SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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MULTIPLIER INC.,D/B/A HARNESS WEALTH,

Plaintiff,

- v -

LAURA MORENO and ESHARES, INC. D/B/A CARTA, INC.,

Defendant.

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INDEX NO. 653428/2022

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 25

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

This is an action by plaintiff Multiplier Inc. d/b/a Harness Wealth (Harness) against its former employee, Laura Moreno, and Moreno's current employer, eShares, Inc. d/b/a Carta, Inc. (Carta). In motion sequence 001, defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

Background

Unless indicated otherwise, the following facts are taken from the complaint and, for the purposes of this motion, are accepted as true.

Harness "helps equity owners – primarily employees of startup companies – navigate the tax and financial complexities that come with equity ownership," analyzing "its clients' personal and financial events, income, assets, goals, and personal preferences and then" connecting clients with advisors. (NYSCEF 7, Complaint ¶ 11.) In 2020, Harness began developing "the concept of a tax advisory platform whereby

Harness would partner with technology companies to provide their employees with the education and advice needed to maximize the value of their equity ownership." (*Id.* ¶ 13.)

In August 2020, Harness began searching for a tax specialist to aid in growing this platform and ultimately offered the position of Senior Tax Manager to Moreno.[1] (*Id.* ¶¶ 13-14.) As a condition of employment, Moreno executed a Propriety Information and Assignment Agreement (Agreement) on August 25, 2020.[2] (*Id.* ¶¶ 14, 18.) The Agreement includes the following noncompetition covenant:

> "[i]n order to protect the Company's Proprietary Information and good will, during my Service Relationship and for a period of one (1) year following the termination of my position of as a Service Provider for any reason (the 'Restricted Period'), I will not directly or indirectly, whether as owner, partner, shareholder, director, manager, consultant, agent, employee, co-venturer or otherwise, engage, participate or invest in any business activity anywhere in the United States that develops, manufactures or markets any products, or performs any services, that are otherwise competitive with or similar to the products or services of the Company (including its subsidiaries (including joint ventures)), or products or services that the Company (including its subsidiaries (including joint ventures)) has under development or that are the subject of active planning at any time during my Service Relationship; provided that this shall not prohibit any possible investment in publicly traded stock of a Company representing less than one percent of the stock of such Company.... I acknowledge and agree that if I violate any of the provisions of this paragraph 8, the running of the Restricted Period will be extended by the time during which I engage in such violation(s)." (NYSCEF 8, Agreement ¶ 8.)

The Agreement also includes the following provisions regarding proprietary information:

> "I agree that all information, whether or not in writing, concerning the Company's business, technology, business relationships or financial affairs which the Company has not released to the general public and

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[1] Moreno is a certified public accountant. (NYSCEF 7, Complaint ¶ 30.)

[2] Although the copy of the Agreement submitted is not signed (NYSCEF 8, Agreement), Moreno concedes that she signed the Agreement. (NYSCEF 9, Defendants' MOL at 6 n 2.)

> which is provided to me by or on behalf of the Company in connection with the Service Relationship, [or] which I have obtained through my Service Relationships or is generated by me as an intended deliverable to the Company pursuant to the Service Relationship (collectively, 'Proprietary Information') is and will be the exclusive property of the Company. By way of illustration, Proprietary Information may include information or material which has not been made generally available to the public, such as: … (d) *operational and technological information*, including plans, specifications, manuals, forms, software, designs, methods, procedures, formulas, discoveries, inventions, improvements, concepts and ideas." (*Id.* ¶ 1.)
>
> "All files, letters, notes, memoranda, reports, records, data, sketches, drawings, notebooks, layouts, charts, quotations and proposals, specification sheets, or other written, photographic or other tangible material containing Proprietary Information, whether created by me or others, which come into my custody or possession, are the exclusive property of the Company to be used by me only in the performance of my duties for the Company. (*Id.* ¶ 6.)

"Upon joining Harness, Moreno was responsible for developing and administering the Harness For Employers program, which Harness marketed as an 'HR financial wellness program for tech companies.'" (NYSCEF 7, Complaint ¶ 19.) Specifically, she "curated a set of educational presentations for clients regarding equity ownership and related tax considerations" which "focused on key liquidity events that could create significant tax implications for the employees' equity options." (*Id.*) The presentations were coupled with employee education sessions. (*Id.*) Harness alleges these educational presentations and sessions constitute Proprietary Information under the Agreement. (*Id.*) Moreno also contributed to developing software tools to aid clients in managing their equity. (*Id.* ¶ 20.)

Harness alleges that it provided Moreno with significant training, "including with respect to the substance of the presentations, the structure of the presentations, the creation of the one-on-one tax planning sessions, the software tools that accompanied both, and the pricing model that Harness would use to maximize the revenue derived

from these products and services." (*Id.* ¶ 21.) Moreno was "the face of the program" and directly interacted with Harness's clients. (*Id.*)

In the summer of 2021, Carta, a software company, began recruiting Moreno. (*Id.* ¶ 23.) Carta "decided to branch out to equity tax advisory services" and "[t]o that end … acquired YearEnd, a firm that created and developed a tax management and optimization product for tech and startup employees." (*Id.*) Thus, Carta would be providing the same services and products as Harness For Employers. (*Id.*)

In the fall of 2021, Moreno informed Harness that she was leaving. (*Id.* ¶ 25.) Shortly thereafter, Moreno revealed her new job as Tax Delivery Lead at Carta via her LinkedIn page. (*Id.*) Harness alleges that Moreno performs the same job responsibilities at Carta as those she performed at Harness, i.e., "developing software and advising clients on how to reach optimal tax outcomes with their equity-based compensation." (*Id.* ¶ 26.) Thus, in October 2021, Harness sent Moreno a cease-and-desist letter, copying Carta, demanding that Moreno cease engaging in any competitive activities pursuant to the Agreement's noncompete provision. (*Id.* ¶ 27.) No response followed. (*Id.* ¶ 28.)

In the spring of 2022, Carta "rolled out its new tax and equity advising service, which mimicked Harness For Employers in all material respects," providing "equity education to technology companies and their employees using the same three components as Harness for Employers – company-wide education sessions, individualized consultations with employees, and supporting software." (*Id.* ¶ 29; *see* NYSCEF 3, Carta: Equity and Tax Advisory at 4.)

In addition to performing virtually identical job responsibilities, Harness alleges Moreno used and/or disclosed Harness' proprietary information to Carta. (NYSCEF 7, Complaint ¶ 37.)

On September 19, 2022, Harness initiated this action for breach of the Agreement's noncompetition and proprietary information provisions, a declaratory judgment, tortious interference with contract, and unjust enrichment. Harness seeks compensatory and punitive damages, injunctive relief, and costs and attorneys' fees pursuant to paragraph 11 of the Agreement. (*Id*. at 18.)

Discussion

"A cause of action may be dismissed under CPLR 3211(a)(1) only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].) On a CPLR 3211 (a) (7) motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs 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] [citation omitted].) "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to

dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

Noncompetition Covenant

Defendants argue that the noncompetition provision is unreasonable, and thus, unenforceable as a matter of law. Defendants further contend that because the noncompetition provision forms the basis for all the claims, the complaint must be dismissed in its entirety.

> "The modern, prevailing common-law standard of reasonableness for employee agreements not to compete applies a three-pronged test. A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public .... A violation of any prong renders the covenant invalid. (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-89 [1999] [internal quotation marks and citations omitted].)

"[A] restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." (*Id.* at 389.) "In cases between professionals, courts recognize the legitimate interest an employer has against unfair competition, but to avoid broad restraints on competition, have limited such employer interests to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." (*Harris v Patients Med., P.C.*, 169 AD3d 433, 434 [1st Dept 2019] [internal quotation marks and citations omitted].) However, an "employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the

employer's expense, to the employer's competitive detriment." (*BDO Seidman*, 93 NY2d at 392 [citations omitted]; *see also Crown IT Servs. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004].)

Defendants contend that Harness fails to allege a legitimate employer interest. They argue that there are no allegations that (i) Moreno misappropriated Harness' trade secrets or confidential customer lists[3] or that (ii) her services were unique or extraordinary. In response, Harness asserts that the complaint contains allegations regarding the unique and extraordinary nature of Moreno's services, as well as Harness' interest in protecting the relationships and goodwill that it developed with its clients.

As to whether Moreno's services were unique and extraordinary, Harness alleges that Moreno was responsible for developing and administering Harness For Employees, contributed to software development, and eventually became the face of the program. (*Id.* ¶¶ 19-21.) However, there are no allegations that Moreno was "irreplaceable and that the [her] departure caused some special harm to" Harness. (*Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp*, LLC, 813 F Supp 2d 489, 510 [SD NY 2011] [citation omitted]; *see H & R Recruiters v Kirkpatrick*, 243 AD2d 680, 681 [2d Dept 1997] ["the employee's services [must be] … truly special, unique or extraordinary, and not merely of high value to his or her employer" (citation omitted)].) There are no allegations that Moreno had special value to Harness because of any relationships she developed with the clients or that she specifically developed a special or unique relationship with Harness' clients. (*See Henson Group, Inc. v Stacy*, 66 AD3d 611, 612 [1st Dept 2009] ["defendant's services were unique or irreplaceable in that, although the

[3] In its opposition brief, Harness does not dispute this.

technical services he performed could have been done by others, his special value was in his relationships with Microsoft personnel" (citation omitted)]; *Contempo Communications, Inc. v MJM Creative Servs., Inc.*, 182 AD2d 351, 354 [1st Dept 1992] [restrictive covenants was "necessary to protect the employer in view of the 'special relationship' which developed between the individual defendants and their clients"], *lv denied* 588 NYS2d 1003 [1992].) The allegation that Moreno was "the face of the program" as a result of her direct interaction with Harness' clients is insufficient. (NYSCEF 7, Complaint ¶ 21.) Direct interaction with clients does not automatically equate to the creation of a special or unique relationship.

Harness also fails to allege that it had a legitimate interest in protecting its goodwill. Absent from the complaint are any allegations that Moreno developed and maintained any relationships with Harness clients at Harness' expense. Nor are there any factual allegations that Harness developed significant business goodwill or client base which Moreno might exploit. The conclusory allegation that Moreno's breach resulted in "significant harm to Harness' goodwill … and the relationship Harness has with existing and prospective clients" is again insufficient. (*Id.* ¶ 4.) Accordingly, Harness has not sufficiently alleged that it had a legitimate interest worthy of protection by the noncompetition clause.

Nevertheless, even if Harness alleged a legitimate interest, the noncompetition provision is overbroad and the geographic scope is unreasonable on its face as it prohibits Moreno's involvement in virtually any capacity in "any business activity anywhere in the United States that develops, manufactures or markets any products, or performs any services, that are otherwise competitive with or similar to the products or

services of the Company (including its subsidiaries (including joint ventures)), or products or services that the Company (including its subsidiaries (including joint ventures)) has under development or that are the subject of active planning at any time during my Service Relationship." (NYSCEF 8, Agreement ¶ 8.) Such "broad-sweeping language is unrestrained by any limitations keyed to uniqueness, trade secrets, confidentiality or even competitive unfairness." (*Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [1977]; *Reed, Roberts Assoc., Inc. v Strauman*, 40 NY2d 303, 307 [1976] [holding that "a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" (citation omitted).) Accordingly, "on its face the covenant is too broad to be enforced as written." (*Columbia Ribbon & Carbon Mfg. Co.*, 42 NY2d at 499 [citations omitted].) Thus, The breach of contract claim is dismissed to the extent it is predicated on Moreno's alleged violation of the noncompetition clause.

The court notes that, contrary to Harness' contention, where appropriate, courts can resolve the issue of whether a noncompetition clause is enforceable on motion to dismiss stage. (*See e.g. Source v Hubbard*, 2020 NY Misc LEXIS 21365, at *12-15 [Sup Ct, NY County 2020]; *Admarketplace Inc. v Salzman*, 2014 NY Misc LEXIS 1458, 2014 NY Slip Op 30813[U], *5-6 [Sup Ct, NY County 2014].)

Proprietary Information

Harness also alleges that the Agreement "prohibits Moreno from disclosing and using Harness' Propriety Information – defined to include 'software, designs, methods, procedures…improvements, concepts and ideas' – for any purpose other than the

performance of her duties at Harness" and Moreno has disclosed such information in violation of her obligation. (NYSCEF 7, Complaint ¶¶ 36-37.) Defendants do not address this breach in their motion. Although defendants argue that the complaint must be dismissed because the noncompetition provision forms the basis for all the claims, any obligation Morena had not to use or disclose proprietary information is governed by paragraph 6 of the Agreement and not paragraph 8, the noncompete provision. Defendants do not address the Agreement's severability clause. (See NYSCEF 8, Agreement ¶ 16.) The breach of contract claim remains as to this alleged breach.

Declaratory Judgment Claim against Moreno

Harness seeks a declaration that "the running of the Restricted Period [in the noncompetition provision] has been and will be tolled during the time in which Moreno is employed by Carta and participating in, affiliated with, or otherwise involved in any way with its tax and equity advisory service." (NYSCEF 1, Complaint ¶ 45.) Because the noncompetition covenant is invalid, this claim is dismissed.

Tortious Interference with Contract Claim against Carta

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] [citations omitted].)

To the extent the tortious interference with contract claim is predicated on the allegations that Carta induced Moreno to violate the noncompetition provision, this claim is dismissed. To the extent this claim is predicated on the allegations that Carta

induced Moreno to use and disclose Harness' proprietary information in violation of the Agreement, Harness fails to allege Carta's knowledge of the Agreement's provision on proprietary information. Harness' conclusory allegation that "Carta was at all relevant times aware of the Agreement between Moreno and Carta" is insufficient. (NYSCEF 1, Complaint ¶ 49.) Although Harness alleges that it sent cease and desist letter to Moreno in October 2021, on which Carta was copied, the letter only "remind[ed] her of the Non-Compete Provision and demand[ed] that she cease any participation in marketing or offering products or services competitive with those offered by Harness." (*Id.* ¶ 27.) Harness does not allege that the letter included any information about Moreno's obligation under the Agreement's provision on proprietary information. (*See Landmark Ventures, Inc. v InSightec, Ltd.*, 179 AD3d 493, 494 [1st Dept 2020] [defendant's knowledge of contract not alleged where email to defendant "provide[d] no information about the 'agreement'"].) There are no allegations from which the court may reasonably infer that Carta was aware of the relevant provision. (*See L.I. City Ventures LLC v Sismanoglou*, 158 AD3d 567, 568 [1st Dept 2018] [holding that defendant Apostolakis "had substantive dealings with plaintiff, from which it can be inferred that he knew of the exclusive brokerage agreement" between plaintiff and defendant corporation, which was created by Apostolakis and two other individual defendants].) Accordingly, this claim is dismissed.

Unjust Enrichment against Moreno and Carta

"[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an

actual agreement between the parties." (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [internal quotation marks and citations omitted].)

To the extent Harness seeks to recover from Moreno for her alleged usurpation of Harness' proprietary information, this claim is precluded as to her by the existence of the Agreement. (*See id.*; *Pappas v Tzolis*, 20 NY3d 228, 234 [2012], *rearg denied* 20 NY3d 1075 [2013].) Insofar as Harness seeks to recover from Moreno based on her alleged conduct in joining Harness' competitor, "equity need not intercede" as Harness alleges to have received benefits of Moreno's employment. (*Meghan Beard, Inc. v Fadina*, 82 AD3d 591, 593 [1st Dept 2011] [unjust enrichment claim was properly dismissed because plaintiffs received benefit from its relationship with defendant].)

Defendants argue that the unjust enrichment claim fails as against Carta because there are no allegations that Harness relied on Carta or that Carta did anything more than hire Moreno. Defendants also argue that the relationship between Carta and Harness is too attenuated.

"[P]laintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party." (*Georgia Malone & Co., Inc.*, 19 NY3d at 516 [citation omitted].) "[A]lthough the plaintiff [is] not required to allege privity, it ha[s] to assert a connection between the parties that was not too attenuated." (*Id.* at 517 [citation omitted].) Plaintiff need not allege reliance or inducement to plead sufficiently close relationship with defendant. (*See Vincent V Hodes Family Irrevocable Trust v Advance Entertainment LLC*, 2020 NY Misc LEXIS 2631, 2020 NY Slip Op 31786[U], *3-5 [Sup Ct, NY County 2020].)

Here, Harness has not alleged a relationship with Carta "other than that of competitor, therefore, a claim for unjust enrichment is too attenuated and will not lie." (*The Jones Group Inc. v Zamarra*, 2014 NY Misc LEXIS 2485, 2014 NY Slip Op 31448[U], *25 [Sup Ct, NY County 2014] [dismissing plaintiff's unjust enrichment claim against new employer of plaintiff's former workers].) Accordingly, this claim is dismissed as against both defendants.

The court has considered the parties' remaining arguments and finds that they do alter the court's determination.

Accordingly, it is

ORDERED that motion sequence 001 is granted, in part, to the extent that (1) the complaint is dismissed in its entirety as against defendant eShares, Inc., d/b/a Carta, Inc. with costs and disbursements to this defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant and (2) to the extent the complaint is dismissed, in part, as against defendant Laura Moreno, to the extent that the breach of contract claim predicated on defendant Laura Moreno's alleged violation of the noncompetition provision of the Agreement is dismissed against said defendant as well as the claims for declaratory judgment and unjust enrichment;

ORDERED that the remaining portion of the breach of contract claim is severed and continues against defendant Laura Moreno; and it is further

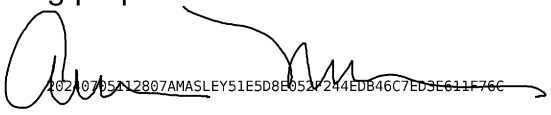
ORDERED that the caption be amended to reflect the dismissal of defendant eShares, Inc., d/b/a Carta, Inc. and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for eShares, Inc., d/b/a Carta, Inc. shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that defendant Laura Moreno is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to submit a joint proposed Part 48 Preliminary Conference Order by July 19, 2024 at 5 pm by email and filing in NYSCEF. If the parties cannot agree, they may submit competing proposed PC Orders.



7/5/2024
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE