

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF KINGS: CIVIL TERM: PART COM-1

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3 MAMMOTH ADVERTISING, LLC, :

4 Plaintiffs, :

5 -against- : Index No.

: 17263-12

6 ALEX DUBIN, :

7 Defendant. :

8 -----X

360 Adams Street
Brooklyn, New York

September 12, 2012

11 B E F O R E: HONORABLE CAROLYN E. DEMAREST
12 Justice of the Supreme Court

13 A P P E A R A N C E S:

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22 PAULA WAINER
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24
25

1 A F T E R N O O N S E S S I O N

2 (Whereupon, the morning session was
3 stenographically recorded, but not transcribed
4 herein.)

5 THE CLERK: This is recalling calendar number
6 nine. Appearances remain the same.

7 THE COURT: You were in the midst of telling
8 me that you think I don't understand the terms of the
9 agreement that your client signed.

10 Is that right, Mr. Goldman?

11 MR. GOLDMAN: Well, I just, I think we need a
12 little clarification, your Honor.

13 The Court always understands. It just needs
14 a little more --

15 THE COURT: I read these papers and I see
16 that there is a non-solicitation provision.

17 MR. GOLDMAN: The words of the
18 non-solicitation provision that is there say not to
19 persuade any customer, potential customer not to do
20 business with the company.

21 What does that mean?

22 That means I can't go -- I can't go to NBC
23 Universal and say don't do business with Mammoth.

24 But it also means that I can go to NBC
25 Universal and say, please, do business with me.

1 And the reason I come to that conclusion is
2 that if you take a look at what was deleted from the
3 clause, what was deleted is that I can persuade or
4 solicit for myself or any company I work for or
5 otherwise derive benefit from any services or goods
6 of the company on any customer that did business with
7 the company during the employee's last year. The
8 last year. So that was struck out of the contract.

9 So that interpretation, that being struck
10 out, creates this clear message that my client can
11 compete with the company.

12 And if I could say a few more things?

13 THE COURT: Yes.

14 MR. GOLDMAN: One is that my clients pointed
15 out to me, if you enforce this long list of
16 customers, like Fox Television, A&E, HBO, Warner
17 Brothers, Universal, he would be literally out of
18 business.

19 I want to point out in getting back to the
20 law, because we have been so focused on the words of
21 the actual clause, at best, is ambiguous.

22 The Courts don't enforce ambiguous --
23 Generally, the Courts don't enforce ambiguous
24 non-competes.

25 But, you know, when an employee is fired, the

1 law will state, generally, is that the non-compete is
2 unenforceable.

3 That goes back to the Appellate Court in Post
4 versus Merrill Lynch, Court of Appeals, who is also
5 Global Data Management versus Pfizer, UGF Cisco
6 versus Advanced Planning Technology and Handel versus
7 Nissan. (Phonetics.)

8 The other question that we briefed in the
9 document on page, I believe, eleven, twelve and
10 thirteen, is that the non-compete is overly broad.

11 Under the Appellate Court Decision of BDO,
12 the non-compete should only be narrow enough to be
13 focused on protecting the interests of the employer.

14 And in BDO, there were three categories of
15 employees -- of clients.

16 There were the clients that were developed
17 during the time that the employee worked for the
18 employer.

19 THE COURT: How long did this client, this
20 Mr. Dublin work for the company?

21 MR. GOLDMAN: About a year, year and a half,
22 in that range. So it would -- so the good will, the
23 good will that they developed would only be during
24 the clients that he worked on.

25 They have to provide you with that

1 documentation.

2 I mean, when we were trying to prepare our
3 argument in response, we had to dig up all these
4 facts and spent hours recreating the facts so that
5 you would even know what a template was or have an
6 idea.

7 THE COURT: Actually, going to that template
8 issue. Your contention is that this software is
9 readily available and there is nothing unique about
10 it; is that correct?

11 MR. GOLDMAN: That's correct.

12 On top of that, we never distributed. We
13 don't have copies of it. We wouldn't have used it.
14 And there is no disclosure.

15 They don't even allege that we disclosed it
16 to anyone.

17 THE COURT: But, Mr. Conway, your client
18 seems to be taking the position, and I was looking
19 for the affidavit that you rely on, that this is
20 somehow a trade secret; is that your position?

21 MR. CONWAY: Yes. I spoke to my client over
22 the lunch break and they indicated that this
23 template, which is the billing and tracking of the
24 template, as I understand for their clients, was
25 developed over the eight years that they had their

1 own business and is actually a trade secret and dealt
2 with their efficiency in-house, in terms of tracking
3 their clients and the billing time.

4 THE COURT: Now, the template, of course,
5 would suggest that there is no specific information
6 on it, but rather it's a formula or a format that is
7 used and you plug in the data; is that what this is?

8 MR. CONWAY: That's my understanding, your
9 Honor, yes.

10 But it's structured in such a way that,
11 again, my clients indicate that it increases their
12 efficiency dramatically.

13 THE COURT: Now what do you say in response
14 to defendant's contention that this is -- I forget
15 the company.

16 MR. GOLDMAN: It's an excel spreadsheet.

17 THE COURT: It's an excel spreadsheet.

18 MR. CONWAY: Again, our position is that in
19 Ms. Quinn's affidavit, this is something they
20 developed, Mammoth developed itself in the eight
21 years they have been in business.

22 I guess, it's a factual question. We might
23 need a hearing on.

24 THE COURT: It appears so.

25 I can go over to J&R and buy it. I don't

1 know why you would need the restraint.

2 MR. CONWAY: Understood.

3 That's only part of it. My client's big
4 problem is, again, their former employee, who they
5 were paying one hundred fifty thousand dollars a year
6 in consideration for him signing onto what is a
7 reasonably tolerable non-solicitation, only lasts a
8 year.

9 If he waited until November, he would have
10 been free and clear. That's two months away.

11 And both of them -- it's one year. And as
12 far as disclosure is concerned, what we argue in our
13 papers is Submarine, which is an entity, templates
14 have been to that entity, to Submarine. There has
15 been disclosure. Frankly, I don't want to --

16 MR. GOLDMAN: There is absolutely no evidence
17 that it has been disclosed to Submarine.

18 You have affidavits from both my clients that
19 say they have never seen it on Submarine. They never
20 used it. It's a simple little business with two
21 people.

22 They have thrown everything in there but the
23 kitchen sink in trying to see what would stick.

24 They failed to describe what this template
25 is. They have pled everything in conclusory

1 allegations where there are sharp disputes and facts.

2 The Courts don't grant preliminary
3 injunctions --

4 THE COURT: I think I have heard this
5 relevant information here.

6 This Order to Show Cause sought preliminary
7 injunctive relief; right?

8 MR. CONWAY: Yes, your Honor.

9 THE COURT: That's what you're here for?

10 MR. CONWAY: Yes, your Honor.

11 THE COURT: And it's returnable today.

12 Now, when Judge Steinhardt granted the TRO,
13 she restrained the defendant from using the software
14 templates.

15 The contention is that the defendants haven't
16 used the software templates, of course, dispute as to
17 whether it should be restrained.

18 In any event, if it were in the public
19 domain, there would be no basis to restrain it.

20 So we have the factual issue regarding that
21 point.

22 But we also have a representation that they
23 haven't used it and, apparently, are not going to use
24 it, at least, not in the short term; correct?

25 MR. GOLDMAN: Or ever. Or ever.

1 THE COURT: Or ever. All right.

2 And then there is a provision herein that the
3 defendants are restrained from persuading plaintiff's
4 current clients from doing business with plaintiff.

5 MR. GOLDMAN: That's not what the -- that's
6 not what the non-compete says.

7 The non-compete says -- it says persuading
8 any customer, potential customer not to do business
9 with the company.

10 That's different than what you just said
11 and --

12 THE COURT: Yes, yes.

13 MR. GOLDMAN: And that is different.

14 That is not what -- while we stand by that,
15 we will abide by that, they can't turn that into a
16 non-compete, and they can't turn that into what was
17 deleted in exhibit six, which is a solicitation.

18 THE COURT: Okay.

19 I must say, I think it is a somewhat
20 ambiguous provision in the agreement, the, quote,
21 non-solicitation. Certainly, it would be clear
22 enough with respect to employees.

23 But the words used here are persuade or
24 attempt to persuade.

25 And I am looking at exhibit five, which is

1 the signed document persuading someone not to do
2 business with the company or reducing the amount of
3 business. And, again, not to persuade any customer,
4 potential customer not to do business with the
5 company.

6 This is redundant to me, it sounds, but all
7 right. Those provisions would just suggest that it
8 would have to be derogatory in some manner, that
9 there would have to be some discouragement, some
10 adverse representations.

11 And that's consistent with paragraph nine
12 regarding disparaging statements which seem -- should
13 not be occurring.

14 But there is no evidence that they have been
15 occurring.

16 Mr. Conway, I see nothing that supports a
17 conclusion that the defendants have affirmatively
18 done anything to disparage your company.

19 The market place is generally open, and I
20 don't see a violation here.

21 Now, I think, I have given you adequate
22 opportunity to make your argument.

23 But if there is anything further that you
24 want to say, you may do so.

25 But I don't see the probability of success

1 here based on the language of the employment
2 contracts.

3 MR. CONWAY: One thing I meant to object to
4 before. We need to stay -- or I feel we need to stay
5 within the four corners of exhibit five, which is
6 actually the signed document.

7 THE COURT: Yes.

8 MR. CONWAY: There is no ambiguity to look at
9 parole evidence. We have a factual dispute, in my
10 opinion, on several issues the least of which is --
11 which is disparaging statements my client said they
12 did. The defendants said they did not.

13 THE COURT: Actually, your client seems to
14 infer that they must have. But the actual response
15 from the only one that was a client that is now going
16 elsewhere, apparently, has done very limited business
17 with Submarine, had nothing to do with anything that
18 the defendants did.

19 MR. CONWAY: I would respectfully argue, once
20 again, we have a factual dispute, I think, on this,
21 also.

22 THE COURT: Counsel, I can't -- this is a
23 sworn affidavit from the principal of this
24 Weinstein --

25 MR. CONWAY: I certainly can't cross-examine

1 it.

2 THE COURT: That's right.

3 MR. CONWAY: And I would respectfully suggest
4 that it's a factual issue that might be better
5 addressed in a hearing.

6 THE COURT: Well, you're going to have a
7 while before you get to that point, I would think,
8 although, that may be your only purpose in bringing
9 this litigation is to seek injunctive relief.

10 At the moment, I don't see a probability of
11 success. And the facts that are disputed here, you
12 persist in contradicting this fellow -- what is his
13 name?

14 MR. CONWAY: Vladimir.

15 THE COURT: Vladimir. But he swears that
16 that wasn't the reason. And there is the email that
17 does indicate some nuance that there was a dispute
18 about the -- or, perhaps, some dissatisfaction with
19 the terms of the contract, the billing that your
20 client was engaged in.

21 MR. CONWAY: If I may be heard on this
22 success on the merits, your Honor?

23 THE COURT: Yes.

24 MR. CONWAY: What I was surprised in what the
25 defendants put in their affidavit pretty much is an

1 admission of what the plaintiff is accusing him of.

2 He acknowledges, Mr. Dubin, that he did use
3 Mr. Henry, their employee. He acknowledges that he
4 has a new client Weinstein, right? He acknowledges
5 that he is working -- that Ms. Belcher is working for
6 him and --

7 MR. GOLDMAN: Let's put the cards on the
8 table here.

9 THE COURT: But the point is, Counsel, I have
10 to look at the language of the agreement that was
11 signed and the language of the agreement requires the
12 defendants to have affirmatively done something to
13 affect these consequences.

14 They do deny that they actually solicited
15 these people.

16 The only thing that Mr. Dubin does
17 acknowledge is this:

18 That he asked his friend Henry to do some
19 work for a project that he was involved in.

20 Now, to that extent, you may say that that
21 constituted a violation of the agreement.

22 But this persuading, I am not sure that that
23 is sufficiently clear that it would constitute a
24 violation of the employment contract.

25 MR. GOLDMAN: It also says employ.

1 It doesn't say uses independent. And my
2 client never tried -- he remained working at Mammoth
3 for a while after that.

4 Mammoth decided to fire him.

5 My client did not employ him. He worked as
6 an independent contractor. So there is a distinct
7 difference.

8 And this is drafted by Mammoth. They were
9 forced to sign this upon the hiring.

10 And the language should be, you know, under
11 the law, interpreted against them.

12 THE COURT: Mr. Goldman, you are kind of
13 winning. You kind of are jumping in with yet another
14 prospective.

15 But that is precisely the point. The
16 prohibition is against persuading an employee, quote,
17 to leave the company's employ, or to become employed
18 by another entity other than the company.

19 Well, employed, yes.

20 Certainly, even an independent contractor in
21 some respects is employed. But I believe this intent
22 here is to actually be permanently employed, not just
23 an independent contractor, or a limited relationship.

24 So all I am finding here, not that you will
25 never prove it, maybe you will, but that it's not

1 sufficiently demonstrated here to enter, well, a
2 preliminary injunction.

3 Ultimately, you may be seeking a permanent
4 injunction. But that has to be established through
5 some discovery and further hearings. Okay.

6 So I am going to deny the preliminary
7 injunction, at this point, and I am vacating the TRO.

8 Obviously, your clients, Mr. Goldman, would
9 be well advised to cease and desist from any activity
10 that could constitute a violation of the terms of
11 that agreement.

12 But you, in the interim during the pendency
13 of the litigation and, of course, plaintiff will come
14 forward with further allegations, if it looks like it
15 is continuing to happen, but at the moment, I am
16 denying it. What are you doing? You haven't joined
17 issue yet?

18 MR. GOLDMAN: No, we haven't.

19 I was going to ask him for an extension
20 because it is due on the twentieth, I believe, in
21 twenty days.

22 MR. CONWAY: Whatever you need, as long as it
23 is reasonable.

24 MR. GOLDMAN: So if we can ask for thirty
25 days to answer, otherwise, to move --

1 MR. CONWAY: Is that thirty days from today?

2 MR. GOLDMAN: Thirty days from the day it's
3 due, which would be September 20th; is that all
4 right?

5 MR. CONWAY: So that's October 20th.

6 MR. GOLDMAN: October 20th. There is
7 Jewish holidays in there.

8 MR. CONWAY: I knew that.

9 THE COURT: All right.

10 So are you consenting? On consent of the
11 plaintiff?

12 MR. CONWAY: Of course.

13 THE COURT: Plaintiff is to answer on or
14 before -- what date did you agree to; October 20?

15 MR. GOLDMAN: October 20th is what we
16 agreed to.

17 THE COURT: Very good. I guess there is no
18 point in -- well, I should be putting it on for a PC
19 to indicate -- maybe we do have to do that to keep
20 some control on the case.

21 What date do you want, assuming it will be
22 joined on or before October 20th?

23 What date do you want? Pick a date.

24 MR. GOLDMAN: December 5th.

25 THE CLERK: That's fine. 12-5.

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MR. CONWAY: At 3:00.

THE COURT: No, it's a morning call.

It's lack of probability on success of the merits. There is not a balance of equities in favor of the plaintiff, in light of the situation of the defendants as otherwise unemployed.

* * * *

Certified to be a true and accurate transcript of the stenographic minutes taken within.

PAULA WAINER
Senior Court Reporter