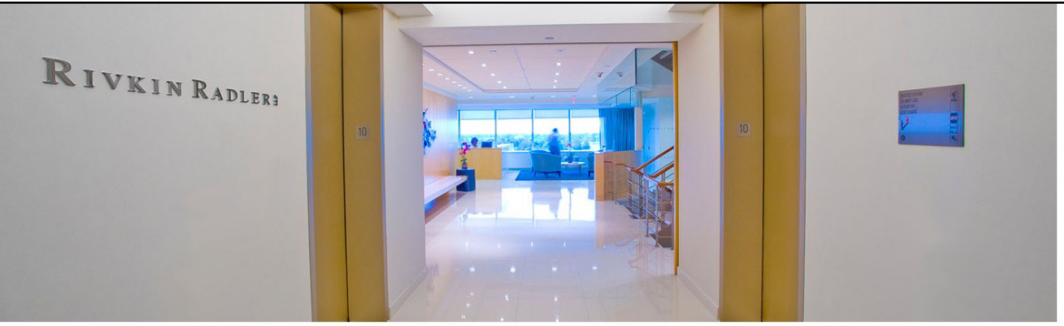

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Federal Court Rejects New York City Police Officer's Employment Discrimination Action

The U.S. District Court for the Southern District of New York has granted summary judgment to the defendants in an employment discrimination lawsuit filed by a New York City police officer.

The Case

Marash Vucinaj, a New York City police officer who identifies as a white male of Albanian ethnicity and national origin, sued the New York City Police Department (the "NYPD") and New York City alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Section 1981"), the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL").

In particular, Vucinaj brought claims for failure to promote and hostile work environment based on his race, color, sex, national origin, and/or religion, and a claim based on denial of overtime work opportunities.

The defendants moved for summary judgment on all claims.

The Court's Decision

The court granted summary judgment to the defendants (except that it declined to exercise jurisdiction with respect to Vucinaj's failure to promote claim under the NYCHRL).

In its decision, the court first granted summary judgment to the NYPD on all claims, finding that the NYPD was "not a suable entity." The court explained that the city was the proper suable entity for claims involving the NYPD.

The court also granted summary judgment to the defendants on Vucinaj's Section 1981 claims, noting that Section 1981 "does not provide a separate private right of action against state actors" and that Vucinaj did not allege that he was bringing his Section 1981 claims under 42 U.S.C. § 1983.

Next, the court granted summary judgment to the defendants on Vucinaj's failure to promote claims, reasoning that Vucinaj had not established a prima facie case of race, color, sex, national origin, and/or religious discrimination, and had not offered sufficient evidence of discriminatory intent.

The court acknowledged that Vucinaj, as a white male of Albanian ethnicity and national origin, was a member "of a protected class." It found, though, that the defendants had offered a "legitimate, non-discriminatory reason" for denying Vucinaj a promotion through evidence that Vucinaj did not receive a recommendation from his bureau head after his application was submitted and reviewed, and that receiving a "[r]ecommendation for promotion by [a bureau head was] an accurate gauge of who will be considered for promotion within the calendar year." Moreover, the court continued, the defendants also offered evidence that, while not determinative, a candidate's disciplinary history was a factor in the promotion process and that Vucinaj "did not have a spotless disciplinary history."

Therefore, the court ruled that Vucinaj had not provided sufficient evidence from which a reasonable jury could conclude that the defendants' decision not to promote him was motivated in whole or in part by discrimination.

The court also was not persuaded by Vucinaj's hostile work environment claims under Title VII, NYSHRL, and NYCHRL.

The court explained that, as a general rule, incidents must be "more than episodic" to amount to a hostile work environment claim – they must be "sufficiently continuous and concerted in order to be deemed pervasive." Unless "very serious," the court said, isolated acts do not meet the threshold of "severity or pervasiveness."

Here, the court found that "no reasonable fact finder" could conclude that the acts and statements cited by Vucinaj, either in isolation or considered as a whole, were sufficiently objectively severe or pervasive to establish a hostile work environment.

The court conceded that, based on Vucinaj's testimony, he subjectively perceived the environment at the NYPD to be hostile during his tenure. The court decided, however, that the acts and statements Vucinaj described, including comments related to his Albanian national identity, were "insufficiently severe or pervasive to constitute an objectively hostile work environment, because they occurred only sporadically over a seven-year period."

After also granting summary judgment to the defendants on Vucinaj's denial of overtime discrimination claim, finding that Vucinaj had offered no evidence that discrimination on the basis of race, color, sex, national origin, and/or religion played any part in his not being assigned overtime shifts, therefore eliminating all of Vucinaj's federal claims, the court concluded by refusing to assert jurisdiction with respect to Vucinaj's failure to promote claim under the NYCHRL.

The case is *Vucinaj v. New York City Police Department*, No. 18 Civ. 7606 (LGS) (S.D.N.Y. Aug. 12, 2020).

CUNY Architect's Gender-Based Pay Discrimination and Retaliation Claims Move Forward

The U.S. District Court for the Southern District of New York has refused to dismiss gender-based pay discrimination and retaliation claims brought by the chief architect of the City University of New York ("CUNY") against the university and several of its officials.

The Case

Kay Xanthakos, CUNY's chief architect, sued CUNY and a number of its officials, alleging that she was not paid as much as her male colleagues. Xanthakos asserted claims for gender-based pay discrimination and retaliation pursuant to, among other things, Title VII of the Civil Rights Act of 1964, the Equal Pay Act ("EPA"), Section 1983 of the Civil Rights Act, the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL").

The defendants moved to dismiss.

The Court's Decision

The court first denied the defendants' motion to dismiss Xanthakos' EPA, Title VII, Section 1983, NYSHRL, and NYCHRL gender-based pay discrimination claims.

The court explained that Xanthakos alleged that she was paid "significantly less" than her male colleagues and that she performed "substantially comparable, if not more complex, work than her higher-paid male colleagues." Moreover, the court added, Xanthakos alleged that although she had the "education, skills, and experience to do the project management work," not all of the higher-paid project management assistant directors had the qualifications to do the CUNY-wide work that she did.

Thus, the court ruled, Xanthakos' allegations that she was paid less than her male colleagues for doing equal, if not more complex, work were "sufficient to state a plausible EPA claim."

The court added that Xanthakos' allegations that she was paid less than her male colleagues for doing equal work, and that her gender was a motivating factor in the pay disparity, were sufficient to permit her claims of gender discrimination pursuant to Title VII, 1983, NYSHRL, and NYCHRL to proceed.

The court also denied the defendants' motion to dismiss Xanthakos' Title VII, Section 1983, EPA, NYSHRL, and NYCHRL retaliation claims.

The court reasoned that Xanthakos claimed that she suffered "numerous adverse actions" after she complained about pay inequity and that she plausibly alleged a causal connection between her "protected activity" and those alleged adverse actions. The court also found that the temporal proximity between Xanthakos' protected activity and the alleged adverse actions supported "an inference of retaliation."

The case is *Xanthakos v. City University of New York*, No. 17-CV-9829 (S.D.N.Y. Aug. 24, 2020).

New York Trial Court Refuses to Dismiss Plaintiff's Contention That Release Had Been Fraudulently Induced

A plaintiff in an employment discrimination lawsuit against Bloomberg LP and her former supervisor may proceed with her argument that a release she signed was void on the ground that it had been fraudulently induced.

The Case

The plaintiff in this case sued Bloomberg LP and her former supervisor for discrimination based on age, disability, and gender and for retaliation. In response, the defendants moved to dismiss the plaintiff's complaint based on a release that the plaintiff had signed barring her from bringing discrimination and retaliation claims.

The plaintiff asserted that the release was void because it was fraudulently induced. In particular, she alleged that she signed the agreement releasing her claims against the defendants based on their misrepresentation that her position had been eliminated as part of a reduction in force.

The plaintiff also alleged that the defendants had concealed their severance policies and misrepresented to her that payment of her accrued salary, bonus, and severance pay was contingent on her signing the release, when in fact the payment was due her regardless of her signing the release.

The Court's Decision

The court refused to dismiss the plaintiff's contention that the release was void on the ground of fraudulent inducement.

In its decision, the court explained that, to void the release for fraudulent inducement, the plaintiff had to show that the defendants misrepresented or concealed a material fact, knowing the misstatement or omission was false, to induce the plaintiff to rely on it, and that the plaintiff justifiably relied on the misrepresentation or omission and incurred damages from that reliance.

The court then ruled that the plaintiff's allegations that the defendants falsely represented that her position was eliminated as part of a reduction in force, on which the plaintiff relied in agreeing to the release, when in fact she was replaced by a younger employee, and that her position and division had not been eliminated, demonstrated "fraudulent inducement that damaged her."

Moreover, the court found that the plaintiff's allegations that the defendants concealed their severance policies and falsely represented that she would receive the payments due her only if she signed the release, on which she also relied in agreeing to it, when in fact she was owed the payment under the defendants' policies without signing the release, "likewise demonstrate[d] fraudulent inducement that damaged her."

The court concluded by explaining that although the release acknowledged that the plaintiff had agreed to it knowingly and voluntarily, if fraudulent inducement voided the release, then this provision was "void along with the release as a whole." It then denied the defendants' motion to dismiss the plaintiff's claim that the release was void because it was fraudulently induced.

The case is *Evans v. Bloomberg LP*, No. 160707/2019 (Sup. Ct. N.Y. Co. Aug. 13, 2020).

Employment Discrimination and Retaliation Action Against Individuals Under Title VII Is Dismissed

The U.S. District Court for the Eastern District of New York has dismissed an employment discrimination and retaliation action brought by a former employee against a number of individuals who worked for her former employer.

The Case

Eleanor Basora-Jacobs, female and Hispanic and a former employee of Independent Living Association ("ILA") in Brooklyn, New York, filed an employment discrimination and retaliation action against ILA's chief executive officer, director of operations, and other employees pursuant to Title VII of the Civil Rights Act of 1964. Basora-Jacobs charged the defendants with "unlawful discriminatory practice relating to their employment based on race, national origin and retaliation" between July 2016 and March 2018.

Basora-Jacobs alleged that "staff spoke other language against company policy in front of clients and their parents" and that her employment was terminated. Basora-Jacobs, however, alleged no other specific facts in support of her discrimination and retaliation claims.

The defendants moved to dismiss.

The Court's Decision

The court granted the motion.

In its decision, the court explained that Title VII makes it unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to h[er] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The court added, however, that, "individuals are not subject to liability under Title VII."

Accordingly, the court dismissed Basora-Jacobs' Title VII causes of action as to the individual defendants for failure to state a claim on which relief could be granted.

The court pointed out that Basora-Jacobs' complaint did not list ILA as a defendant. The court then stated that, even if it had, Basora-Jacobs' complaint did not state sufficient facts to support a Title VII claim against ILA.

The court noted that on the employment discrimination complaint form, Basora-Jacobs checked the "race" and "gender/sex" boxes, and provided that she was Hispanic and female. The court said, however, that Basora-Jacobs did not allege any facts suggesting that her termination or retaliation was done "at least, in part, for a discriminatory reason."

Accordingly, the court dismissed her Title VII claim for failure to state a claim.

The case is *Basora-Jacobs v. Palevsky*, No. 20-CV-1675 (LDH)(LB) (E.D.N.Y. July 9, 2020).

Federal Court Rejects Plaintiff's Employment Discrimination Action Against Union and Former Employer

The U.S. District Court for the Eastern District of New York has dismissed an employment discrimination lawsuit filed by a former employee against his union and his former employer.

The Case

Juan Santiago filed an employment discrimination action against 1199 SEIU United Healthcare Workers East (the "Union") and his former employer, Triboro Center. Santiago, who suffered from alcoholism and severe depression, asserted discrimination claims under the Americans with Disabilities Act ("ADA"), among other laws.

The defendants moved to dismiss.

The Court's Decision

The court granted the defendants' motion.

In its decision, the court explained that although Santiago's termination qualified as an "adverse employment action," he had not plausibly alleged that he was terminated because of his disability. The court acknowledged that Santiago mentioned his alcoholism in some of his allegations, but found that he "was not terminated because of his alcoholism, by his own account."

The court reached the same result with respect to Santiago's claims against the Union.

The court explained that employment discrimination claims against labor organizations were analyzed differently from claims against employers. At the pleading stage, an ADA plaintiff alleging a violation by a union must demonstrate that the union breached its duty of fair representation, and that the union's actions were motivated by discriminatory animus.

The court then rejected Santiago's contention that Union representatives did not contact him about his suspension or his complaints, finding that the Union did conduct a grievance proceeding and concluding that Santiago's allegations that the Union failed to respond to his complaints were "insufficient to show breach" of its duty of fair representation.

The court also found that Santiago had not plausibly alleged that the Union was motivated by discriminatory animus based on disability. Simply put, the court determined that Santiago had "not alleged any facts" that supported his "conclusory statements" that Union representatives "harass[ed]" and "bullied" him because of his alcoholism and depression.

The case is *Santiago v. 1199 SEIU*, No. 18-CV-06711 (AMD) (RLM) (E.D.N.Y. July 29, 2020).

Court Blocks IBM Executive's Move to Microsoft

The U.S. District Court for the Southern District of New York has issued a preliminary injunction prohibiting a senior executive at the International Business Machines Corporation ("IBM") from taking a position at Microsoft Corporation.

The Case

On June 15, 2020, IBM filed a complaint against Rodrigo Kede De Freitas Lim, asserting claims for breach of contract and misappropriation of trade secrets.

IBM also sought a preliminary injunction seeking to enjoin Lima, who had worked at IBM for approximately 25 years until resigning in May 2020, from commencing employment at Microsoft Corporation as corporate vice president for Latin America.

In support of its request for a preliminary injunction, IBM relied on a non-competition agreement Lima had previously signed in connection with his employment as an IBM senior executive and on the common law misappropriation of trade secrets.

The Court's Decision

The court granted a preliminary injunction.

In its decision, the court first found that IBM had carried its burden of demonstrating that it likely would succeed on the merits, reasoning that IBM had established its legitimate interest in protecting its confidential information as defined in the non-compete agreement and its trade secrets.

Next, the court decided that the non-compete agreement did not impose an "undue hardship" on Lima, that it was "reasonable in time and geographic scope under the circumstances of this case," and that it was "not injurious to the public."

After observing that Microsoft and IBM were competitors that engaged the same clients while competing to move those clients to the cloud, the court held that IBM had demonstrated a

likelihood of success on the merits on its claim that Lima had breached the non-compete agreement he had signed by accepting a job with an IBM competitor in a geographic area in which he had job responsibilities within the prior 12 months that "could result" in his use, disclosure, and/or reliance on IBM's trade secrets and confidential information for the benefit of Microsoft, IBM's competitor.

The court also found that IBM had demonstrated that, in the absence of a preliminary injunction, its trade secrets "likely" would "inevitably be disclosed." Therefore, the court found, without injunctive relief, "IBM would suffer irreparable injury."

The court rejected Lima's argument that the non-compete completely prohibited him from working in the technology industry, and it preliminarily enjoining Lima through May 18, 2021 (or a further order of the court) from:

- Working at or providing services to Microsoft as corporate vice president for Latin America;
- Working or providing any services in violation of the non-compete agreement;
- Soliciting any customer of IBM with which Lima was involved as a part of his job responsibilities during the last 12 months of his employment at IBM; and
- Retaining, using, disclosing, and/or relying upon IBM's confidential information.

The case is *IBM v. De Freitas Lima*, No. 7:20-cv-04573 (PMH) (S.D.N.Y. Sep. 3, 2020).

Court Refuses to Issue "Impermissibly Broad" Preliminary Injunction Against Plaintiff's Former Employee

A New York trial court has denied a company's request to preliminarily enjoin a former employee from competing with the company, finding the proposed injunction to be "impermissibly broad."

The Case

Setter Capital, Inc., asked the court for a preliminary injunction enjoining its former employee, Maria Chateauvert, from "directly or indirectly soliciting, inducing or recruiting or attempting to interfere with the relationship between plaintiff and any customer, client supplier, licensee or other business relation of plaintiffs or otherwise disrupt, damage, impair or interfere in any manner with the business of plaintiff until February 3, 2022."

Setter based its request on confidentiality and non-compete provisions in an employment agreement that Chateauvert had signed two years after graduation from college in exchange for a salary of $45,000. The agreement stated that the scope of Chateauvert's employment was to provide "a highly personal service on a sustained and recurring basis to the Clients of Setter Capital."

The Court's Decision

The court denied the motion.

In its decision, the court explained that, to prevail on its motion, Setter had the burden to establish a likelihood of success on the merits of its action, the danger that it would suffer irreparable injury in the absence of preliminary injunctive relief, and a balance of equities in its favor.

The court then found that Setter had not shown a likelihood of success on the merits because its presentation was "insufficient to establish a protectable trade secret."

It also ruled that Setter had not established "irreparable harm," reasoning that the harm that Setter asserted was "the diversion of future deals," which the court said was "hardly irreparable."

Finally, the court found that the balance of equities favored Chateauvert. According to the court, the injunction requested by Setter was "impermissibly broad such that [Chateauvert would] lose her livelihood." The purpose of a noncompete agreement, the court concluded, was "to prevent unfair competition; not competition altogether."

The case is *Setter Capital, Inc. v. Chateauvert*, No. 651992/2020 (Sup. Ct. N.Y. Co. July 15, 2020).

Court Dismisses Most – But Not All – Causes of Action in Dispute Between Two Manhattan-Based Diamond Wholesalers

A New York trial court has dismissed most of the causes of action in a lawsuit alleging breach of a non-compete agreement and a confidentiality agreement brought by one Manhattan-based diamond wholesaler against another, and against a former employee. It refused to dismiss the claim for misappropriation of trade secrets, however.

The Case

After working for E.M. Diam. Inc. ("EM Diamonds"), a Manhattan-based diamond wholesaler, Charles Rosen took a job at XL Diamonds LLC, another Manhattan-based diamond wholesaler. As a condition of his employment with XL Diamonds, Rosen executed a "Covenant Not to Compete for at Will XL Diamonds Employee" (the "Non-Compete Agreement") and a "Confidentiality Agreement for at Will Employee of XL Diamonds" (the "Confidentiality Agreement").

After three-and-a-half weeks at XL Diamonds, Rosen returned to work at EM Diamonds.

Thereafter, XL Diamonds filed a lawsuit against EM Diamonds and Rosen, alleging that Rosen had received training from XL Diamonds and its staff, had full access to its proprietary computer, sales, and pricing systems, and had obtained vendor information and customer lists, and that EM Diamonds had conspired with Rosen to obtain XL Diamonds' proprietary information and trade secrets.

XL Diamonds asserted causes of action for breach of the Non-Compete Agreement and the Confidentiality Agreement against Rosen, tortious interference with the Non-Compete Agreement and the Confidentiality Agreement against EM Diamonds, and misappropriation of trade secrets against both EM Diamonds and Rosen.

EM Diamonds and Rosen moved to dismiss.

The Agreements

Pursuant to the Non-Compete Agreement, Rosen covenanted and agreed that:

> during the term of this agreement, and for a period of one (1) year following the termination of employee's employment, employee will not, either directly or indirectly, engage in/or acquire an interest in . . . any business that is competitive with the business of employer. A business shall be deemed competitive for purposes of this provision if it

performs services or conducts business similar to the service and business of employer, which is the wholesale diamond business via sales by the internet and/or phone and is conducted within the territory of the United States. . . .

The Confidentiality Agreement provided:

Access to trade secrets and confidential information. Employee recognizes that during the course of employee's employment, employee[] may receive, develop, or otherwise acquire, have access to, or become acquainted with trade secrets or other confidential, sensitive, and/or proprietary information relating to the business of employer. Employee further recognizes that the knowledge and information acquired by employee concerning employer's clients, methods of acquiring clients, client contacts, maintaining clients, unique advertising and marketing, represent a vital part of employer's business and constitute, by their very nature, trade secrets and confidential information of employer.

In addition, the Confidentiality Agreement provided:

6. Employee's duties on termination. In the event of termination of employment with employer, employee shall immediately deliver to employer all equipment, keys, materials, notebooks, software, documents, memoranda, reports, supplies, equipment, manuals, files, books, correspondence, client lists, and other written records of property of or relating to employer or its business, including any copies, transcripts from, or extracts of any of the foregoing, that are in employee's possession or under employee's control.

7. Protection of clients and other relationships. Employee agrees that during the term of employee's employment by employer, and for a period of one year (1) thereafter, Employee shall not, either directly or indirectly, attempt to or actually call on, solicit, or take away or assist to be called on, solicited, or taken away, any of the clients or other employees of employer, either for employees own benefit, for any existing or potential competitor, or for the benefit of any other person, firm, or corporation.

The Court's Decision

The court first dismissed the claim against Rosen for breach of the Non-Compete Agreement.

The court explained that, under New York law, a restrictive covenant only will 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." It then ruled that the Non-Compete Agreement was "fatally overbroad" and that the geographic scope was "unreasonable."

According to the court, enforcement of the Non-Compete Agreement would prevent Rosen from working in the diamond wholesale business, which was his chosen profession, anywhere in the United States. In any event, the court said, XL Diamond failed to allege any damages flowing from Rosen's alleged breach of the Non-Compete Agreement; its "conclusory allegation" that it was "suffering irreparable harm" was "insufficient as a matter of law."

The court also dismissed the claim against Rosen for breach of the Confidentiality Agreement.

The court found that XL Diamonds made the "conclusory allegation" that Rosen breached the Confidentiality Agreement by disseminating confidential information to EM Diamonds, but that it "failed to allege in any detail what, if any, information was disclosed to EM Diamonds or that it sustained any damages."

Next, the court dismissed the claim against EM Diamonds for tortious interference with the Non-Compete Agreement and the Confidentiality Agreement, explaining that XL Diamonds "vaguely" alleged that it was "suffering irreparable harm to its business" as a result of its proprietary information and trade secrets being "compromised," the court said. However, according to the court, XL Diamonds fell short of identifying "any harm" that it had incurred as a result of EM Diamonds' alleged conduct. Because damages are an essential element of a claim for tortious interference with contract, the court dismissed this cause of action.

Finally, the court denied the motion to dismiss XL Diamond's claim for misappropriation of trade secrets against EM Diamonds and Rosen, finding that XL Diamond's complaint sufficiently stated a cause of action for misappropriation of trade secrets. In the court's opinion, XL Diamonds sufficiently alleged that it had leveraged over three decades of experience and expertise of its members to develop a proprietary system for purchasing, cataloging, and tracking inventory through a unique in-house software program that was not commercially available, as well as proprietary training and sales techniques and customer and vendor lists, which were confidential and closely guarded trade secrets that were not available to the public. Because XL Diamonds also alleged that EM Diamonds had used the trade secrets (at a minimum, the customer lists), in violation of the Confidentiality Agreement and as a result of improper means, i.e., through what essentially was corporate espionage, the court denied the motion to dismiss this cause of action.

The case is *XL Diamonds LLC v. Rosen*, No. 656102/2019 (Sup. Ct. N.Y. Co. July 15, 2020).

Court Issues Narrow Injunction Against Ex-Employee in Favor of Former Employer

A New York trial court has denied a former employer's request for a broad injunction based on a non-disclosure and non-compete agreement signed by a former employee – but the court granted a more narrow injunction in favor of the former employer.

The Case

On June 27, 2017, Shaindy Stralberg executed a non-disclosure and non-compete agreement with Landmark FG Realty LLC. The non-compete provisions prohibited Stralberg from engaging in any "phase of any business or enterprise similar to that" of Landmark's for a period of 60 months "anywhere in the world" where Landmark operated. The non-disclosure provisions prohibited Stralberg from divulging any confidential information or from using the confidential information for herself or others.

Landmark filed suit, alleging that Stralberg's subsequent employment at a direct competitor violated the non-compete agreement. It moved for a preliminary injunction restraining Stralberg from engaging in her current employment.

Landmark asserted that it gave Stralberg a company laptop so she could work from home during the COVID-19 lockdown. Landmark argued that the company laptop contained the "entirety" of its client confidential database; that Stralberg would never have had access to the database otherwise; and that Stralberg "disseminated and disbursed confidential company information to unauthorized third parties through the use of the company laptop."

For her part, Stralberg denied ever divulging any confidential information at all or that she ever was in possession of confidential information at all. She acknowledged that the laptop was purchased for her by Landmark and that it was given to her to be used at home during the lockdown, but she asserted that the laptop was new and that it had arrived at her home with the factory seal still intact.

The court denied Landmark's motion for injunctive relief, finding that the "entire basis for the injunction" was disputed. It noted, however, that the non-disclosure portion of the agreement was legally valid and that Stralberg remained "bound not to disclose any information in the future" that was the subject of the agreement.

The court then turned to the non-compete portion of the agreement. It found that it essentially prohibited Stralberg from working "anywhere in the world" where Landmark operated and was "too broad and not enforceable." The court added that because the non-compete was not limited or focused on trade secrets, confidentiality, or competitive unfairness but rather encompassed "any employment with any competitor for any reason," it was overbroad and unenforceable as written.

The court, however, granted Landmark's request for an injunction to the extent of ordering that Stralberg "may not divulge any secrets or proprietary information of [Landmark] she acquired while employed there" and "may not solicit or engage with any clients of [Landmark] while employed elsewhere."

The case *is Landmark FG Realty LLC v. Stralberg*, No. 509998/20 (Sup. Ct. Kings Co. July 17, 2020).

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