

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED RENTALS (NORTH	:
AMERICA), INC.,	:
Plaintiff,	:
	:
-vs-	: Civ. No. 3:03cv589(PCD)
	:
CHARLOTTE MYERS,	:
Defendant.	:

Plaintiff moves for a temporary restraining order pursuant to FED. R. CIV. P. 65. For the reasons set forth herein, the motion is **granted**.

I. BACKGROUND

Plaintiff is a Delaware corporation with its principal place of business in Connecticut.

Defendant is a citizen of Texas and former employee of plaintiff.

From May 20, 2002 until March 7, 2003, defendant worked for plaintiff in sales at its Shreveport, Louisiana office. During her term of employment, defendant had access to trade secrets involving sales and rental data, budget processes for market areas and rental projections, marketing plans and strategies, contract details, customer data, discount information, pricing information, cost information, financing information, financial information and fleet information. All information is available on plaintiff's computer system and none is made available to the public.

On her first day of work, defendant signed an employment agreement with plaintiff. The agreement contained a confidentiality clause prohibiting disclosure of certain information without plaintiff's permission. The agreement also contained a non-compete provision prohibiting, *inter alia*, employment with any company within one hundred miles of any location in which an employee

performed services, for a twelve month period after employment with plaintiff ends. The agreement finally provides that “[t]he interpretation and enforcement of the provisions of this Agreement shall be resolved and determined exclusively by the state or federal courts sitting in Fairfield County, Connecticut and such courts are hereby granted exclusive jurisdiction for such purpose.”

On March 7, 2003, defendant resigned from her sales position and accepted a position with Head & Enquist Equipment, Inc. (“H & E”), plaintiff’s competitor, located approximately ten miles from plaintiff’s Shreveport office in Bossier City, Louisiana. Defendant was reminded by plaintiff’s agent of the restrictive covenants contained in the agreement but indicated she would continue her employment. Defendant performs many of the same function for H & E as she did for plaintiff.

II. STANDARD

A party seeking a temporary restraining order must demonstrate irreparable harm and either (1) a likelihood of success on the merits or (2) sufficiently serious questions on the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the moving party’s favor.

Reuters Ltd. v. United Press Int’l, Inc., 903 F.2d 904, 907 (2d Cir.1990)); *see also Local 1814 Int’l Longshoremen’s Assoc. AFL-CIO v. New York Shipping Assoc., Inc.*, 965 F.2d 1224, 1228 (2d Cir. 1992) (standard for TRO is the same as preliminary injunction standard). “Irreparable harm must be shown by the moving party to be imminent, not remote or speculative, . . . and the alleged injury must be one incapable of being fully remedied by monetary damages.” *Reuters Ltd.*, 903 F.2d at 907. Likelihood of success on the merits does not require that the party demonstrate that success is an absolute certainty, rather the party need only show that the probability of his prevailing is better than fifty percent. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985).

III. DISCUSSION

Defendant objects to the present motion arguing that Louisiana law does not permit forum selection or choice of law clauses in employment agreements, thus Louisiana, not Connecticut, law applies and would not permit enforcement of the covenant not to compete. Forum selection clauses are, as a matter of federal law, prima facie valid. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) (“forum-selection clauses, although not historically . . . favored, are prima facie valid” (internal quotation marks omitted)); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) (forum selection clause should control absent “strong showing that it should be set aside”); *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718, 721-22 (2d Cir. 1982) (“a sufficient basis to hold that contractual forum-selection clauses will be enforced unless it clearly can be shown that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching” (internal quotation marks omitted)). As such, the present agreement suffices to establish jurisdiction over defendant.

As to the question of applicable law, when an agreement contains a choice of law clause, the district court must apply the law of the forum state to determine whether the clause will be honored. *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 393 (2d Cir. 2001); *Woodling v. Garrett Corp.*, 813 F.2d 543, 551 (2d Cir. 1987). In Connecticut, choice of law clauses are reviewed under RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187. *See Elgar v. Elgar*, 238 Conn. 839, 850, 679 A.2d 937 (1996).

[P]arties to a contract generally are allowed to select the law that will govern their contract, unless either: (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id. (internal quotation marks omitted). Defendant argues that the choice of law clause fails for want of a substantial relationship and for violation of a fundamental Louisiana policy prohibiting the enforcement of clauses enforceable in this forum.

Under Louisiana law,

The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.

LA. REV. STAT. ANN. § 23:921(A)(2). The highest court in Louisiana has indicated that § 23:921 "is an expression of strong Louisiana public policy." *Sawicki v. K/S Stavanger Prince*, 802 So.2d 598 (La. 2001) (addressing policy as to forum selection clauses). As such, the contract provisions at issue, specifically the non-competition clause, the forum selection clause and the choice of law clause contravene Louisiana public policy and thus render Connecticut law inapplicable under the Restatement approach. As the only contact plaintiff apparently has had with Connecticut apparently is by virtue of her employer's state of incorporation, Louisiana law applies.

Although Louisiana law is clearly less favorable to plaintiff, it is entitled to the remedy sought by

virtue of the confidentiality agreement. Notwithstanding its reluctance to enforce non-competition agreements, confidentiality agreements are enforceable if the material sought to be protected is in fact confidential. *See NCH Corp. v. Broyles*, 749 F.2d 247, 253 (5th Cir. 1985). Defendant appears not to take issue with plaintiff's claim that the subject information is in fact confidential but rather that information committed to memory is not protectable as a trade secret. As it is likely, given defendant's employment in close proximity to her former employer's location, her employer's competition with plaintiff in the market, and her assuming a position comparable to that formerly held, that she will utilize confidential information learned in the course of her former employment, good cause is found for issuance of the temporary restraining order. *See Maestri v. Destrehan Veterinary Hosp., Inc.*, 554 So.2d 805, 810 (La. App. 1989).

new position participation in the same market, and Whether confidential information gleaned from prior employment is protectable as a trade secret is neither here nor there. It suffices to say that the protection As such, this Court finds that defendant will disclose trade secrets in the course of her employment with plaintiff's competitor based on the proximity of the two

Under Connecticut law, non-compete clauses will be upheld if "they are reasonably limited and fairly protect the interests of both parties." *Robert S. Weiss & Associates, Inc. v. Wiederlight*, 208 Conn. 525, 530, 546 A.2d 216 (1988). In light of clauses that have been upheld by Connecticut involving up to a statewide prohibition for a term of five years, *see Scott v. General Iron & Welding Co.*, 171 Conn. 132, 138, 140, 368 A.2d 111 (1976), the present clause involving a one hundred mile geographical restriction for a period of one year is not patently unreasonable. There appears to be no substantive dispute as to the enforceability of the confidentiality clause.

Proceeding to the merits of the motion for a temporary restraining order, there is no dispute that defendant is employed, to some extent, by plaintiff's competitor. There further appears no dispute that she performs some of the same tasks performed while in plaintiff's employ. As such, the undisputed facts under Connecticut law themselves establish a likelihood of success on the merits.

There further appears to be no dispute that defendant was privy to business information meeting the definition of trade secrets. *See* CONN. GEN. STAT. § 35-51(d) (defining trade secret as “information, including a formula, pattern, compilation, program, device, method, technique, process, drawing, cost data or customer list that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy”); *see also Elm City Cheese Co., Inc. v. Federico*, 251 Conn. 59, 74-75, 752 A.2d 1037 (1999) (describing protection afforded financial data and customer lists).

As the subject matter involved in the apparent breach of restrictive covenants involves the protection of trade secrets, the potential loss of a trade secret constitutes irreparable harm. *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir.1984) (“loss of trade secrets cannot be measured in money damages”); CONN. GEN. STAT. § 35-52(a) (prohibiting the “[a]ctual or threatened misappropriation” of trade secrets). Additionally, a breach of restrictive covenants, as involved here, generally justify a finding of irreparable harm resulting from such breach. *See Matts v. Lally*, 138 Conn. 51, 56, 82 A.2d 155 (1951) (“[i]rreparable damage would inevitably result from a violation of the defendant's promises”); *see also FMC Corp.*, 730 F.2d 63-64 (concluding narrowly

drawn preliminary injunction appropriate in circumstances involving breach of restrictive covenant under New York law). In light of defendant's present responsibilities and the likelihood that she will utilize plaintiff's trade secrets in the course of her day-to-day responsibilities with a competitor, it cannot be said that the present violation of a restrictive covenant will not cause plaintiff irreparable harm. Plaintiff has therefore established good cause for issuance of a temporary restraining order prohibiting defendant from violating the terms of her confidentiality agreement and non-compete clause.

IV. CONCLUSION

Plaintiff's motion for a temporary restraining order (Doc. No. 8) precluding defendant from competing against plaintiff or disclosing plaintiff's trade secrets, per terms of her employment agreement, is **granted**.

SO ORDERED.

Dated at New Haven, Connecticut, April ____, 2003.

Peter C. Dorsey
United States District Judge

802 So.2d 598
La. R.S. § 23:921