

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. LOUIS B. YORK
Justice

PART 2

-----X
ALLIANCEBERNSTEIN, L.P.,
Plaintiff,
-against-

Index No. 100905/11
Motion Date 02/16/11
Motion Seq. No. 001
Motion Cal. No. _____

WILLIAM CLEMENTS,
Defendant.

-----X
The following papers, numbered 1 to _____ were read on this motion for Preliminary Injunction

| PAPERS

NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

FILED

Replying Affidavits _____

MAY 27 2011

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

This is a motion for a preliminary injunction to require the defendant to abide by his agreement with the plaintiff requiring him to give 60-days notice of his resignation and not to solicit any customers of the plaintiff or to retain or use any confidential information. The defendant cross-moves to require arbitration of the dispute. For the reasons that follow, the Court grants a preliminary injunction.

Pending the decision on this motion, the Court issued a temporary restraining order prohibiting the defendant from soliciting the business of any of plaintiff's clients and from retaining any confidential information.

Defendant, an experienced financial advisor, had no experience in the securities industry. On joining the plaintiff, defendant was given an extensive training program in New York, plaintiff obtained his license and paid for his registration with various securities exchanges. As a result, defendant became a valued and well-paid financial advisor. According to plaintiff, defendant earned more than \$1,000,000 in 2010.

Defendant had access to plaintiff's confidential information, including its extensive client lists.

In 2009, defendant and plaintiff entered into an extensive incentive plan, which included additional compensation for defendant. In it, defendant promised to give 60-days notice of his resignation, during which time he would receive his regular salary. During that time, defendant would not, *inter alia*, solicit clients or employees of plaintiff and permanently would keep the confidentiality of plaintiff's trade secrets or other confidential information. The agreement also provided that any breach of these conditions constituted irreparable injury incapable of measurement of damage, resulting in plaintiff being able to obtain a preliminary and permanent injunction.

Defendant did resign but left on the same day without giving the 60-days notice called for in the agreement. Plaintiff then went to work with a competing company, Barclays Global Wealth Management

("Barclays"). During that 60-day period, plaintiff continued to pay defendant his salary by depositing the money in defendant's bank account. Claiming that he is no longer an employee of plaintiff, defendant has refused to claim these funds.

On the same day that defendant left plaintiff, Barclays sent an e-mail message to plaintiff's clients informing them of plaintiff's change of employment. To do this, they used a customers list that defendant had brought with him and given to Barclays.

Plaintiff seeks to enforce the 60-day notice provision, by preventing defendant from working for Barclays during that period and preventing him from using plaintiff's list of employees and soliciting plaintiff's customers.

Defendant contends that the 60-day notice provision did not change his status as an employee at-will. It merely allowed him to continue working for that period, if he chose to do so, but did not change his or the plaintiff's right to terminate him at any time during that period.

Arguing that all significant contacts were in California, rather than New York, California, which treats non-compete agreements far more negatively than New York, defendant contends that the California courts are the preferred forum to try this case.

Defendant also asserts that he did not solicit any of plaintiff's customers. Rather, Barclays sent out the notices. All of these contacts were individuals who were either

personally known to defendant before his employment with plaintiff or whose identities were obtainable from publicly available sources.

Finally, defendant asserts that in accordance with the employment agreement that they executed, these matters are to be determined by arbitration and not by any Court.

The first order of business is to determine whether New York or California courts and law apply. Defendant argues for California, a California forum and law because the employment agreement between the parties says so and because defendant lives and works in California and the clients, who plaintiff claims defendant has illegally solicited are located in California. However, the plaintiff's headquarters and principal address is in New York. Defendant spent 4 months being trained in New York. Defendant frequently communicated with and obtained support from plaintiff's employees in New York. Moreover, the clients' accounts were maintained and managed in New York. Defendant was paid and received benefits from the New York headquarters. And, significantly, the agreement which contained the 60-day notice provision chose New York law and the New York courts as the forum for the resolution of disputes between the two parties.

A forum selection clause (and the accompanying choice of law) is *prima facie* valid and enforceable, unless it can be shown that it is unreasonable or unjust, or fraud or overreaching is attached to it (*New Moon Shipping v Man B&W Diesel AG*, 121 F.3rd 24

[2d Cir 1997]; *Fidelity Co. of Maryland v Altman*, 209 AD2d 195, 618 NYS2d 86 [1st Dept 1994]). In *New Moon Shipping*, the Court enforced the parties' selection of New York as the appropriate forum even though most of the defendants neither resided nor worked in New York, holding that the distance between New York and Connecticut was a mere inconvenience. In *Bernstein v Wysoki*, 77 AD3d 241, 807 NYS2d 49 [2d Dept 2010], a single mother residing in Dutchess County, New York, failed to establish that litigation in Missouri would be prohibitive. As in this case, she offered no evidence that the cost of the evidence would be too great. This is not a case where the trial in a foreign jurisdiction, such as Tokyo, with not only a body of laws distinctly different from New York, but a proceeding conducted in a totally foreign language in a forum vastly distant from New York, would effectively deprive the plaintiff of his day in court, *see, Yoshida v PC Tech USA*, 22 AD3d 373, 803 NYS2d 48[1st Dept 2005].

Here, the Court sees nothing unjust or unreasonable about trying this case here in accordance with the parties previously selected choice of law and forum. As has been shown, New York has very significant contacts with both parties. New York's interest in trying cases of plaintiffs who reside here is substantial and while defendant may be inconvenienced by being compelled to come to New York to litigate this matter, he can certainly afford to do so. Therefore, this is the forum to try the matter pursuant to the laws of this jurisdiction.

Whether the Court will issue an Order for a preliminary injunction as requested by plaintiff, requires a consideration of the three criteria reiterated in *Chernof Diamond & Co. v Fitzmaurice, Inc.*, 234 AD2d 200, 651 NYS2d 504 [1st Dept 1996]; (1) likelihood of success on the merits; (2) potential for irreparable harm; and (3) the balance of equities tips in movant's favor.

When it comes to non-compete type agreements such as is involved here, the injunction must be reasonable in scope, duration and geographical area, *id.*

Thus in *Chernof Diamond & Co.*, the Court upheld an agreement which, like here, required 60-day's notice and, in addition, prohibited the defendant from soliciting the employer's clients and employees for two years from his resignation. In granting a preliminary injunction, the Court stated that the two-year restriction and its scope were not unduly burdensome. Moreover, defendant was not geographically restricted from otherwise pursuing his livelihood.

Anti-solicitation clauses of the type involved in this action have been approved as supporting a preliminary injunction since losing the clients would sustain a loss of business which is impossible or at least difficult to quantify. This would establish irreparable harm (*Willis of New York v DeFelice*, 299 AD2d 240, 750 NYS2d 39 [1st Dept 2002]),

Given defendant's highly valued position that made him privy to client lists and other confidential information which he has already violated, he is restrained by both the common law and his agreement from any further solicitation of plaintiff's clients, except those he brought to the firm with him and since it appears that the client lists he has taken from his employer are going to be held to be confidential material and trade secrets, pending a final decision, he is restrained from using those lists or copies thereof in any way. Defendant may deny that he has used these lists to solicit clients, but how can he explain how his new employer was able to contact plaintiff's client? Where did Barclays get these lists, if not from defendant?

Defendant has argued that since the 60-day notice period has passed, there is no way to enforce it, going so far as to say that the 60-day period was only viable while each side enforced it, arguing that as an employee at-will, he or the plaintiff could terminate his employment at any time before the 60 days expired. The Court cannot accept this rationale. Permitting defendant to immediately leave could jeopardize plaintiff's relationship with its clients. It would also prevent an orderly transition of important projects to other employees, possibly causing irreparable injury. While it is too late to literally apply the 60-day notice requirement, defendant can be restrained for that period from working for any competing

companies for 60 days (*Evolution Markets v Penny*, 2009 WL 1467051 [Supreme Westch Cty 2009]).

In conclusion on this issue, it seems clear that the balance of hardships tips decidedly in plaintiff's favor. For a very short length of time of 60 days, plaintiff will not be permitted to join a competitor, but plaintiff has paid him his salary for those two months. This hardship is slight. He will also be prohibited from soliciting clients that never belonged to him in the first place. But not issuing the injunction will result in the real possibility that plaintiff may permanently lose valued clients.

Defendant also argues in his cross motion that the parties are compelled to submit their dispute to arbitration by virtue of the employment agreement that they entered into. However, as plaintiff correctly points out, the economic incentive agreement that they entered into five years after the employment contract specifically provides exclusive jurisdiction to the New York courts. Defendant also argues that because defendant is an associate member of Finia, the successor organization to the National Association of Securities Dealers, and an affiliate corporation of plaintiff is a member of Finia, this case must be argued in accordance with the Finia rules regarding arbitration of disputes between Finia members. Nevertheless, since plaintiff is not itself a member of Finia, there is no basis for it to be bound by Finia rules. Hence, there is no necessity to order arbitration.

The Court has examined defendant's remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that for a period of 60 days from the service upon defendant of a copy of this decision with Notice of Entry, defendant is restrained from engaging in any activities or being employed by an individual or entity in competition with the plaintiff; and it is further

ORDERED that defendant is preliminarily enjoined from soliciting any clients or employees of plaintiff, except those clients whom defendant had personally brought with him to the firm; and it is further

ORDERED that pending a final order of this Court, defendant is restrained from in any way using, copying, or sharing with others, the client lists of plaintiff; and it is further

ORDERED that plaintiff shall post security of \$25,000 within 10 days of the entry of this Order.

FILED

MAY 27 2011

Dated: *May 24, 2011*

Enter:

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Ley
Louis B. York, J.S.C.

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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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