

Project Veritas v Thibodeau
2023 NY Slip Op 30204(U)
January 18, 2023
Supreme Court, New York County
Docket Number: Index No. 654301/2022
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

PROJECT VERITAS

Plaintiff,

- v -

PATRICE THIBODEAU,

Defendant.

-----X

INDEX NO. 654301/2022

MOTION DATE 01/17/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 46

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 2, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49

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

BACKGROUND

Petitioner commenced this Article 75 Proceeding seeking a preliminary injunction in aid of arbitration. Petitioner asks that the court to prevent Respondent from publicly disclosing Petitioner's confidential information and publicly disparaging Petitioner and its personnel, in what Petitioner alleges is a clear violation of the parties' Employment Agreement.

ALLEGED FACTS

Respondent was hired by Petitioner as a video editor in or about December 2019. Under the terms of his Employment Agreement, dated December 17, 2019, Respondent was an at-will employee.

Petitioner alleges its journalism and news-gathering activities involve the use of secret devices and undercover journalists, who sometimes use pseudonyms to protect their identities.

Respondent became aware of the methods and devices used by Petitioner to gather information, the methods Petitioner used to portray the information gathered, and the identities of the undercover journalists who gathered such information.

Petitioner requires in its employment agreements – including Respondent’s Employment Agreement – that its’ employees strictly maintain the confidentiality of such information, both during and after their employment. Relevant provisions from Respondent’s Employment Agreement include:

Paragraph 12 of the which states Respondent will maintain and protect the confidentiality of Petitioner’ Confidential Information both during and after his employment; and

Paragraph 17 which prohibits Respondent from disparaging Petitioner or its personnel during his employment and after its termination; and

Paragraph 18 which prohibits Respondent from publishing any information about Petitioner, either directly or through his agents, both during and after the term of his employment; and

Paragraphs 12, 17, and 18 also provide that a violation of any one of these provisions paragraphs would cause irreparable harm to Petitioner, and that Project Veritas entitling Petitioner to injunctive relief; and

Paragraph 26 provides for damages for the breach of said provisions including liquidated damages.

On or about September 15, 2020, Respondent voluntarily resigned his position with Petitioner and allegedly embarked on a career as an adult film actor and standup comedian.

In August 2022, Respondent began publishing a series of videos on YouTube which addressed press coverage about several lawsuits between Petitioner and a terminated employee named Antonietta Zappier. Respondent posted said videos to his YouTube channel under the name “Jean Jacques the Cock.”

Respondent published seven videos on August 7, 2022; August 8, 2022; August 9, 2022; August 10, 2022; August 15, 2022, September 1, 2022, and January 11, 2023. Petitioner alleges

that in each video, Respondent disclosed proprietary and confidential information. Respondent also blatantly disparaged Petitioner and its personnel (including, mainly, Project Veritas' CEO James O'Keefe) in the videos.

In at least one of the videos, Respondent acknowledged that he was violating the terms of his Employment Agreement with Petitioner.

On August 30, 2022, counsel for Petitioner sent Respondent a cease-and-desist letter directing Respondent to take down videos posted as of said date and desist from publishing any further such videos or other public statements disparaging Petitioner or its employees.

Respondent did take down the videos but days later, on or about September 1, 2022, published a sixth video – which, Petitioner alleges is still up on YouTube – in which Respondent mocks Petitioner's effort to prevent Respondent from continuing his conduct.

Petitioner filed a formal request for Arbitration on September 7, 2022. In the Arbitration, Petitioner seeks to enforce the terms of the Employment Agreement and obtain damages and a permanent injunction.

PENDING APPLICATIONS FOR RELIEF

On November 7, 2021, Petitioner filed its notice of petition seeking an order pursuant to CPLR § 7502(c) and CPLR § 6301 preliminarily enjoining Respondent during the pendency of the underlying arbitration from publishing videos or statements which disclose Petitioner's Confidential Information, or which disparage Petitioner and its personnel, and from otherwise using and/or disclosing Petitioner's proprietary and Confidential Information.

On December 15th, 2021, Petitioner moved by order to show cause for an order to seal the redacted portions of the Petition and Exhibit A as well as and Exhibits 1-7 to the Affirmation of Justin T. Kelton, dated November 17, 2022.

On January 17, 2023, Respondent cross-moved for dismissal of the petition.

On January 17, 2023, the court heard argument and reserved decision. The motions and petition are consolidated herein for determination. For the reasons stated below, the petition and Petitioner's motion to seal are granted and Respondent's cross-motion seeking dismissal is denied.

DISCUSSION

CPLR § 7502(c) permits the court to preliminarily enjoin Respondent's conduct during the pendency of the Arbitration pursuant to Articles 62 and 63 of the CPLR, if failing to do so would render any award in Arbitration ineffectual. *See* CPLR § 7502(c).

CPLR § 6301 provides, in relevant part:

A preliminary injunction may be granted in any action where it appears 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...

See CPLR § 6301.

The decision to grant a preliminary injunction lies within the sound discretion of the Court. *See Borenstein v. Rochel Properties*, 176 A.D.2d 171, 172 (1st Dep't 1991). A preliminary injunction may be granted "when the party seeking such relief demonstrates: (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 tipping in the moving party's favor." *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).

On the record before this court Petitioner has asserted the *prima facie* elements for breach of contract, and there for has established a likelihood of success on the merits. It is uncontested that the parties have a written contract, and that Respondent has engaged in conduct which violates the provisions of that contract. Respondent's videos clearly disparage Petitioner and its

officers/employees, and Respondent acknowledges that his is in violation of the terms of the Employment Agreement on more than one instance in the videos.

Respondent also discloses the technology used by Petitioner to obtain information from sources, the manners in which the information is collected by undercover journalists, and the name of at least one undercover journalist.

Moreover, in the Employment Agreement Respondent specifically agreed to injunctive relief in the event of a breach, and such provisions are enforceable. See e.g., *New York Rowing Ass'n v. Peter Jay Sharp Boathouse, Inc.*, 92 A.D.3d 595, 596 (1st Dep't 2012); *CanWest Global Communications Corp. v. Mirkei Tikshoret Ltd.*, 804 N.Y.S.2d 549, 564-65 (Sup. Ct. N.Y. Cnty. Apr. 1, 2005).

Under the second prong of CPLR § 6301, Petitioner must demonstrate “danger of irreparable injury in the absence of an injunction...” *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840 (2005). A party suffers irreparable harm when there is not an adequate legal remedy that is “as complete, practicable and efficient as the equitable one” available in the form of a preliminary injunction. *Poling Transport Corp. v. A&P Tanker Corp.*, 84 A.D.2d 796, 797 (2d Dep't 1981). If the TRO were not granted, the ultimate relief sought by Petitioner in the arbitration would be meaningless.

Finally, the balance of the equities weighs in Petitioner's favor. The potential for irreparable harm to Petitioner is greater than any possible harm that would be caused to Respondent through the imposition to the injunction. *Lombard v. Station Square Inn Apartments Corp.*, 94 A.D.3d 717, 721-722 (2d Dep't 2012).

As noted above, Respondent's motion to dismiss is essentially based on arguments that the Employment Agreement is not enforceable, however Respondent has failed to support its

claim through applicable and binding legal precedent. To the extent Respondent argues that the Employment Agreement constitutes an unconstitutional prior restraint of speech, there is binding authority that holds to the contrary. *See Lancaster v. Incorporated Vill. of Freeport*, 22 N.Y.3d 30, 37 (2013); *Denson v. Donald J. Trump For President, Inc.*, 180 A.D.3d 446, 452 (1st Dep't 2020).

To the extent Respondent raises new arguments in its reply, the court will not consider same.

A decision granting the TRO and sealing the portions of the filings to be kept confidential will preserve the *status quo ante* between the parties pending the outcome of the arbitration.

The documents requested to be sealed, concern proceedings relating to proprietary and confidential information belonging to Petitioner that Respondent was only privy to pursuant to his employment as a videographer. Pursuant to the Employment Agreement between the parties Respondent agreed to keep such information confidential.

Under 22 NYCRR § 216.1, the Court is permitted to seal court records, in whole or in part, “upon a written finding of good cause” specifying the grounds thereof.

“New York courts have authorized sealing the records of Article 75 proceedings involving arbitrable disputes since the matter properly belongs in arbitration and the material filed with the court belongs not in the court, but in the files of the arbitrating body.” *Cohen v. S.A.C. Capital Advisors, LLC*, 11 Misc.3d 1054(A), at *8 (Sup. Ct. N.Y. Cnty. 2006), *citing Feffer v. Goodkind, Wechsler, Labaton & Rudoff*, 152 Misc.2d 812, 815-16; *see also Jetblue Airways Corp. v. Stephenson*, 31 Misc.3d 1241(A), at *6 (Sup. Ct. N.Y. Cnty. 2010).

The confidential information Petitioner seeks to seal concerns its undercover journalistic operations, which are described in detail in the Petition. Specifically, the confidential

information relates to the way Petitioner gathers news, the technology it uses, the name of an undercover journalist, and how the organization edits and presents the information it receives from its undercover journalists.

If the court does not seal the relevant portions of the Petition, the confidential information will be republished, which would undermine the purpose of the arbitration.

Petitioner has taken reasonable steps to protect the confidentiality of such information, such as, for example, requiring its employees to sign employment agreements containing provisions that protect the confidentiality of such information.

Since the underlying arbitration proceeding is properly before the American Arbitration Association, and there is a confidentiality agreement pertaining to the information at issue, it is proper for the Court to seal the documents as requested by Petitioner. Moreover, there is no countervailing public interest that would be furthered by the disclosure of this information.

Finally, Respondent's cross-motion did not seek leave to file an answer, in the event the motion was denied, and even if said leave had been sought by Respondent it would be denied by this court.

CPLR §404(a) provides “ ... The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court **may** permit the respondent to answer, upon such terms as may be just ...”. Thus, the court is not required to allow Respondent to file an answer after the denial of a motion to dismiss. In this case, given that the court has already ruled on the sole issue in this proceeding, an answer will serve no useful purpose. (*In re Dodge's Trust* 25 NY2d 273 (1969); *Application of Cunningham* 75 AD2d 521 (1980)).

CONCLUSION

WHEREFORE it is hereby:

ORDERED that Respondent PATRJCE THIBODEAU, is hereby enjoined during the pendency of the underlying arbitration from:

(a) publishing videos to YouTube, or publishing statements on any other public forum, which disclose Project Veritas' Confidential Information; and

(b) publishing videos to YouTube, or publishing statements to any other public forum, which disparage Project Veritas and its personnel; and

(c) using and/or disclosing Project Veritas' proprietary and Confidential Information; and it is further

ORDERED that good cause exists for the sealing in part of the file in this action and the grounds therefor having been specified, it is now

ORDERED that the Clerk of the Court is directed, upon service on him of a copy of this order with notice of entry, to seal the redacted portions of the Petition (Doc #1) and Exhibit A (Doc #5) as well as and Exhibits 1-7 to the Affirmation of Justin T. Kelton, dated November 17, 2022 (Doc # 10), and to separate these documents and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that Respondent's cross-motion to dismiss is denied in its entirety and that Respondent is denied leave to serve an answer in this proceeding; and it is further

ORDERED that, within 20 days from entry of this order, Petitioner shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



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1/18/2023

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE