

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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MARILYN MODEL MANAGEMENT, INC.,

Plaintiff,

- v -

DEREK SAATHOFF, 1 MODEL MANAGEMENT, LLC D/B/A ONE
MANAGEMENT

Defendant.

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INDEX NO. 655776/2018

MOTION DATE 11/20/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 27, 30, 31, 32, 33, 34, 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, 72, 73, 74, 75

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

Upon the foregoing papers, it is ordered that plaintiff Marilyn Model Management, Inc.'s (Marilyn) motion for a preliminary injunction is granted.

On August 13, 2013, Derek Saathoff started working as a model agent for Marilyn. That same day, the parties entered into an employment agreement that included non-competition, non-solicitation and non-disclosure provisions (2013 Agreement) (NYSCEF Doc. No. 11, aff of Maria Cognata, exhibit 1 at ¶¶ 6, 7). Subsequently, the parties entered into two more employment agreements on September 16, 2015 and September 16, 2017 (respectively, 2015 Agreement and 2017 Agreement), ultimately extending Saathoff's employment with Marilyn until 2019 (NYSCEF Doc. Nos. 12 & 13, Cognata aff., exhibits 2 & 3). The 2017 Agreement clearly states that it supersedes all prior and contemporaneous agreements.

Pursuant to the 2017 Agreement, Saathoff was not permitted to: (1) provide services, the same or similar to those he provided while at Marilyn, to any business

engaged in model management or talent management in New York, New Jersey or Connecticut; (2) solicit, or assist in the solicitation of, any person or entity Marilyn provided services to during the two years prior to and during Saathoff's employment and any person or entity Saathoff had contact with six months prior to his termination; (3) solicit or interfere with Marilyn's business relationships that existed during the two years prior to and during Saathoff's employment and any person or entity Saathoff had contact with six months prior to his termination; or (4) solicit for the purpose of offering employment or hiring Marilyn's current employees for a period of six months after his employment ceased (NYSCEF Doc. No. 13 at ¶6). The Agreement further prevents Saathoff from using, sharing, or selling any confidential or proprietary information belonging to Marilyn, including, but not limited to, the model's identities and their preferences, business methods, advertising materials, and financial information (*id.* at ¶7).

In September 2018, Saathoff informed Marilyn's President, Maria Cognata, that he was offered a position with Marilyn's competitor, defendant 1 Model Management, LLC (1 Model) (NYSCEF Doc. No. 10, Cognata aff at ¶5). On September 25, 2018, Marilyn sent Saathoff an acceptance of resignation (Letter Agreement) which Saathoff signed the following day (NYSCEF Doc. No. 14, Cognata aff, exhibit 4). In the Letter Agreement, Marilyn agreed to waive the non-compete provision of the Employment Agreement, but the non-solicitation and non-disclosure provisions remained in effect (*id.*).

Cognata states that, in October 2018, she became aware that Saathoff was contacting Marilyn's models and inviting them for drinks on various occasions (NYSCEF

Doc. No. 10, Cognata aff at ¶¶8-21). Cognata further states that after Saathoff met with Marilyn models, Missy Rayder and Cleirys Velasquez, those models broke their contracts and signed with 1 Model (*id.* at ¶¶13-14, 16-19, 22; exhibits 9, 11-14; NYSCEF Doc. Nos. 37 & 38, Cognata supp aff, exhibits A-B). Another Marilyn model, was pictured on Saathoff's Instagram page prior to the expiration of her contract with Marilyn, and she left for 1 Model once her contract was over (NYSCEF Doc. Nos. 16 & 17, Cognata aff, exhibits 6-7). Plaintiff contends that all of this is evidence of solicitation in clear violation of the 2017 Agreement's non-solicitation provision. As a result, Marilyn believes that it has lost business opportunities to 1 Model due to Saathoff's actions, causing damage to its reputation.

Saathoff affirms that he has never solicited Marilyn's models to join 1 Model (NYSCEF Doc. No. 32, aff of Derek Saathoff at ¶5). Saathoff states that he went out for drinks with some Marilyn models, but that it is his regular practice to socialize and network with models managed not only by his agency, but also by other agencies (*id.* at ¶6). He further states that he was given the 2013 Agreement only a day or two before his employment with Marilyn began, that Marilyn never advised him to consult an attorney, and that he did not consult an attorney before executing the 2013 Employment Agreement (*id.* at ¶2). Saathoff also did not consult an attorney regarding the 2015 and 2017 Agreements and states that he was never informed to do so (*id.*).

Marilyn now moves to enjoin Saathoff and 1 Model from (1) using, disclosing, and/or misappropriating any of Marilyn's confidential information; (2) unfairly competing with Marilyn through the use of Marilyn's confidential information; and (3) interfering with the contracts between Marilyn and its models or any other individuals employed by or

providing services to Marilyn; and Saathoff only from (1) contacting, soliciting, or assisting in the solicitation of any model under contract with Marilyn with whom Saathoff had contact or about whom he learned confidential information while employed by Marilyn; and (2) breaching his post-termination obligations under the 2017 Agreement.

For injunctive relief under CPLR 6301, the movant must establish likelihood of success on the merits of the action; the danger of irreparable harm in the absence of a preliminary injunction; and a balance of equities in favor of the moving party (*Gliklad v Cherney*, 97 AD3d 401, 402 [1st Dept 2012] [citations omitted]). “A preliminary injunction should not be granted unless the right thereto is plain from the undisputed facts and there is a clear showing of necessity and justification” (*O'Hara v Corporate Audit Co.*, 161 AD2d 309, 310 [1st Dept 1990] [citations omitted]).

Non-Solicitation Provision

Likelihood of Success

Marilyn contends that not only has it established a likelihood of success that the restrictive covenants are enforceable, but also that Saathoff has breached them. Under New York law, restrictive covenants are strictly construed (*Columbia Ribbon & Carbon Mfg. Co v A-1-A Corp.*, 42 NY2d 496, 499 [1977]). A restrictive employment covenant is reasonable if it is (1) no greater in time or area than is necessary to protect the legitimate business interest of the employer; (2) does not impose undue hardship on the employee; and (3) does not injure the public. (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999].)

Here, Marilyn has demonstrated a likelihood of success in establishing that the non-solicitation provision is reasonable, and thus, enforceable. The non-solicitation

restrictive covenant is only for six months, which is short compared to other cases in the Commercial Division which generally exceed a year. Despite there being no mention of geographical restriction in the non-solicitation clause, the non-competition clause of the same provision restricts competition in the geographical areas of New York, New Jersey, and Connecticut. Restricting solicitation in the tri-state area does not make the agreement overbroad and unreasonable (*see Good Energy, L.P. v Kosachuk*, 49 AD3d 331, 332 [1st Dept 2008] [geographical area of the entire United States unreasonable where there is a limited number of suppliers and plaintiff company only conducted business in eight states]).

A restrictive covenant may be enforced based on an employer's legitimate interest in the "protection against misappropriation of [its] trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary" (*BDO Seidman*, 93 NY2d at 389). Further, an interest in protecting customer relationships and goodwill has also been found to be a legitimate interest (*see Scott, Stackrow & Co., C.P.A's, P.C. v Skavina*, 9 AD3d 805, 807 [3d Dept 2004]). Here, Marilyn has sufficiently evidenced its interest in protecting its customer relationships in a particularly competitive field and protecting its goodwill. There is also no undue hardship on Saathoff because, if the injunction is granted, he is free to solicit and contact any model that is not represented by Marilyn. As a new agent at another agency, it is not unreasonable to ask Saathoff to refrain from contacting Marilyn's models, its business assets. Finally, there is no indication that the public at large would be harmed.

Marilyn also presents evidence showing a likelihood of success on its claims against Saathoff. The evidence presented supports Marilyn's claim that Saathoff actively pursued Marilyn's models, two of whom signed with 1 Model, and at least one Marilyn employee (NYSCEF Doc. Nos. 15, 16, 17, 20, 21, & 24, Cognata aff, exhibits 5, 6, 7, 10, 11, & 14; NYSCEF Doc. Nos. 37, 38, 39, Cognata supp aff, exhibits A, B, & C; NYSCEF Doc No. 41, aff of Victoria Perillo). This evidence, at the least, supports its breach of contract claim.

Irreparable Harm

A movant must demonstrate that it will suffer an actual and imminent injury, and not one remote or speculative (*Waterscape Resort, L.L.C. v 70 W. 45th St. Holding LLC*, 2015 NY Slip Op 31255[U], *6 [Sup Ct, NY County 2015]; see also *Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995]). The court is satisfied that Marilyn will suffer actual and imminent injury if Saathoff is not enjoined from soliciting Marilyn's models and otherwise breaching the 2017 Agreement. Further, an award of money damages is unlikely to make Marilyn whole if its former employee, now employed with a competitor, is hiring away Marilyn's models; the value of the lost relationship is not easily determined (see e.g. *Matter of Yung Bros. Real Estate Co. v Limandri*, 26 Misc 3d 1203[A], 2009 NY Slip Op 52653[U], *4 (Sup Ct, NY County 2009) ("[w]hile financial loss suffered by a party can often be calculated, the damage of a lost relationship with an existing business client is more difficult to calculate, and thus can be held to constitute irreparable harm"). In addition, there is also a difficulty in calculating an award of monetary damages that would redress the loss of goodwill. This loss of

business would be very difficult to quantify (*Willis of N.Y., Inc. v DeFelice*, 299 AD2d 240, 242 [1st Dept 2002] [citation omitted]).

Balance of Equities

For the third requirement, a balancing of the equities in the movant's favor, the movant must show that the irreparable injury is more burdensome than the harm caused by the imposition of the injunction (*McLaughlin, Piven. Vogel, Inc. v W.J. Nolan & Co., Inc.*, 114 AD2d 165, 174 [2nd Dept 1986] [citation omitted]). The balance of the equities tilts in favor of the party who merely seek to maintain the status quo (*Gramercy Co. v Benenson*, 223 AD2d 497, 498 [1st Dept 1996]). Here, the balance tilts in Marilyn's favor. The restraint of limiting Saathoff from contacting, soliciting, or assisting in the solicitation of Marilyn's models will not deprive him of his livelihood and will not prevent him from being successful at 1 Model (*Willis of N.Y., Inc. v DeFelice*, 299 AD2d at 242 [citation omitted]).

Non-Disclosure Provision

Marilyn also seeks to enjoin both Saathoff and 1 Model from (1) using, disclosing, and/or misappropriating any of Marilyn's confidential information; (2) unfairly competing with Marilyn through the use of Marilyn's confidential information; and (3) interfering with the contracts between Marilyn and its models or any other individuals employed by or providing services to Marilyn.

The non-disclosure provision is reasonable, especially in this field. Marilyn has demonstrated that it maintains confidential information regarding its models and business methods and has shown a likelihood of success on the merits of its claim it spent considerable time and effort developing and maintaining this information and

cultivating those relationships (see *Crown IT Servs., Inc. v Kovel-Olsen*, 11 AD3d 263, 265 [1st Dept 2004]). Marilyn has also demonstrated a likelihood of success on its claims that defendants have used that information to gain an unfair advantage. Further, the alleged use of this information has caused Marilyn irreputable harm, and enjoining defendants from using, disclosing, and/or misappropriating any of Marilyn's confidential information and interfering with Marilyn's current contracts will impose no significant harm to defendants. As stated above, this limited restraint does not prevent defendants from having a successful livelihood.

Regarding defendants' request for an undertaking, the 2017 Agreement provides that Marilyn does not need to procure a bond if it seeks injunctive relief. While Marilyn does not have to procure a bond with respect to Saathoff, a signatory to the Agreement, it does have to procure one with respect to 1 Model, who is not bound by the terms of the Agreement.

It appearing to this court that causes of action exists in favor of plaintiff and against defendants and that plaintiff is entitled to a preliminary injunction on the ground that defendants threaten or are about to do, or are 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, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in the sum of \$500 conditioned that plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to defendant 1 Model Management LLC d/b/a One Management all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendant Derek Saathoff is enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendants or otherwise, any of the following acts:

a. Contacting, soliciting, or assisting in the solicitation of any model under contract

with Marilyn Model Management, Inc. with whom Derek Saathoff had contact or about whom he learned confidential information while employed by Marilyn;

b. Using, disclosing, and/or misappropriating any of Marilyn Model Management, Inc.'s confidential information;

c. Otherwise breaching his post-termination obligations under the 2017 Employment

Agreement with Marilyn Model Management, Inc.;

d. Unfairly competing with Marilyn Model Management, Inc. through the use of Marilyn's confidential information; and

e. Interfering with the contracts between Marilyn Model Management, Inc. and its models or any other individuals employed by or providing services to Marilyn Model Management, Inc.; and it is further

ORDERED defendant 1 Model Management LLC d/b/a One Management, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of 1 Model Management, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or

through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

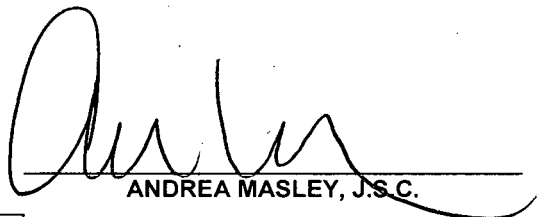
a. Using, disclosing and/or misappropriating any of Marilyn Model Management, Inc.'s confidential information;

b. Unfairly competing with Marilyn Model Management, Inc. through the use of its confidential information; and

c. Interfering with the contracts between Marilyn Model Management, Inc. and its models or any other individual employed by or providing services to Marilyn Model Management, Inc.; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 242, 60 Centre Street, on March 29, 2019, at 10 AM.

3/8/2019
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE