

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

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MORGAN STANLEY SMITH BARNEY LLC,

Index No.: 105177/11

Petitioner,

Mot. Date: 5/10/11

Mot. Seq. No.: 001

-against-

DECISION AND JUDGMENT

LAURA MASSARI and PETER MASSARI,

Respondents

-----X  
BARBARA JAFFE, J.S.C.:

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
11B)

For petitioner:  
Joseph E. Gehring, Jr., Esq.  
Gehring & Satriale LLC  
370 Lexington Ave., Ste. 1200  
New York, NY 10017  
212-400-7420

For respondents:  
John J. Kenney, Esq.  
Hoguet Newman, *et al.*  
10 E. 40<sup>th</sup> St.  
New York, NY 10016  
212-689-8808

By order to show cause dated May 2, 2011, petitioner moves for an order pursuant to CPLR 7502(c) enjoining respondents from soliciting any of petitioner's customers pending an expedited arbitration hearing and related relief. Respondents oppose the petition.

In order to establish entitlement to a preliminary injunction, plaintiff must show: (1) a likelihood of success on the merits, (2) irreparable injury, and (3) a balancing of equities in its favor. (*Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]).

Absent any contract or agreement prohibiting respondents from soliciting petitioner's customers, petitioner has not established a likelihood of success on the merits. (*See Glazer v Brown*, 55 AD3d 1385 [4<sup>th</sup> Dept 2008] [denying preliminary injunction seeking to enjoin defendant from soliciting plaintiff's clients where there was no covenant not to compete between them]; *Don Buchwald & Assocs., Inc. v Marber-Rich*, 11 AD3d 277 [1<sup>st</sup> Dept 2004] [employee

may create competing business without breaching fiduciary duty to former employer unless she improperly uses employer's time, facilities, or proprietary secrets in doing so]; *Headquarters Buick-Nissan, Inc. v Michael Oldsmobile*, 149 AD2d 302 [1<sup>st</sup> Dept 1989] [absent use of plaintiff-employer's time or facilities or diversion of its business, defendants could have legally incorporated competing business while still employed by plaintiff]; *but see Weiser LLP v Coopersmith*, 51 AD3d 583 [1<sup>st</sup> Dept 2008] [plaintiff established *prima facie* that defendants breached fiduciary duty by "having engaged in acts, prior to their voluntary withdrawal from [plaintiff], that conflicted with [plaintiff's] interests, including using its staff and equipment to set up their new firm and soliciting its clients and employees to follow them to their new firm; defendant's actions involved more than informing clients of impending withdrawal from company]).

Moreover, even if respondents had breached their fiduciary duty to petitioner, petitioner may be compensated adequately with money damages, and has thus failed to demonstrate that it will suffer irreparable injury absent an injunction. (*See GFI Securities, LLC v Tradition Asiel Securities, Inc.*, 61 AD3d 586 [1<sup>st</sup> Dept 2009] [petitioner failed to show irreparable harm in seeking preliminary injunction as "it failed to submit evidence showing that its defecting brokers were irreplaceable or that its losses, other than the speculative claim of lost goodwill, were not compensable by money damages"]; *U.S. Re Cos., Inc. v Scheerer*, 41 AD3d 152 [1<sup>st</sup> Dept 2007] [even if former employee-broker had violated confidentiality agreement, employer could have sought money damages for value of transactions lost, precluding finding of irreparable harm]; *Suburban Graphics Supply Corp. v Nagle*, 5 AD3d 663 [2d Dept 2004] [in action for breach of fiduciary duty, among others claims, based on allegation that defendants, plaintiff's former

employees, actively solicited plaintiff's customers, injunction was properly vacated as plaintiff had adequate remedy in form of damages]).


Petitioner also failed to show that the balance of equities are in its favor. (See *Arnold K. Davis & Co., Inc. v Ludemann*, 160 AD2d 614 [1<sup>st</sup> Dept 1990] [balance of equities preponderated in former employee-broker's favor as "an injunction would preclude (defendant) from calling upon his experience, knowledge, friendships and expertise in dealing with persons serviced by him for some 15 years"]; *Kanan, Corbin, Schupak & Aronow, Inc. v FD Intl., Ltd.*, 8 Misc 3d 412 [Sup Ct, New York County 2005] [balance of equities did not favor former employer as injunction would not compel clients to return to employer or prevent current clients from moving accounts to former employee's new business while injunction would prevent employee from continuing to service existing clients]).

Accordingly, it is hereby

ORDERED and ADJUDGED, that petitioner's application for a preliminary injunction is denied except that respondents are directed to return to petitioner any of petitioner's confidential information or property currently in their possession and not retain a copy of it; and it is further

ORDERED, that any stays previously entered are hereby lifted and vacated.

ENTER:

  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

DATED: May 12, 2011  
New York, New York

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B)