowledge of Statista becomes accessible to its direct competitors, like Global, plaintiff will be irreparably harmed. The potential damages, claims plaintiff, are difficult to quantify and cannot be compensated with money "[w]here, as here, an employee such as Gordon is a Sales Director and has access not only to the proprietary processes that [p]laintiff uses to compile statistics but also to customer lists built over years, as well as marketing materials, sales pitches, expansion goals and other confidential and proprietary sales related materials, as well as his unique role as a top earning salesperson clearly will lead to irreparable harm." Additionally, plaintiff argues that the balance of the equities favors the granting of the motion since Gordon agreed to the terms of the non-compete agreement and cannot claim to be harmed by its enforcement. (NYSCEF Doc. No. 8, *memorandum of law in support of motion*).

Plaintiff submits the affidavit of its president Alexander Carberry, who affirms that Gordon, one of the top five salesperson at Statista, earning almost $40,000.00 annually in commissions, was "intricately involved in client communication and development" and was trusted to deal with some of plaintiff's largest corporate customers. Carberry further claims that Gordon "was also intimately involved with the expansion of the New York office, had unlimited access to the CRM database that listed all of the [c]ompany's customers and notes on details that would help encourage them to renew or sign back up for the [c]ompany's services" and that "he had a unique view of how Statista had been able to succeed in a crowded marketplace." (NYSCEF Doc. No. 4, *Carberry affidavit*).

In opposition to the motion, defendants submit the affidavit of Gordon, who affirms that his position at Global is different from his prior position with plaintiff. Specifically, he asserts that the focus of his work at Global is in consumer products while at Statista it was in the technology sector. He further claims that the consumer products sector is not competitive with Statista's technology sector. Gordon states, "[w]hile I had some general knowledge of clients, other than arguably the identity of certain clients (which I have not and will disclose [sic]), I do not believe that I was exposed to any confidential information or trades secrets while employed at Statista. While I had been briefly promoted at one point to a more managerial team leader role at Statista, I quickly went back to a sales role to focus exclusively on sales. Even Alexander Carberry's Affidavit acknowledges as much. (See Carberry Aff. at ¶8). In a sales role, my exposure to larger business decisions and information which arguably may be confidential was non-existent or quite limited." According to Gordon, plaintiff terminated him in August 2021

when he expressed his intent to join Global and plaintiff never offered to pay him three months' notice or three months of "garden leave." He further affirms that "[w]hile employed by GlobalData, [he] ha[s] not solicited any of the former clients or customers that [he] worked with at Statista, and [he] ha[s] never used any Statista confidential information (to the extent any even exists)." (NYSCEF Doc. No. 26, *Gordon's affidavit*).

By memorandum of law in opposition to the motion, defendants contend that plaintiff has failed to establish its entitlement to injunctive relief on this application. Since Gordon's role with plaintiff was selling fixed subscriptions to database materials in the electronics/technology sector, defendants argue that plaintiff fails to show that Gordon's current position with Global is competitive with plaintiff and, thus, violative of the non-compete provision. Defendants argue that "rather than selling off-the shelf subscriptions as he did at Statista, at GlobalData Mr. Gordon is focused on the consultancy services that GlobalData provides, which includes providing bespoke research products for clients in the consumer products sector." Defendants also argue that the subject non-compete is broad and unreasonable. Therefore, defendants maintain that plaintiff is not able to establish a likelihood of success on the merits. According to defendants, plaintiff also fails to show harm, much less irreparable harm, insofar as its claimed harm is based on conclusory, self-serving allegations. They further assert that the balance of the equities tips in favor of the denial of the motion because plaintiff seeks to enjoin an employee that is paid an annual salary of only $80,000.00 and that it terminated, from working in the only industry he has worked in since graduating in May 2014. (NYSCEF Doc. No. 25, *memorandum of law*).

To prevail on a motion for injunctive relief, a movant "is required to make a clear showing of likelihood of ultimate success on the merits, that it will suffer irreparable injury unless the relief sought is granted and that the balancing of the equities lies in its favor." (*OraSure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348, 348 [1st Dept 2007] [internal quotation marks and citation omitted]; *see Metro. Steel Indus., Inc. v Perini Corp.*, 50 AD3d 321, 322 [1st Dept 2008].)

Generally, "a restrictive covenant will only be subject to specific enforcement 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]; see *Reed, Roberts Assocs. v Strauman,* 40 NY2d 303, 307 [1976].) The breach of a non-compete clause does not, in and of itself, warrant injunctive relief. Case law is clear that "[s]ince there are powerful considerations of public policy which militate against sanctioning the loss of a [person's] livelihood, the courts will subject a covenant by an employee not to compete with his former employer to an overriding limitation of reasonableness." (*Karpinski v Ingrasci*, 28 NY2d 45, 49 [1971] [internal quotation marks and citations omitted].)

Here, plaintiff fails to establish, on this application, a likelihood of success on the merits as a matter of law. Although non-compete provisions limited to a 30-mile radius and for a time period beyond eighteen (18) months have, in certain circumstances, been found to be enforceable (See *Gelder Med. Group v Webber*, 41 NY2d 680, 681 [1977]; *Metro. Med. Group, P. C. v Eaton*, 154 AD2d 252, 254 [1st Dept 1989]), plaintiff has failed to demonstrate to this court that

said limitations on a mid-level employee, such as Gordon, are reasonable. Carberry's general statements regarding Gordon's employment, his involvement with plaintiff's clients, and his purported access to confidential information are insufficient to establish the reasonableness of the non-compete provision. Moreover, plaintiff fails to show that the language of the non-compete agreement, indicating that Gordon is prevented from any "restrictive activities" consisting of "*any* services that are *the same or similar* to any of the services that [Gordon] performed for [plaintiff] during [his] employment by the [c]ompany," are not broader than necessary to protect its stated interest.

Plaintiff also fails to establish irreparable harm. It relies on conclusory and unsupported claims that Gordon, being privy to confidential information about Statista during his employment, will share with Global confidential information in his current position that will result in irreparable harm. The moving papers fail to identify any specific information that has been disseminated by plaintiff to establish that Gordon's continued employment with Global will result in imminent harm. Moreover, Gordon affirms that his position in Global is, in fact, not similar to the work he performed for plaintiff and that he has not and will not reveal any confidential information about plaintiff to Global. Furthermore, this court finds that plaintiff's argument is, in essence, that Gordon's knowledge obtained during his employment with Statista will result in a loss of sales, which is insufficient to establish irreparable harm for a preliminary injunction. (See *Geritrex Corp. v Dermarite Indus., LLC*, 910 F Supp 955, 966 [SDNY 1996].) Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order with notice of entry upon plaintiff; and it is further

ORDERED that the parties are directed to appear for a remote conference on June 1, 2022, details which shall be provided no later than May 30, 2022.

April 12, 2022

HON. VERNA L. SAUNDERS, JSC

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**