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HMS Holdings Corp. v Moiseenko
2015 NY Slip Op 51647(U)
Decided on November 13, 2015
Supreme Court, Albany County
Platkin, J.
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Decided on November 13, 2015

Supreme Court, Albany County

HMS Holdings Corp., HEALTH MANAGEMENT SYSTEMS, INC., and HMS BUSINESS SERVICES, INC., Plaintiffs,

against

Elena Moiseenko and JOSEPH FLORA,, Defendants.

900859-15

APPEARANCES:

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Richard M. Platkin, J.

Plaintiffs HMS Holdings Corp., Health Management Systems, Inc. and HMS Business Services, Inc. (collectively "HMS") commenced this action against defendants Elena Moiseenko and Joseph Flora "to safeguard HMS's confidential, proprietary, and trade secret information, to prevent further irreparable injury to HMS's business interests, and to protect the goodwill of its business" (Amended Complaint ["Complaint"] ¶ 1). HMS now moves pursuant to CPLR article 63 for a preliminary injunction. Defendant Elena Moiseenko opposes the motion and cross-moves pursuant to CPLR 3211 for dismissal of the Complaint as against her. Defendant Joseph Flora has answered the Complaint, but has not filed any opposition to HMS's motion.

BACKGROUND

Plaintiff HMS is a provider of cost containment solutions for government and commercial healthcare programs. One of its core areas of business is the provision of Third Party Liability services to state Medicaid agencies. Third Party Liability ("TPL") refers to the legal obligation of third parties, such as insurers, to pay for healthcare services furnished to an enrollee in a state Medicaid plan. Companies that provide TPL services focus on identifying and verifying alternative forms of coverage and recovering funds from third party payors. HMS alleges that it is a leading provider of TPL services, a success that it attributes to "unique, confidential and proprietary systems and technologies".

Defendant Elena Moiseenko was a corporate vice president of HMS engaged in providing TPL and related services to state Medicaid agencies and other governmental and healthcare organizations. In that capacity, Moiseenko is alleged to have been a key member of HMS's TPL team who had access to and knowledge of a wealth of trade secrets and confidential information, including information concerning HMS's clients and employees. Moiseenko terminated her employment with HMS on August 2, 2013, and she commenced employment with Public Consulting Group, Inc. ("PCG"), a competitor to HMS, in March 2014. Moiseenko is identified as a proposed staff member on several TPL bids submitted by PCG to state Medicaid agencies.

Defendant Joseph Flora previously was employed by the Office of the Medicaid Inspector General for the State of New York ("OMIG"). As director of New York's TPL program, Flora oversaw contracts with vendors, including the contract between HMS and New York State, which was effective from January 2009 through 2015. The Complaint alleges that the contract is replete with highly confidential, competitively sensitive and proprietary information that HMS specifically designated as "Proprietary and Confidential". Flora allegedly was hired as an independent contractor by PCG in March 2014 under a six-month agreement that contemplated full-time

employment commencing in September 2014. Flora continued to work for PCG through July 2015. On July 27, 2015, Moiseenko's counsel represented to the Court that Flora no longer works for PCG.

In August 2014, HMS commenced an action in this Court against three former HMS employees, Sean Curtin, Danielle Lange and Matthew Arendt, seeking to enforce their contractual promises to safeguard HMS's confidential, proprietary and trade secret information, [*2]to prevent unfair competition and irreparable injury to HMS's business interests, and to protect the goodwill of its business (*HMS v Arendt*, Index No. A754/2014). At the same time, HMS commenced a parallel action in the District Court of Dallas County, Texas, against PCG and former HMS employees James Gambino and Jason Ramos ("Texas Action").

In a decision dated July 10, 2015 ("Texas Decision"), the District Court granted HMS's application for a temporary injunction, finding that HMS had demonstrated a likelihood of success in proving that: (a) PCG breached contractual obligations owed to HMS by developing a competing TPL business and by soliciting and hiring HMS employees; (b) Gambino and Ramos breached their employment agreements by using and disclosing confidential and proprietary HMS information; and (c) PCG, Gambino and Ramos misappropriated HMS's trade secrets, including financial, strategic, customer and technical information.

With respect to Moiseenko, the Complaint highlights the District Court's findings regarding her role in recruiting HMS employees to PCG. HMS also emphasizes Moiseenko's activities with respect to the so-called "shopping list", an issue addressed both in the Texas Decision and in this Court's Decision & Order of July 14, 2015 ("Prior Decision").

In determining that HMS had demonstrated a likelihood of success in establishing that Curtin had misappropriated HMS trade secrets, this Court found:

On May 21, 2014, two days before Ramos's departure from HMS, Moiseenko sent Curtin (her former supervisor) an email regarding the following subject: "Sean see list below for Jason to gather for us and let me know if you want to add any additional items to the list". The body of the email set forth a "shopping list" of 14 categories of HMS information, including: client billing information; the matching and posting logic rules used by HMS; known deficiencies or complaints concerning HMS's performance; recent HMS responses to requests for proposals; and lists of industry contacts that were compiled and maintained by HMS.

The Court further found that, despite Curtin's denial of any involvement with the "shopping list", the trier of fact likely would "infer that Curtin sanctioned Moiseenko's flagrant theft of HMS's confidential information and then used the stolen trade secrets (or knowingly allowed the trade secrets to be used) in the development of PCG's [TPL] proposals."

HMS also relies upon the findings of both the District Court and this Court that Moiseenko received misappropriated HMS trade secrets from Curtin, Flora, and others, and that Moiseenko wrongfully used misappropriated materials in preparing TPL proposals for PCG. Specifically, HMS cites to a portion of the Texas Decision describing Moiseenko as having obtained a copy of HMS's proposal and contract from Flora and using those documents in drafting PCG's proposal. HMS also cites to the Prior Decision's reference to Curtin having emailed trade secret and/or confidential information to Moiseenko while in the midst of preparing PCG's proposals.

Finally, the Complaint references Flora's deposition testimony in which he admitted to emailing to his personal account unredacted HMS information obtained in the course of his OMIG employment.

On the basis of the foregoing allegations, HMS asserts three causes of action. First, HMS alleges that defendants have misappropriated trade secrets, in violation of the Texas Uniform Trade Secrets Act (Texas Civil Practice & Remedies Code § 134A.001 *et seq*.) and common law. The second cause of action alleges that Moiseenko

breached continuing fiduciary duties owed to HMS by improperly soliciting, acquiring, disclosing and using HMS's confidential and proprietary information and trade secrets. The final cause of action accuses defendants of civil conspiracy.

By Order to Show dated August 4, 2015 ("OTSC"), HMS sought to preliminarily enjoin defendants from: (1) disclosing, disseminating or using any of HMS's trade secrets or other confidential or proprietary information; (2) marketing, developing, offering or providing TPL services on behalf of PCG; and (3) soliciting, diverting or attempting to solicit or divert any of HMS's state Medicaid clients.

Moiseenko opposes the motion for a preliminary injunction on the merits, and she cross-moves for dismissal of the Complaint pursuant to CPLR 3211 on three grounds: (1) mandatory forum selection clauses in her non-competition and separation agreements with HMS that allegedly require this case to be litigated in the courts of Texas; (2) the absence of personal jurisdiction; and (3) the failure of the Complaint to state a claim upon which relief can be granted.

Flora has answered the Complaint, generally denying the allegations or professing a lack of sufficient knowledge or information. He has not, however, opposed HMS's motion.

MOISEENKO

The Court begins with the branch of Moiseenko's cross motion seeking dismissal of this action as against her on the basis of the forum selection clauses contained in her written agreements with HMS.[FN1]

In July 2012, HMS and Moiseenko entered into a "Noncompetition, Nonsolicitation, Proprietary and Confidential Information and Developments Agreement" ("Noncompetition Agreement"). Section 3 of the

Noncompetition Agreement, entitled "Proprietary and Confidential Information", prohibits Moiseenko from disclosing or using HMS's "Proprietary Information" while an HMS employee or at any time thereafter. "Proprietary Information" is defined broadly to encompass any information or know-how of a private or confidential nature concerning HMS's business, customers or employee relationships, and finances, including trade secrets. The Noncompetition Agreement is governed by Texas law, and "[a]ny action . . . that is commenced to resolve any matter arising under or related to any provision of this Agreement must be commenced only in a court of the State of Texas" (¶ 6 [f]).

On August 5, 2013, following the termination of her employment, Moiseenko and HMS entered into a "Separation, Waiver and General Release Agreement" ("Separation Agreement"). Among other things, the Separation Agreement incorporates and reaffirms the Noncompetition [*3]Agreement and expressly provides that Moiseenko's "continuing confidentiality obligations to [HMS] survive the execution of [the Separation] Agreement". Moiseenko also acknowledged and agreed that she was subject to a common-law duty of confidentiality that prevents her from using or disclosing HMS's "Confidential Information" following the termination of her employment, including any information relating to HMS's clients, business processes, trade secrets, marketing, finances and employees. The Separation Agreement also is governed by Texas Law, and "[a]ny action . . . that is commenced to resolve any matter arising under or related to any provision of this Agreement must be commenced only in a court of the State of Texas" (¶ 15 [c]).

Under New York law, forum selection clauses are prima facie valid and enforceable (*Brooke Group, Ltd. v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]; *Harry Casper, Inc. v Pines Assoc., L.P.*, 53 AD3d 764, 764 [3d Dept 2008]).[FN2] "[T]hey provide certainty and predictability in the resolution of disputes" (*Brooke*, 87 NY2d at 534). In interpreting a forum selection clause, the Court must be "guided by basic principles of contract interpretation which instruct that a contract should be construed to give effect to the parties' intent as gleaned from the four corners of the document itself, provided that its terms are clear and unambiguous" (*Elmira Teachers' Assn. v Elmira City School*

Dist., 53 AD3d 757, 759 [3d Dept 2008], *lv denied* 11 NY3d 709 [2008]; *see Brooke*, 87 NY2d at 534).

In response to Moiseenko's invocation of the forum selection clauses, HMS concedes that the second cause of action, alleging her breach of continuing fiduciary duties, "arises from the contractual relationship between HMS and Moiseenko" (Plaintiffs' Memorandum of Law in Opposition, at 17). For this reason, HMS requests that the Court sever the claim "so that it may be litigated in the proper forum" (*id.*). Accordingly, Moiseenko's motion to dismiss must be granted as to the second cause of action.

HMS's first cause of action is grounded upon allegations that Moiseenko misappropriated and misused its confidential, proprietary and trade secret information. But HMS does not sue

to enforce the ongoing confidentiality obligations imposed by the Noncompetition Agreement or the Separation Agreement. Rather, HMS sues to enforce its rights under the Texas Uniform Trade Secrets Act and the common law of trade secrets. Nonetheless, HMS's claim that Moiseenko misappropriated HMS's trade secrets is sufficiently "related to" the confidentiality provisions of the Noncompetition Agreement and Separation Agreements (collectively "Agreements") as to require the matter to be litigated in the courts of Texas.

The language of the forum selection clauses is mandatory, broad and unequivocal, encompassing not only matters "arising under" the Agreements, but also matters "relating to" any provision thereof. "To arise out of' . . . generally indicates a causal connection", whereas the phrase "relating to" is "defined more broadly" to simply mean "connected by reason of an established or discoverable relation" (*Coregis Ins. Co. v American Health Found., Inc.*, 241 F3d 123, 128-129 [2d Cir 2001] [Sotomayor, J.]). For this reason, the Court is unpersuaded by HMS's reliance on cases involving forum selection clauses that are limited to matters "arising out [*4]of" contracts (*see e.g. Phillips v Audio Active Ltd.*, 494 F3d 378, 390-392 [2d Cir 2007]; *cf. Hansa Consult of N. Am. v Hansaconsult Ingenieurgesellschaft*, 163 NH 46, 52-55 [2011]).

The parties' Agreements define the scope of HMS's confidential and proprietary information and impose upon Moiseenko a continuing duty to refrain from disclosing or using such information, including trade secrets. There is nothing in the Agreements that limits this duty to confidential and proprietary information acquired by Moiseenko during the course of her employment. In fact, HMS argued in *Arendt* that the same contractual language applies to confidential and proprietary information acquired by a former employee following the termination of her employment (*see* Prior Decision, at pp 19-20; *see also HMS v Arendt*, NYSCEF Documents Nos. 436-440).

Moreover, while HMS has chosen to forego the assertion of contract claims based upon alleged breaches of the confidentiality provisions of the Agreements, a party cannot avoid the consequences of the forum selection clause through artful pleading (*see Tourtellot v Harza Architects, Engrs. & Constr. Mgrs.*, 55 AD3d 1096 [3d Dept 2008]). The Complaint here is replete with allegations concerning HMS's confidential and proprietary information, a key subject matter of the Agreements (*see e.g.* Complaint ¶¶ 1, 56 [Moiseenko "knowingly us[ed] confidential, proprietary, and trade secret information belonging to HMS in breach of [her] respective agreements, confidential relationship[] or dut[y], by using it for [her] own behalf, and/or disclosing such information"]). Thus, the cause of action for trade secret misappropriation is premised largely upon the same operative facts as the unasserted breach-of-contract claim.

The confidentiality provisions of the Agreements also are implicated by the relief sought by HMS on its misappropriation claim. The Complaint emphasizes Moiseenko's access to and knowledge of HMS's confidential information and trade secrets during her HMS employment (*see e.g.* Complaint ¶¶ 12, 39-43). These allegations are directed, at least in part, to the issue of whether HMS would suffer irreparable harm absent an injunction prohibiting Moiseenko from performing TPL work for PCG. Further, the preliminary injunction sought by HMS encompasses not only the protection of its trade secrets, but also any "other confidential or proprietary information" belonging to

HMS.

Based on the foregoing, the Court concludes that Moiseenko has demonstrated a sufficient relationship between HMS's misappropriation claim and the Agreements defining the scope of HMS's confidential and proprietary information and imposing a duty upon her to protect the information. As a result, the forum selection clauses assented to by the parties require the misappropriation claim to be litigated in the Texas courts.

In addition to the relationship between the misappropriation claim and the confidentiality provisions of the Agreements, the Court also is mindful of the relationship between the causes of action alleged in the Complaint. HMS now concedes that at least a portion of this case must be litigated in Texas: its second cause of action alleging that "Moiseenko breached her fiduciary duties to HMS by improperly soliciting, acquiring, disseminating, disclosing, and using HMS's confidential and proprietary information and trade secrets" subsequent to the termination of her employment (Complaint ¶ 65). The interests of consistency and judicial economy would not be well served by allowing claims premised on the same operative facts to be split between two States. This is true even without regard to the potential preclusive effect that a judgment [*5]rendered in one forum may have on an action commenced in the other (*see Tovar v Tesoros Prop. Mgt., L.L.C.*, 119 AD3d 1127, 1128-1130 [3d Dept 2014]).[FN3]

The final cause of action alleges civil conspiracy against both defendants. "New York does not recognize civil conspiracy to commit a tort, including conversion, as an independent cause of action. Accordingly, a claim alleging conspiracy to commit a tort stands or falls with the underlying tort" (*Dickinson v Igoni*, 76 AD3d 943, 945 [2d Dept 2010]). Having concluded that the underlying tort claims against Moiseenko must be litigated in Texas because they "relate to" the Agreements, the Court further concludes that the civil conspiracy claim against Moiseenko also must be litigated in Texas.

Accordingly, the branch of Moiseenko's motion seeking dismissal of the Complaint as against her on the basis

of the forum selection clauses should be granted, without prejudice to HMS refiling the action in a proper forum.

FLORA

HMS moves for a preliminary injunction restraining Flora from: (1) disclosing, disseminating or using its trade secrets or other confidential or proprietary information; (2) providing TPL services on behalf of PCG; and (3) soliciting or diverting any of HMS's state Medicaid clients. To obtain a preliminary injunction, the moving party has the burden of demonstrating: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable harm in the absence of the requested injunctive relief; and (3) a balance of the equities tipping in favor of the movant (*see* CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Confidential Brokerage Servs., Inc. v Confidential Planning Corp.*, 85 AD3d 1268, 1269 [3d Dept 2011]).

The Court finds that HMS's written submissions demonstrate a likelihood of success on its claim that Flora misappropriated and misused HMS's trade secrets, the prospect of irreparable harm if injunctive relief is not granted, and a balance of the equities tipping in plaintiff's favor. Accordingly, the requested relief should be granted.[FN4]

CONCLUSION

Accordingly, it is

ORDERED that the motion of Elena Moiseenko seeking dismissal of the Complaint on the basis of the forum selection clauses is granted; and it is further

ORDERED that the Complaint is dismissed as against Elena Moiseenko, without prejudice to refiling in a

proper forum; and it is further

ORDERED that HMS's motion for a preliminary injunction against Elena Moiseenko is denied as academic; and it is further

ORDERED that HMS's motion for a preliminary injunction against Joseph Flora is granted; and it is further

ORDERED that Joseph Flora, his agents and all persons or entities acting in concert or [*6]cooperation with him, or acting under his direction, directly or indirectly, are preliminarily enjoined from: (1) disclosing, disseminating or using any of HMS's trade secrets; (2) marketing, developing, offering or providing TPL services in any manner on behalf of Public Consulting Group, Inc.; and (3) soliciting or diverting, or attempting to solicit or divert, any of HMS's state Medicaid clients; and finally it is

ORDERED that the remaining parties to this action shall confer regarding a schedule for discovery and the filing of a note of issue and, within thirty (30) days, either: (i) stipulate to a scheduling order, which shall be submitted to the Court for approval; or (ii) request a scheduling conference with the Court.

This constitutes the Decision & Order of the Court. The original Decision & Order is being transmitted to HMS's local counsel for filing and service; an electronic copy is being uploaded to NYSCEF. The signing of this Decision & Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York

November 13, 2015

Richard M. Platkin

A.J.S.C.

Papers Considered:NYSCEF Documents Nos. 6-64.

Footnotes

Footnote 1: Moiseenko also asserts the threshold defense of lack of personal jurisdiction, but "the very point' of forum selection clauses . . . is to avoid litigation over personal jurisdiction, as well as disputes arising over the application of the long-arm statute" (*Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006]).

Footnote 2: The Noncompetition Agreement and Separation Agreement both are governed by Texas law, but the parties have not identified any conflict of laws regarding the interpretation and enforcement of forum selection clauses.

Footnote 3:HMS has not identified any impediment to all of its claims against Moiseenko being determined in a single Texas forum.

Footnote 4: In the absence of any opposition to the motion for a preliminary injunction, the Court will dispense with the requirement of an undertaking.

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