JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 17-3619 PA (AFMx)	Date	June 2, 2017
Title	Oren Enterprises, Inc., et al. v. Stefanie Cove & Co., et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
V.R. Vallery	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
None	None

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is a Motion to Compel Arbitration filed by defendants Stefanie Cove ("Cove"), Catherine Shell ("Shell"), and Stefanie Cove and Company ("SCC") (collectively "Defendants") (Docket No. 15). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is are appropriate for decision without oral argument. The hearing scheduled for June 19, 2017, is vacated, and the matter taken off calendar.

I. Factual and Procedural Background

Plaintiffs Oren Enterprises, Inc. ("Oren Enterprises") and Yifat Oren ("Oren") (collectively "Plaintiffs") commenced this action on May 12, 2017. According to the Complaint, Cove worked at Oren Enterprises until December 7, 2016, when she resigned as an executive at Oren Enterprises, and then launched SCC. Both Oren Enterprises and SCC provide event planning services for celebrities, high net worth individuals, and others. Shell worked at Oren Enterprises until she resigned on January 9, 2017, and now works at SCC. Plaintiffs allege that while still working at Oren Enterprises, Cove stole trade secrets and confidential information, including client contact and vendor information, for the benefit of SCC. Plaintiffs also allege that Cove copied data from a computer and hard drive issued to her by Oren Enterprises prior to her resignation, and prior to returning those items and a company-issued mobile phone, deleted information from those devices. Oren Enterprises similarly alleges that Shell copied trade secrets and confidential information from a computer issued to her by Oren Enterprises in the weeks before her resignation. Plaintiffs allege that Cove, Shell, and SCC have used this stolen information to solicit Oren Enterprises' clients. According to Oren, Cove defamed her by calling her, among other things, "crazy" and "bipolar" to clients, vendors, and employees of Oren Enterprises.

While employed by Oren Enterprises, Cove and Shell executed employment agreements that contained provisions concerning confidentiality, non-competition/non-solicitation, and arbitration. Specifically, those clauses provide:

> 7. Confidentiality. Employee acknowledges that as a result of Employee's employment relationship with Company, Employee shall have access to a

great variety of written, oral and visual personal and private information about Company, its partners, principals, clients, suppliers and other employees and personal and business associates of Company, and proprietary information and trade secrets of Company (consisting of written, oral and visual material) including, but not limited to, financial information, projects, potential projects, projects in development, corporate and personal business contacts and relationships, personal information, habits and preferences, corporate and personal business opportunities, techniques, marketing plans, strategy, forecasts, written and intellectual material and concepts, databases, telephone logs or messages, video or audio tapes and/or disks, photographs, film, slides including all negatives and positive and prints, computer disks or files, e-mail, rolodex cards or other lists or files of names, addresses or telephone numbers, contracts, releases, and/or journals and calendars compiled by Employee and/or others that contain references to Company, its officers, directors, principals, clients, suppliers, employees and personal and business associates, whether contained in documents, business records of any kind, writings of any kind or nature whatsoever, and other documents, materials or writings that belong to Company, including those which are prepared or created by Employee or come into possession of Employee by any means or manner and which relate directly or indirectly to Company, its partners, principals, clients, or any of them (all of the above collectively "Proprietary Information"). Employee agrees as follows:

(a) All Proprietary Information shall be the sole property of Company and its assigns. Employee hereby assigns to Company any rights he/she may have or acquire in all Proprietary Information during his/her performance of services hereunder.

(b) Employee represents that his/her performance of all terms of this Agreement as an employee of Company does not and will not breach any agreement to keep in confidence Proprietary Information acquired by him/her in confidence or in trust prior to his/her employments. Employee has not entered into, and agrees that he/she will not enter into, any agreement, either written or oral, in conflict herewith.

(c) Employee agrees not to disclose to any person, other than in furtherance of Company's business, or use, other than in Company's business, any Proprietary Information, either during or after his/her employment or the termination of this Agreement, except with the express written permission of Company's

President. Employee understands that information and materials received in confidence by Employee from third parties either within or outside of Company with regard to the business of Company is included within the meaning of this Section [7]. Upon termination of his/her employment, Employee agrees not to make copies of written or electronic Proprietary Information and Employee agrees to return all written Proprietary Information to Company.

8. Non-Competition/Non-Solicitation.

(a) During the term of Employee's employment with Company, Employee shall not directly or indirectly promote, participate or engage in any business or activity which is competitive with any current or future business or products of Company, whether as an officer, director, employee, sales representative, individual proprietor, consultant, holder of debt or equity securities, partner, creditor, promoter, or otherwise. Employee's failure to comply with the provisions of the preceding sentence shall give Company the right (in addition to all other remedies Company may have) to terminate any benefits or compensation to which Employee may be otherwise entitled following termination of his/her employment hereunder.

(b) Employee agrees that during his/her employment with Company, and at all times thereafter, Employee will not directly or indirectly: (a) induce any client of Company or its successors to patronize any business similar to the present or future business of Company or its successors; (b) request or advise any client, vendor or supplier of Company or its successors to withdraw, curtail or cancel customer's vendor's or supplier's business with Company or its successors; (c) disclose to any other person the names or addresses of any of the clients of Company or its successors; or (d) induce or encourage any employee to terminate his/her relationship with Company. In addition, Employee agrees that, if his/her employment hereunder is terminated, he/she will not directly or indirectly, employ or attempt to employ any of Company's employees.

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9. Agreement To Arbitrate - WAIVER OF JURY TRIAL. Except as provided herein, any controversy or claim arising out of or relating in any way to this Agreement or the breach thereof, Employee's employment and any statutory claims including all claims of employment discrimination shall be subject to private and confidential arbitration in the County of Los Angeles in accordance with the laws of the State of California. The arbitration shall be conducted in a procedurally fair manner by a mutually agreed upon arbitrator selected in accordance with the National Rules for the Resolution of Employment Disputes ("Rules") of the American Arbitration Association or if none can be mutually agreed upon, then by one arbitrator appointed pursuant to the Rules; the arbitration shall be conducted confidentially in accordance with the Rules; the arbitration fees shall be paid by the Company; each party shall have the right to conduct discovery including (3) depositions, requests for production of documents and such other discovery as permitted under the Rules or ordered by the arbitrator; the arbitrator shall have the authority to award any damages authorized by law for the claims presented including punitive damages and shall have the authority to award reasonable attorneys fees to the prevailing party; the decision of the arbitrator shall be final and binding on all parties and shall be the exclusive remedy of the parties; and the award shall be in writing in accordance with the Rules, and shall be subject to judicial enforcement and review in accordance with California law.

(Wanner Decl. Exs. A & B.)

According to Defendants, before commencing this action, Plaintiffs filed, on March 24, 2017, a similar action in Los Angeles Superior Court. Plaintiffs twice applied ex parte for temporary restraining orders from the Los Angeles Superior Court, but those applications were denied. Plaintiffs dismissed the state court action on May 11, 2017, and filed this action the next day. After Defendants filed this Motion to Compel Arbitration, Plaintiffs filed a Motion for Preliminary Injunction in this Court. That Motion for Preliminary Injunction is currently set for a hearing on July 3, 2017.

Plaintiffs' federal action asserts claims for: (1) misappropriation of trade secrets in violation of the Defend Trade Secrets Act, 18 U.S.C. § 1831, against Cove, Shell, and SCC; (2) misappropriation of trade secrets in violation of the California Uniform Trade Secrets Act, Cal. Civ. Code § 3426.1, against Cove, Shell, and SCC; (3) violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, based on unauthorized access, against Cove; (4) violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, based on unauthorized wiping of data, against Cove; (5) conversion against Cove, Shell, and SCC; (6) breach of contract against Cove and Shell; (7) breach of fiduciary duty and duty of loyalty against Cove and Shell; (8) breach of confidence against Cove and Shell; (9) intentional interference with contract against Cove, Shell, and SCC; (10) tortious interference with prospective economic relations against Cove, Shell, and SCC; (11) unfair competition pursuant to California Business and Professions Code section 17200 against Cove, Shell, and SCC; (12) unjust enrichment against Cove, Shell, and

SCC; (13) defamation brought by both Oren and Oren Enterprises against Cove; (14) false and misleading statements pursuant to California Business and Professions Code section 17500 against Cove and SCC; and (15) injunctive relief.

II. Legal Standard

"The [Federal Arbitration Act ("FAA")] provides that any arbitration agreement within its scope 'shall be valid, irrevocable, and enforceable,' and permits a party 'aggrieved by the alleged . . . refusal of another to arbitrate' to petition any federal district court for an order compelling arbitration in the manner provided for in the agreement." Chiron Corp. v. Ortho Diagnostic Systems, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000) (quoting 9 U.S.C. § 4). The FAA reflects both a "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011) (quotations and citations omitted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." Id. (internal citations omitted). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 105 S. Ct. 1238, 1241, 84 L. Ed. 2d 158 (1985). "The court's role under the Act is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. . . . If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." Chiron Corp., 207 F.3d at 1130 (citations omitted).

III. Analysis

Defendants' Motion to Compel Arbitration seeks to enforce the binding arbitration clauses contained in the employment agreements between Oren Enterprises, Cove, and Shell. In their Opposition, Plaintiffs assert that at least some of the claims in their Complaint, including the defamation claim asserted individually by Oren, and claims asserted against SCC, are not subject to the arbitration agreement because neither Oren in her individual capacity nor SCC were parties to those agreements. Plaintiffs also contend that even if some of the claims against Cove and Shell are subject to the arbitration agreements for conduct occurring while they were employed by Oren Enterprises, the agreements do not apply to post-employment conduct. Plaintiffs seek to have the Court retain jurisdiction over any claims that are not subject to the arbitration agreements and exercise its discretion to consider Plaintiffs' pending request for a preliminary injunction.

Plaintiffs do not challenge the validity of the arbitration agreements and the Court concludes that, at a minimum, Plaintiffs' federal misappropriation of trade secret claim brought pursuant to the Defend Trade Secrets Act, alleged against Cove and Shell, and the Computer Fraud and Abuse Act claims alleged against Cove, are subject to the arbitration agreements. Although those claims include allegations concerning Cove and Shell's conduct after their resignations from Oren Enterprises, the employment agreements broadly apply to "any controversy or claim arising out of or relating in any way

to the Agreement or the breach thereof" and impose obligations concerning trade secrets, confidential information, and non-solicitation that continue beyond their dates of employment. (See, e.g., Wanner Decl. Exs. A & B §§ 7(c), 8(b), & 9 (including contractual provisions that apply"either during or after his/her employment or the termination of this Agreement" and "during his/her employment with Company, and at all times thereafter").) The federal claims alleged against Cove and Shell are therefore within the scope of the arbitration agreements.

The Court further concludes that despite not being a signatory to the arbitration agreements, SCC may also compel arbitration of, at a minimum, the federal trade secret claim asserted against it. "The United States Supreme Court has held that a litigant who is not a party to an arbitration agreement may invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement." Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128 (9th Cir. 2013) (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 632, 129 S. Ct. 1896, 1903, 173 L. Ed. 2d 832 (2009)). Among the principles of state contract law that may allow a nonsignatory to enforce an arbitration agreement are "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir. 2006) (citation omitted). Under California law, equitable estoppel applies to allow a nonsignatory to enforce an arbitration agreement "in two circumstances: (1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are 'intimately founded in and intertwined with' the underlying contract, and (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and 'the allegations of interdependent misconduct [are] founded in or intimately connected with the obligations of the underlying agreement.'" Kramer, 705 F.3d at 1128-29 (quoting Goldman v. KPMG LLP, 173 Cal. App. 4th 201, 219 & 221, 92 Cal. Rptr. 3d 534, 541 & 543 (2009)).

Here, Oren Enterprises' federal trade secret claim against SCC requires Oren Enterprises to rely on the terms of the employment agreements with Cove and Shell to assert that claim against SCC. The federal trade secret claim against SCC is also dependent upon and founded in or intimately connected with the obligations of the underlying agreements. Kramer, 705 F.3d at 1128-29. As a result, SCC may compel Oren Enterprises to arbitrate that claim.

For these reasons, the Court concludes that all of the federal claims asserted by Plaintiffs are subject to arbitration. While many if not all of the remaining state law claims also appear to fall within the scope of the arbitration agreements, the Court need not resolve those issues because it both declines to exercise supplemental jurisdiction over those claims and the parties agreed to allow the arbitrator to determine arbitrability. See 28 U.S.C. § 1367(c)(3); see also Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015) ("[W]e hold that incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability."); AAA Employment Rules and Mediation Procedures § 6(b) ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."); Wanner Decl. Exs. A & B § 9 ("The arbitration shall be conducted in a procedurally fair manner by a

mutually agreed upon arbitrator selected in accordance with the National Rules for the Resolution of Employment Disputes ("Rules") of the American Arbitration Association . . . .").

IV. Injunctive Relief

Plaintiffs have requested that the Court exercise its discretion to retain jurisdiction over this matter so that it may consider Plaintiffs' upcoming Motion for Preliminary Injunction. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." Id. The Ninth Circuit employs a "sliding scale" approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding scale," a preliminary injunction may issue "when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as long as the other two Winter factors have also been met. Id. (internal citations omitted). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997).

A plaintiff's delay in seeking relief weighs against granting a temporary restraining order or preliminary injunction. See Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm"); Lydo Enters., Inc. v. City of Las Vegas, 745 F.2d 1211, 1213 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief"); Hi-Rise Technology, Inc. v. Amateurindex.com, 2007 WL 1847249, at *4 (W.D. Wash. June 27, 2007) ("Such a long delay in seeking relief weights against granting a temporary restraining order or a preliminary injunction.").

Although the parties have not completed briefing on the Motion for Preliminary Injunction, it is apparent that Plaintiffs have delayed in seeking injunctive relief in this Court. Cove and Shell resigned from Oren Enterprises in December 2016 and January 2017, and Plaintiffs have known of Defendants' efforts to compete with Oren Enterprises and the alleged misappropriation of trade secrets and confidential information since then. The sixth month delay in seeking injunctive relief establishes a lack of irreparable harm that is, on its own, a sufficient basis to deny the injunctive relief Plaintiffs seek. Moreover, the Court notes that Plaintiffs tried and failed twice to obtain injunctive relief when a similar action was pending in Los Angeles Superior Court. This apparent forum shopping also justifies denying the provisional equitable relief Plaintiffs seek.

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Conclusion

For all of the foregoing reasons, the Court concludes that the arbitration agreements between Oren Enterprises, Cove, and Shell require the parties to arbitrate the federal claims alleged in this action. The Court therefore grants the Motion to Compel Arbitration. Plaintiffs' federal claims against Defendants are hereby referred to arbitration. Pursuant to the arbitration agreements, the arbitrator may determine the arbitrability of the remaining state law claims. Because the Court has resolved all of the claims over which it has original jurisdiction, the Court declines to exercise jurisdiction over the remaining supplemental claims. Those claims are therefore dismissed without prejudice. See 28 U.S.C. § 1367(c)(3). Given that all of Plaintiffs' federal claims are subject to arbitration, this action is dismissed. See Martin Marietta Aluminum, Inc. v. Gen. Elec. Co., 586 F.2d 143, 147 (9th Cir. 1978); Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988) (affirming trial court's dismissal of claims referred to arbitration). The Court denies the Motion for Preliminary Injunction (Docket No. 18). Defendants' Ex Parte Application to Modify the Briefing Schedule (Docket No. 19) is denied as moot.

IT IS SO ORDERED.