

David J. Louie, Inc. v Lu

2025 NY Slip Op 34695(U)

December 6, 2025

Supreme Court, New York County

Docket Number: Index No. 659649/2025

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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DAVID J. LOUIE, INC.,

Plaintiff,

- v -

XU DAN SHIRLEY LU,

Defendant.

INDEX NO. 659649/2025

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

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

Plaintiff David J. Louie, Inc. (Employer) initiated this action against its longtime employee, defendant Xu Dan Shirley Lu, alleging that during her 27-year tenure, Lu had for years “divert[ed] Plaintiff’s business to Plaintiff’s competitors for Defendant’s own pecuniary gain.” (NYSCEF Doc. No. [NYSCEF] 1, Complaint ¶ 4.) Employer seeks a preliminary injunction:

“(1) enjoining Defendant from continuing to solicit any active clients of Plaintiff in violation of either the 2024 Non-Disclosure, Non-Competition, and Non-Solicitation Agreement, and/or the 2025 Confidential Separation Agreement and Release, which precludes Defendant Ms. Lu for a period of two years through and including June 10, 2027, from engaging in any solicitation of any business, clients, insureds, third-party relationships, staff, or employees of Plaintiff absent the express written consent and permission of David J. Louie, who shall have the sole and exclusive authority to determine whether or not to grant any such request of Defendant Lu; and (2) directing Defendant to cease and desist from any further solicitation of any of Plaintiff’s business, clients, insureds, third-party relationships, staff, or employees in violation of either of these agreements.” (NYSCEF 2, Order to Show Cause [OSC] at 1-2.)

Employer asserts claims for (1) breach of the duty of loyalty and/or faithless servant; (2) breach of contract (June 11, 2025 Separation Agreement); and (3) unjust enrichment. (NYSCEF 1, Complaint.) In support of its first and third causes of action, Employer levels very serious allegations against LU for usurping business opportunities causing employer's loss of commission and clients while Lu was paid commission by other brokers. (NYSCEF 1, Complaint ¶¶ 50-52, 54-56, 60-61.)

Lu executed a Non-Disclosure, Non-Competition, and Non-Solicitation Agreement as a condition of her continued employment on October 1, 2024.¹ (NYSCEF 4, 2024 Restrictive Covenant Agreement [2024 Agreement].) It provides:

“3. Covenant Not to Solicit. You agree that during your employment with Company and for a period of twelve (12) months after the termination of your employment with Company, regardless of the cause of the termination, you shall not: a. Solicit or service in any way, on behalf of yourself or on behalf of or in conjunction with others, any client, customer or employee, or prospective client, customer or employee, which has been solicited, serviced or engaged by Company or any or its affiliates within twelve (12) months prior to the termination of your employment; b. Enter into any contract or arrangement for personal services or employment with any person who during the prior twelve (12) months was an employee of Company or any of its affiliates or who provided personal services to Company or any of its affiliates as a consultant or independent contractor; c. Induce or attempt to induce any employee or consultant of Company to leave employ of Company; d. In any way interfere with the relationship between Company and any employee of Company; e. Employ or otherwise engage as an employee, consultant or independent contractor, the services of any person who during the twelve (12) months prior to this termination was employed by Company or engaged as a consultant or independent contractor of Company; f. Induce or attempt to induce any customer, client, vendor, licensee, or business relation of Company to cease doing business with Company, or in any way interfere with the relationship between any customer, client, vendor, licensee, or business relation of Company; or g. Solicit from, or provide services of the type that Company provides to, any entity or person who is or was a customer of Company at any time during your employment with Company.” (*Id.* § 3 [emphasis added].)

¹ Lu was paid hourly until January 2025. (NYSCEF 20, Lu aff ¶ 8.)

Lu was terminated on June 11, 2025, the same day she executed the Separation Agreement, which provides:

“Lu acknowledges and agrees that because of circumstances unique to her, including, but not limited to her position of trust within DJL in light of her many years of employment, and in light of the investigation undertaken by DJL before her termination, Lu shall refrain from engaging in any solicitation of any business, clients, insureds, third-party relationships, staff, or employees of DJL from the date of her termination for a period of two years, through and including June 10, 2028. To the extent that Lu wishes or attempts to work with any clients or insureds of DJL that Lu herself originated during her employment with DJL, generated by her own efforts from her own network where she was and is listed as the in-house producer when coverage was bound by DJL (“Originated Insureds”), she may contact David J. Louie, via email, to request permission to engage with any such insured, with the understanding that DJL and its owners, affiliates, agents, and representatives, shall have the sole and exclusive authority to determine whether or not to grant any such request of Lu for any of her Originated Insureds. Any breach by Lu of this paragraph shall be deemed a material breach of this Agreement.” (NYSCEF 6, Separation Agreement § 6 [emphasis added].)

To obtain a preliminary injunction, a movant must establish: “(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 equities tipping in the moving party’s favor.” (*Doe v Axelrod*, 73 NY2d 748, 750 [1988] [citation omitted].)

Employer has not established likelihood of success on its breach of contract claim.² Employer has the burden to show that the contracts it seeks to enforce “(1) [are] *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) [do] not impose undue hardship on the employee, and (3) [are] not injurious to the

² In this motion for a preliminary injunction, Employer does not assert likelihood of success on its claims for (1) breach of the duty of loyalty and/or faithless servant or (3) unjust enrichment. Employer’s discussion of likelihood of success on these causes of action in its reply is unfair and impermissible. (NYSCEF 64, Employer’s Reply.)

public. A violation of any prong renders the covenant invalid.” (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-89 [1999] [internal citation omitted].)

The protectable interest that Employer asserts is its goodwill.³ “The employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment.” (*Id.* at 392.) However, the employer must show that it contributed to that goodwill. (See *Kanan, Corbin, Schupak & Aronow, Inc. v FD Intl., Ltd.*, 8 Misc 3d 412, 422 [Sup Ct, NY County 2005] [denying injunction where plaintiff “failed to demonstrate that it contributed meaningfully to the generation of goodwill with respect to the disputed clients.”].)

“[I]t would be unreasonable to extend the covenant to personal clients of defendant who came to the firm solely to avail themselves of his services and only as a result of his own independent recruitment efforts, which [plaintiff] neither subsidized nor otherwise financially supported as part of a program of client development. Because the goodwill of those clients was not acquired through the expenditure of [plaintiff's] resources, the firm has no legitimate interest in preventing defendant from competing for their patronage. Indeed, enforcement of the restrictive covenant as to defendant's personal clients would permit [plaintiff] to appropriate goodwill created and maintained through defendant's efforts, essentially turning on its head the principal justification to uphold any employee agreement not to compete based on protection of customer or client relationships.” (*BDO Seidman*, 93 NY2d at 393.)

Employer listed Lu as the “inhouse producer” for 501⁴ policies as of June 10, 2025. (NYSCEF 8, Employer's Chart of “Policies in which Shirley Lu had previously

³ As discussed on the record on December 3, 2025, this case is not about the other two categories of protectable interests: misappropriation of trade secrets or confidential information post-employment or competition by an employee whose services are unique or extraordinary. Any discussion of law regarding those two categories is irrelevant.

⁴ Employer claims that some of these designations are false. (NYSCEF 21, Louie aff.)

been the inhouse producer".) The Separation Agreement acknowledges that "Lu herself originated [clients or insureds] during her employment with DJL, generated by her own efforts from her own network where she was and is listed as the in-house producer." (NYSCEF 6, Separation Agreement § 6.) Employer has identified a few clients that Lu serviced for Employer but did not originate. (NYSCEF 21, Louie aff ¶¶ 14-15, 31.) Lu insists that she recruited clients on her own time at night and on weekends for which she did not use Employer's resources; nor did Employer reimburse her for client development costs. (NYSCEF 20, Lu aff ¶¶ 5-7.) An issue of fact exists as to who generated these clients. (See *Milbrandt & Co., Inc. v Griffin*, 5 Misc 3d 1011(A), 2004 NY Slip Op 51333[U], *2 [Sup Ct, Westchester County 2004].) While this issue of fact alone is not sufficient to defeat a motion for a preliminary injunction, combined with Employer's other deficiencies, Employer has failed to satisfy its burden. (See *Kanan, Corbin, Schupak & Aronow, Inc.*, 8 Misc 3d at 419.)

Even if Employer generated and serviced the clients, the agreements are overbroad and conflict. The 2024 Agreement sets a 12-month restrictive period while the Separation Agreement is for a period of two years. (NYSCEF 4, 2024 Agreement § 3; NYSCEF 6, Separation Agreement § 6.) The agreements bar contact with clients with whom Lu never interacted, dormant clients, and unsuccessful prospects. These are not relationships that are protectable. (See *BDO Seidman*, 93 NY2d at 393.)

The court must decline Employer's invitation to blue pencil the agreements. The provisions at issue here are essential provisions, not provisions that the court can easily blue-pencil such as geographic restrictions or time limits. (See *id.* at 394.) Moreover, to benefit from blue-penciling, Employer must show

“an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct. Factors weighing against partial enforcement are the imposition of the covenant in connection with hiring or continued employment—as opposed to, for example, imposition in connection with a promotion to a position of responsibility and trust—the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant was overly broad.” (*Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 AD3d 805, 807 [3d Dept 2004] [citations omitted].)

Employer's assertion that Lu received a raise with the 2024 Agreement is undermined by Lu's claim that she was an hourly employee until 2025, which Louie admits. (See NYSCEF 20, Lu aff ¶ 8; NYSCEF 21, Louie aff ¶¶ 3, 57.) In addition to seemingly not being connected to the 2024 Agreement, the September and November 2024 paystubs on which Employer relies are meaningless since Lu's hours worked and commission could change pay period to pay period. (NYSCEF 22, Paystubs.) As to the Separation Agreement, Lu faced the threat of “protracted litigation.” (NYSCEF 6, Separation Agreement at 1, 7.) Therefore, Employer has failed to sufficiently show the absence of coercion.

An issue of fact exists as to whether Lu breached the agreements. Lu admittedly referred clients to other agencies and brokers but insists that Employer was aware of such referrals because she “did it for over two decades without discipline or incident.” (NYSCEF 20, Lu aff ¶14.) However, the agreements did not exist prior to 2024. Further, Employer impermissibly injects Lu's conduct pre-Agreements as proof of her breach of the Separation Agreement. However, Lu claims she is unemployed and thus cannot breach the agreements. (*Id.* ¶ 33.) Employer's evidence otherwise is insufficient to show that Lu is currently unlawfully soliciting or servicing clients. The email upon which Employer relies is silent as to who initiated the communication. Moreover, “not all discussions between a seller and former client are impermissible.

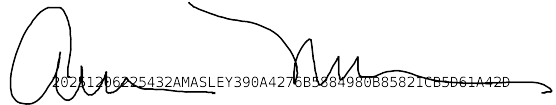
While the ‘implied covenant’ places certain barriers on a seller’s conduct, it in no way prohibits a former customer or client from gathering information about that seller. In the free market, consumers of goods and services have the right to make informed choices.” (*Bessemer Tr. Co., N.A. v Branin*, 16 NY3d 549, 558 [2011].) Lu denies that she initiated the communication and that she said anything improper. (NYSCEF 20, Lu aff ¶¶ 34-38.) This is a quintessential credibility issue.

Second, Employer fails to establish irreparable harm because money damages are available and easy to compute. (See NYSCEF 3, Louie Declaration ¶¶ 54, 56.) No irreparable harm exists where “monetary damages could be calculated without great difficulty.” (*Modern Telecom., Inc. v Zimmerman*, 140 AD2d 217, 221 [1st Dept 1988] [“[i]f, in fact, respondent does prove that the defendants engaged in unfair trade practices, monetary damages could be calculated without great difficulty.” (citation omitted)].)

Finally, as to the equities, “powerful considerations of public policy ... militate against sanctioning the loss of a man’s livelihood.” (*Reed, Roberts Assoc., Inc. v Strauman*, 40 NY2d 303, 307 [1976] [internal quotation marks and citation omitted].) “In balancing the equities, the court must weigh the harm suffered by the plaintiff if the injunction were denied against the harm suffered by the defendant if the injunction were granted.” (*Bank of Am., N.A. v PSW NYC LLC*, 29 Misc 3d 1216(A), 2010 NY Slip Op 51848[U], *12 [Sup Ct, NY County 2010] [citation omitted].) As between restraining Lu from working and the calculable financial harm to Employer, the equities favor Lu. Further, because the agreements as written impinge on the public’s right to engage any broker they wish, the equities favor the public over Employer.

Accordingly, it is

ORDERED that the motion is denied and all TROs are vacated.



12/6/2025
DATE

ANDREA MASLEY, 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