

Arencibia v SilverLining, Inc.

2025 NY Slip Op 35117(U)

January 22, 2025

Supreme Court, New York County

Docket Number: Index No. 659588/2024

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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JOEL ARENCIBIA

Plaintiff,

- v -

SILVERLINING, INC.,

Defendant.

INDEX NO. 659588/2024

MOTION DATE 12/12/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 15, 16, 17, 18, 19, 20, 21, 22, 23

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

Upon the foregoing documents and for the reasons set forth on the record (*tr.* 1.21.25), the motion seeking a preliminary injunction is denied as moot and the cross-motion seeking dismissal is denied.

Joel Arencibia is entitled to the declaratory judgment that he seeks. SilverLining, Inc. (**SilverLining**) can not condition already earned compensation upon the execution of a general release or severance to support a covenant not to compete. This is not enforceable under New York law. For clarity, although it may be permissible to pay Mr. Arencibia six month compensation in the form of severance to compensate him for his forbearance from competing during that six month time period, it is simply not permissible under New York law to pay him for six months to forbear from competing for three years where his termination was without cause (*see King v Marsh & McLennan Agency, LLC*, 191 AD3d 507 [1st Dept 2021]; *Kolchins v Evolution Mkts., Inc.*, 182 AD3d 408 [1st Dept 2020]; *Buchanan Capital Mkts., LLC v DeLucca*,

144 AD3d 508 [1st Dept 2016]) or to condition such forbearance payment on the execution of a general release while still seeking to enforce the three year restrictive covenant against Mr. Arencibia. This too is impermissible and not enforceable for three years.

As discussed below, Mr. Arencibia brought the motion seeking a preliminary injunction based on SilverLining's failure to provide him with the required 30 days' notice for termination. Since the original hearing date, SilverLining has corrected this error by providing Mr. Arencibia with a notice which complies with the terms of the Employment Agreement (NYSCEF Doc. No. 19), dated April 30, 2015, by and between SilverLining and Mr. Arencibia. Thus, improper termination can no longer form the predicate for the preliminary injunction and it must be denied as moot.

DISCUSSION

A party seeking a preliminary injunction must demonstrate (i) a probability of success on the merits, (ii) danger of irreparable harm in the absence of an injunction, and (iii) a balance of the equities in their favor (*Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY2d 839, 840 [2005]).

On a motion to dismiss pursuant to CPLR § 3211 (a)(7), the court must afford the pleading a liberal construction and accept the facts as alleged as true, according the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Bare legal conclusions

are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

Reference is made to a prior Decision and Order of this Court, dated December 13, 2024 (the **Prior Decision**; NYSCEF Doc. No. 15), pursuant to which the Court granted the branch of Mr. Arencibia's motion seeking a temporary restraining order (i) prohibiting SilverLining from enforcing against Mr. Arencibia the non-competition provision of the Employment Agreement (ii) prohibiting SilverLining from informing its business partners, customers, and potential customers that Mr. Arencibia is bound by the non-competition provision, and (iii) providing Mr. Arencibia with a termination date on or after January 1, 2025.

Pursuant to the Prior Decision, the Court held that Mr. Arencibia was entitled to a temporary restraining order under the circumstances because his employment was not properly terminated, as the termination notices issued by SilverLining to Mr. Arencibia did not provide for the 30 days' prior written notice required under the terms of the Employment Agreement:

Section 6.04. By the Company without Cause. The Company may terminate the Term and the Executive's employment hereunder at any time without Cause effective upon thirty (30) days' prior written notice to the Executive.

(NYSCEF Doc. No. 19 § 6.04). Significantly, the Court noted that “nothing prevent[ed] SilverLining from properly terminating Mr. Arencibia's employment pursuant to the terms of the Employment Agreement” prior to the Court's ruling on the preliminary injunction (NYSCEF Doc. No. 15 at 4).

Now, in opposition to the motion, SilverLining cross-moves to dismiss the Complaint on the basis that (i) Mr. Arencibia has now been properly terminated with 30 days' prior written notice as of January 17, 2025, and (ii) the Employment Agreement's non-competition provision is enforceable against Mr. Arencibia. As discussed below, the motion to dismiss must be denied and the Employment Agreement's non-competition provision is not enforceable.

Both parties argue that they are entitled to a declaratory judgment as to the enforceability of the non-competition provision as against Mr. Arencibia and that no discovery is required as to the court's adjudication of this issue.

In support of its position, SilverLining adduces, among other things, (i) a certain third termination notice (the **Third Notice**; NYSCEF Doc. No. 23), dated December 13, 2024, sent from SilverLining to Mr. Arencibia, (ii) a certain Stockholders' Agreement (NYSCEF Doc. No. 20), dated April 30, 2015, by and between Mr. Arencibia and Joshua Wiener, and (iii) a certain Stock Purchase Agreement (NYSCEF Doc. No. 21), dated February 14, 2020, by and between SilverLining, Mr. Arencibia, Mr. Wiener, and the Joshua Wiener 2001 Revocable Trust.

As discussed above, and as an initial matter, SilverLining has now complied with the Employment Agreement's notice provision such that Mr. Arencibia's employment was properly terminated. To wit, on December 13, 2024, SilverLining sent the Third Notice, which supersedes the first two facially defective notices, to Mr. Arencibia purporting to terminate his employment as of January 17, 2025 (NYSCEF Doc. No. 23). As such, the Third Notice provides Mr. Arencibia with 35 days' written notice of termination in compliance with the terms of the

Employment Agreement. Thus, the motion seeking a preliminary injunction on the basis that a proper termination notice was not previously sent must be denied as moot.

However, SilverLining is not entitled to enforce the non-competition provision for three years. As drafted, it is overbroad. The non-competition provision prohibits Mr. Arencibia from transacting business with any construction business in the New York metropolitan area for a period of three years after his termination:

Section 8.03. Non-Competition Covenant. Except as otherwise expressly provided in the last sentence of this Section 8.03, the Executive agrees that during the course of the Executive's employment with the Company and for a period of three (3) years after the Termination Date (the "Restricted Period"), the Executive will not, without the express prior written consent of the President or the Board, either directly or indirectly, whether alone or as an owner, shareholder, partner, member, joint venturer, investor, lender, officer, director, consultant, independent contractor, agent, employee or otherwise of any company or other business enterprise, (a) other than in furtherance of the Company's objectives and consistent with the duties and responsibilities of the Executive, directly or indirectly contact, communicate, solicit, accept business from, transact business with or perform services for (or assist any third party in contacting, communicating, soliciting, accepting business from, transacting business with, or performing services for) any Customer for the purpose of inducing such Customer to be connected to or benefit from a Competitive Business or to terminate, alter, or otherwise limit such person's or such entity's business relationship with the Company or any subsidiary or affiliate thereof; nor (b) directly or indirectly render services or be connected with any Competitive Business in the New York metropolitan area and any other geographic area in which the Company or any of its subsidiaries has conducted, currently conducts, conducts at the relevant time of determination or has proposed to conduct business with that Customer. For purposes of this Agreement, the term "Competitive Business" shall mean (i) any business or enterprise which provides construction and/or renovation services, and (ii) any other business, product or service related to any of the foregoing which has been performed or provided by the operations of the Company, and the term "Customer" shall mean any person or entity (A) with whom the Company has a business relationship pursuant to which the Company has either received compensation or paid compensation, (B) retained by the Company in connection with a business relationship for which the Company has either received compensation or paid compensation, (C) which the Company is in the process of preparing an estimate for on the Termination Date, or (D) which the Company is soliciting on the Termination Date or had solicited within the ninety (90) day

period immediately preceding the Termination Date or solicits during the thirty (30) day period immediately following the Termination Date. If, and only if, the Term of this Agreement and the Executive's employment with the Company has been terminated by the Executive with Good Reason, the provisions of this Section 8.03 with respect to the Restricted Period shall not be applicable to the Executive.

(NYSCEF Doc. No. 19 § 8.03).

This overbroad prohibition is not saved by virtue of paying Mr. Arencibia six months of severance as provided for in the Employment Agreement:

Section 7.02. Termination without Cause or following Death or Disability. In the event the Term of this Agreement or the Executive's employment by the Company hereunder is terminated due to the death of the Executive or by the Company without Cause or by the Company at any time after the Executive has suffered a Disability due to such Disability, the Executive, or the Executive's estate or beneficiary, as applicable, shall receive, as the Executive's exclusive right and remedy in respect of such termination, (a) the Executive's Accrued Benefits, except that, for this purpose, Accrued Benefits shall not include (i) any entitlement to severance under any Company severance policy generally applicable to the Company's salaried executives or (ii) except as otherwise provided below in clause (c)(II) below, any portion of the Annual Bonus with respect to the year in which the Termination Date occurs, (b) by the later of sixty (60) days after the Termination Date and the date that is thirty (30) days after the Company's receipt of its annual reviewed financial statements from the Company's accountants with respect to the calendar year immediately prior to the Termination Date, an amount equal to one hundred percent (100%) of the Executive's Specified Retained Earnings, and (c) provided that (i) the Executive does not violate in any material respect any of the terms, provisions and/or covenants contained in Section 8 of this Agreement, and (ii) the Executive executes and delivers to the Company, no later than 45 days after the date of Termination Date, a Release (as defined below) and does not revoke the Release, the Company shall pay to the Executive or the Executive's estate or beneficiary, as applicable, (I) severance in the form of the Executive's Base Salary from the Termination Date to the date which is six (6) months following the Termination Date ("Severance"), payable in accordance with the Company's regular payroll practices, commencing with the first regular payroll date following expiration of any revocation period set forth in the Release, and (II) a pro-rated portion of the Executive's Annual Bonus with respect to the portion of the calendar year that the Executive worked prior to the Termination Date (the "Partial Bonus"); provided that, in the event of the death of the Executive, no Release shall be required to be

executed or delivered and the amount of Severance payable by the Company shall be reduced to an amount equal to the Executive's Base Salary from the Termination Date to the date which is one (1) month following the Termination Date. The Partial Bonus shall be an amount equal to the product of (x) the quotient, expressed as a percentage, obtained by dividing (I) the number of days in the calendar year from and including January 1 of such year to and including the Executive's Termination Date, by (II) 365, multiplied by (y) the Annual Bonus with respect to the entire calendar year the Executive would have been entitled to under this Agreement absent termination of employment. The Partial Bonus shall be paid to the Executive within thirty (30) days of the Company's receipt of its annual reviewed financial statements from the Company's accountants with respect to the calendar year to which such Partial Bonus relates.

....

Section 7.06. Release. Any payments to be made or benefits to be provided by the Company pursuant to this Section 7 or any other provision hereof which requires receipt of a release from Executive, shall be subject to the Company's receipt from the Executive (within forty-five (45) days after the Termination Date) of an effective general release from all liability and an agreement not to sue in favor of the Company, its affiliates and subsidiaries, and each of their respective shareholders, partners, members, directors, officers, employees, agents and representatives, in a written form reasonably satisfactory to the Company (the "Release"). The parties shall be obligated to proceed in good faith and in an expeditious manner regarding the negotiation and execution of the Release in accordance herewith.

(*id.* §§ 7.02, 7.06). Entitlement to the forbearance severance requires execution of a general release. This is clearly an impermissible condition under New York law. To be sure although Mr. Arencibia could be compensated to forbear from competing, he is not being compensated for his forbearance for two and half years of the period in which SilverLining seeks to enforce the covenant. This too makes the covenant not to compete impermissibly overbroad.

For completeness, the Court notes that SilverLining is not correct that already-earned compensation and the negotiated rights for buyback by the company constitutes additional consideration for Mr. Arencibia's forbearance. To wit, the Stock Purchase Agreement provides a

buy-back option for SilverLining to purchase Mr. Arencibia's shares in SilverLining at 175% of the principal price, plus 100% of the interest that he has paid:

5.02 Termination of Employment.

(a) Purchase Right. In the event Arencibia's employment with the Company ceases for any reason, effective from and after the Termination Date, the Company, Wiener and the Trust (as applicable, the "Purchaser") would each have the right (the "Purchase Right"), but not the obligation, to purchase some or all of Arencibia's Vested Shares for a purchase price as set forth in this Section 5.02 (such price, the "Vested Shares Purchase Price"). In the event (i) Arencibia's employment with the Company ceased due to the death of Arencibia or due to the termination by the Company of Arencibia's employment due to the Disability of Arencibia, or (ii) the Exercise Date (as defined below) is after the last day of the Initial Purchase Period, then, in each of the foregoing cases, the Vested Shares Purchase Price shall be equal to the sum of (A) the Fair Market Value of Arencibia's Additional Shares with respect to Arencibia's Vested Additional Shares subject to the Purchase Notice (as defined below) as of the Termination Date, plus (B) the Fair Market Value of Arencibia's Initial Shares with respect to Arencibia's Vested Initial Shares subject to the Purchase Notice as of the Termination Date. In the event (I) Arencibia's employment with the Company ceased due to any reason not set forth in clause (i) of the preceding sentence of this Section 5.02 a ,and (II) the Exercise Date is on or prior to the last day of the Initial Purchase Period, then the Vested Shares Purchase Price shall be equal to the excess of (A) the sum of (x) the Additional Shares Repurchase Price with respect to Arencibia's Vested Additional Shares subject to the Purchase Notice as of the Termination Date, plus (y) the Initial Shares Repurchase Price with respect to Arencibia's Vested Initial Shares subject to the Purchase Notice as of the Termination Date, over (B) in the event Arencibia's employment with the Company were terminated by the Company for Cause, an amount equal to the out-of-pocket costs and expenses, including without limitation reasonable attorneys' fees and expenses, incurred or payable by the Company arising from or due to the circumstances or events constituting Cause, otherwise zero dollars (\$0).

(NYSCEF Doc. No. 21 § 5.02[a]). This buyback is at SilverLining's unilateral option and cuts off Mr. Arencibia's upside. Mr. Arencibia has already earned this equity compensation and it does not provide any additional compensation to support the otherwise unenforceable covenant not to compete in the Employment Agreement.

As the parties agree as to the enforceability of the covenant not to compete, no discovery is appropriate. Mr. Arencibia is entitled to a declaratory judgment that the non-competition provision and the forfeiture provision as drafted are unenforceable against him beyond the six month period in which he would receive compensation and are entirely unenforceable as against him because the forbearance agreement requires execution of a general release which would bar any unrelated claims that he may have.

For the avoidance of doubt, either SilverLining will or will not exercise its option to buy-back Mr. Arencibia's shares and nothing in this decision and order addresses any potential claims related to that purported buy back.

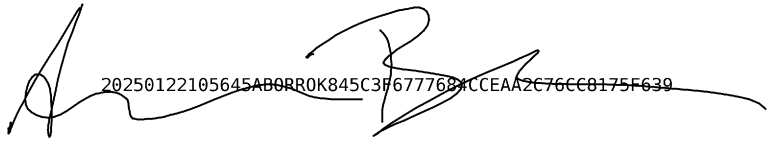
The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the branch of Mr. Arencibia's motion seeking a preliminary injunction is DENIED as moot; and it is further

ORDERED that SilverLining's cross-motion to dismiss is DENIED; and it is further

ORDERED that Mr. Arencibia is entitled to a declaration that the non-competition provision as drafted is unenforceable against him.


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1/22/2025

DATE

ANDREW BORROK, 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