H

Rogerscasey, Inc. v. Nankof
C.A.2 (N.Y.),2002.
This case was not selected for publication in the Federal Reporter.RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)", UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.Please use FIND to look at the applicable circuit court rule before citing this opinion. Second Circuit Rules § 0.23. (FIND CTA2 s 0.23.)

United States Court of Appeals,Second Circuit.
ROGERSCASEY, INC., Plaintiff-Appellant,
v.
Joseph S. NANKOF and Meriam R. Zandi, Defendants-Appellees.
No. 02-7489.

Sept. 3, 2002.

After employees of pension fund investment consulting business left to starting their own competing firm, the business sued its former employees, alleging that they had violated various tort and contract duties owed to the business, and moved to enjoin former employees from disparagement, misappropriation of its confidential information, solicitation of its remaining employees, and solicitation of its clients. The United States District Court for the Southern District of New York, Rakoff, J., 2002 WL 726655, granted the business' motion in all respects except that the court declined to enjoin former employees from soliciting the business' clients. Business appealed. The Court of Appeals held that: (1) under California law, former employees were not betraying trade secrets by soliciting clients, and thus, the business was not entitled to anti-solicitation injunction to preclude such solicitation, and (2) under Connecticut law, former employees did not take any action breaching a duty owed under either the Connecticut Unfair Trade Practices Act (CUTPA) or Connecticut common law by soliciting the clients.

Affirmed.
West Headnotes
[1] Antitrust and Trade Regulation 29T ⚷418

29T Antitrust and Trade Regulation
29TIV Trade Secrets and Proprietary Information
29TIV(A) In General
29Tk418 k. Confidential Relation. Most Cited Cases
(Formerly 382k984 Trade Regulation, 379k10(5))

Injunction 212 ⚷56

212 Injunction
212II Subjects of Protection and Relief
212II(B) Matters Relating to Property
212k56 k. Disclosure or Use of Trade

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Secrets. Most Cited Cases

Labor and Employment 231H ⚷122

231H Labor and Employment
231HIII Rights and Duties of Employers and Employees in General
231Hk120 Post-Employment Duties
231Hk122 k. Duty Not to Solicit Customers. Most Cited Cases
(Formerly 255k50 Master and Servant)
Under California law, former employee cannot normally be prevented from soliciting clients of its former employer unless valid contract prohibits former employee from revealing corporate trade secrets and an anti-solicitation injunction is necessary to protect those trade secrets.

[2] Antitrust and Trade Regulation 29T ⚷421

29T Antitrust and Trade Regulation
29TIV Trade Secrets and Proprietary Information
29TIV(A) In General
29Tk421 k. Customer Lists and Information. Most Cited Cases
(Formerly 382k991 Trade Regulation, 379k10(5))

Injunction 212 ⚷56

212 Injunction
212II Subjects of Protection and Relief
212II(B) Matters Relating to Property
212k56 k. Disclosure or Use of Trade Secrets. Most Cited Cases
Under California law, former employees of pension fund investment consulting business were not betraying trade secrets by soliciting clients of their former employer, and thus, their former employer was not entitled to anti-solicitation injunction to preclude such solicitation based on the former employees' alleged disclosure of trade secrets and their alleged unfair competition with their former employer in violation of a proprietary rights and confidentiality agreement; in the niche occupied by the pension fund investment consulting business and its competitors, clients selected their investment advisors primarily on the basis of personal relationships, and information regarding a firm's clients was listed in an industry directory which was publicly available.

[3] Antitrust and Trade Regulation 29T ⚷252

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(D) Particular Relationships
29Tk252 k. Employer and Employee. Most Cited Cases
(Formerly 382k862 Trade Regulation)

Labor and Employment 231H ⚷122

231H Labor and Employment
231HIII Rights and Duties of Employers and Employees in General
231Hk120 Post-Employment Duties
231Hk122 k. Duty Not to Solicit Customers. Most Cited Cases
(Formerly 255k50 Master and Servant)
Under Connecticut law, former employees of pension fund investment consulting business did not take any action breaching a duty owed under either the Connecticut Unfair Trade Practices Act (CUTPA) or Connecticut common law by soliciting their former employers' clients, where former employees' employment at-will employment had ended by April 1, and trial court had credited testimony that the former employees waited until April 1 to solicit former employer's clients, and former employer provided no support for its argument that former employees owed duties to their former employer for 14 days after their termination. C.G.S.A. § 42-110a et seq.

[4] Labor and Employment 231H ⚷123

231H Labor and Employment
231HIII Rights and Duties of Employers and Employees in General
231Hk120 Post-Employment Duties
231Hk123 k. Duty Not to Compete in General. Most Cited Cases
(Formerly 255k50 Master and Servant)
Under Connecticut law, in the absence of a restrictive covenant, a former employee may compete with his or her former employer upon

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

termination of employment.

Appeal from the United States District Court for the Southern District of New York (Rakoff, J.).

Bainton McCarthy LLC, New York, NY; John G. McCarthy and Irene M. Hurtado on the brief, for Appellant J. Joseph Bainton, Rogerscasey.
Laura B. Hoguet, Hoguet Newman & Regal LLP, New York, NY; Dorothea W. Regal and Luisa K. Hagemeier on the brief, for Appellees Joseph S. Nankof and Meriam R. Zandy.

Present JACOBS, CABRANES, and F.I. PARKER, Circuit Judges.

SUMMARY ORDER

****1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the order of the district court be **AFFIRMED.**

In April 2002, BARRA Rogerscasey, Inc. (" BARRA Rogerscasey"), a pension fund investment consulting firm based in Connecticut, was acquired by Capital Resource Advisors, Inc. The successor firm is called RogersCasey, Inc. ("RogersCasey").
Upon learning of the acquisition, a group of BARRA Rogerscasey employees-including Joseph S. Nankof and Meriam R. Zandi (collectively, " Defendants")-decided to start their own competing firm.

RogersCasey sued, alleging that Defendants had violated various tort and contract duties owed to BARRA Rogerscasey and its successor RogersCasey, and moved to enjoin Defendants from disparagement, misappropriation of its confidential information, solicitation of its remaining employees, and solicitation of its clients. The District Court granted RogersCasey's motion in all respects except one: The court declined to enjoin Defendants from soliciting RogersCasey's clients.

On appeal, RogersCasey makes four principal arguments as to why the District Court abused its discretion in refusing to enjoin solicitation of its clients: (1) the court erroneously applied Connecticut law, rather than California law, to claims that Defendants violated contractual agreements not to compete "unfairly" with RogersCasey; (2) the court improperly applied the California Uniform Trade Secret Act to the same claims; (3) the court failed to consider whether Defendants had breached fiduciary duties or duties of loyalty owed to RogersCasey; and (4) the court failed to consider whether Defendants had violated the Connecticut Unfair Trade Practices Act, Conn. Gen.Stat. § 42-110a et seq. ("CUTPA"). We affirm.

[1][2] RogersCasey's first two arguments involve claims that Defendants disclosed trade secrets and competed "unfairly" with it, in violation of a Proprietary Rights and Confidentiality Agreement (the "Agreement") signed by each Defendant. The choice-of-law provision in the Agreement says that all provisions of the Agreement (with the exception of Section 11) are to be governed by and construed in accordance Connecticut law; section 11-which contains the post-termination prohibition ***463** on unfair competition discussed above-is governed by and construed in accordance with California law.
While the District Court appears to have recited this choice-of-law provision in reverse, the transposition did not affect the outcome.[FN*] *By arguing that the District Court failed to properly apply California law to its claims that Defendants breached the Agreement, see* Brief of Plaintiff Appellant, at 30-42, RogersCasey undercuts its own argument that the District Court failed to apply California law to the same claim, *see id.* at 29-30. RogersCasey calls the transposition plain error, but it fails to explain why it made any difference.

FN* This mistake appears to have been facilitated by the following exchange between the court and counsel at the preliminary injunction hearing:
THE COURT: I am assuming that both sides are in agreement that I ought to apply California law, other than to the one count under Connecticut law.
MS. HOGUET: Correct.
THE COURT: Any disagreement on that?

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

> MS. HOGUET: No.
> MR. BAINTON: Sort of. We think that you need to apply-in the end I am not sure it makes a difference-we think you need to apply California law to the unfair competition claim. Connecticut law applies to-we have a second argument which completely has nothing to do with trade secrets and we think Connecticut law applies to that.
> Tr. at 265.

As the District Court pointed out, under California law, a former employee cannot normally be prevented from soliciting clients of its former employer unless a valid contract prohibits the former employee from revealing corporate trade secrets and an anti-solicitation injunction is necessary to protect those trade secrets. *Moss, Adams & Co. v. Shilling,* 179 Cal.App.3d 124, 130, 224 Cal.Rptr. 456 (Cal.Ct.App.1986). The District Court found that in the niche occupied by RogersCasey and its competitors: (i) clients select their investment advisors primarily on the basis of personal relationships, *see Rogerscasey, Inc. v. Joseph S. Nankof and Meriam R. Zandi,* 02-CIV-2599, 2002 WL 726655, at *2 (S.D.N.Y. Apr.22, 2002), and (ii) information regarding a firm's clients is listed in an industry directory which is publicly available, *id.* at *3. On the basis of these findings, which are not challenged, it cannot be said that Defendants were betraying trade secrets under California law. RogersCasey, therefore, was not entitled to an anti-solicitation injunction under California law.

****2** In RogersCasey's third and fourth arguments on appeal, it argues that the District Court failed to address its CUTPA and Connecticut common law fiduciary duty and duty of loyalty claims. To the contrary, the court's memorandum opinion examined "[CUTPA] and ... general fiduciary principles [under Connecticut law]," before determining that "[n]othing in any of this law ... precludes [Defendants] from competing for [RogersCasey's] clients." *Rogerscasey,* 2002 WL 726655, at *3.

[3][4] The record contains no evidence that Defendants took any action breaching a duty owed under either CUTPA or Connecticut common law. Under Connecticut law, "in the absence of a restrictive covenant, a former employee may compete with his or her former employer upon termination of employment." *Elm City Cheese Co. v. Federico,* 251 Conn. 59, 752 A.2d 1037, 1044 (Conn.1999). The parties dispute whether Defendants were terminated on March 26, 2002 or resigned on April 1, but it is undisputed that Defendants' at-will employment had ended by April 1. The district court credited testimony that Defendants waited until April 1 to solicit RogersCasey clients; that finding is not clearly erroneous. Indeed, RogersCasey points to no other evidence that ***464** Defendants solicited its clients before that date. While RogersCasey argues that Defendants owed duties to RogersCasey for 14 days after their termination, but provides no support for this proposition.

RogersCasey's remaining arguments are without merit.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

C.A.2 (N.Y.),2002.
Rogerscasey, Inc. v. Nankof
50 Fed.Appx. 461, 2002 WL 2010748 (C.A.2 (N.Y.))

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

H
Rogerscasey Inc. v. Nankof
S.D.N.Y.,2002.
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.
ROGERSCASEY INC., Plaintiff,
v.
Joseph S. NANKOF and Meriam R. Zandi, Defendants.
No. 02 CIV. 2599(JSR).

April 23, 2002.

MEMORANDUM

RAKOFF, D.J.

*1 Following an evidentiary hearing on April 11-12, 2002, *see* transcript ("Tr."), the Court, by Order dated April 16, 2002, granted in part and denied in part plaintiff's motion for a preliminary injunction. This Memorandum briefly states the reasons for that ruling.

By way of background, plaintiff is a pension fund investment consulting business whose predecessor, BARRA Rogerscasey Inc., a Connecticut-based subsidiary of BARRA, Inc., a California-based corporation, was recently acquired by Capital Resource Advisors. Defendants are disaffected BARRA employees who chose, coincident with the acquisition, to leave and set up their own competing firm. Plaintiff seeks to enjoin defendants not only from disparaging their former employer (or its successor), misappropriating its confidential information, and soliciting its remaining employees to join their new firm, but also from soliciting its clients. Defendants, while contending that there is no evidence of disparagement or misappropriation, do not contest that they are prohibited from such conduct, but they strenuously contest that they are in any way prohibited from soliciting their former firm's clients or its employees.

To obtain a preliminary injunction, a movant must demonstrate both irreparable harm in the absence of the injunction and either (a) a likelihood of success on the merits, or (b) sufficiently serious questions on the merits to make them fair ground for litigation and a balance of hardships tipping decidedly in the moving party's favor. *See, e.g., Random House v. Rosetta Books LLC,* 283 F.3d 490, 490 (2d Cir.2002). A preliminary injunction is an extraordinary remedy, one that should not be lightly granted. *See, e.g. Sampson v. Murray,* 415 U.S. 61 (1974); *Checkers Motors Corp. v. Chrysler Corp.,* 405 F.2d 319 (2d Cir.1969), *cert. denied,* 394 U.S. 999 (1969). Here, where plaintiff essentially seeks restraints on free competition, a court should proceed with some caution.

Under California law-which the parties here agree governs all but one issue in this case (discussed *infra*)-a former employee cannot normally be prevented from soliciting clients of its former employer unless a valid contract prohibits the former employee from revealing corporate trade secrets and an anti-solicitation injunction is necessary to protect those trade secrets. *Moss, Adams & Co. v. Shilling,* 179 Cal.App.3d 124, 130 (Cal.App.Ct.1986) (" Antisolicitation covenants are void as unlawful business restraints except where their enforcement is necessary to protect trade secrets.") Here, defendants entered with plaintiff's predecessor into a "Proprietary Rights and Confidentiality" agreement (Plaintiff's hearing exhibits 32 and 33) that, with the exception of one provision, is governed by California law, and that provides that during the term of his/her employment with plaintiff "and thereafter" an employee shall not, *inter alia,* use or exploit plaintiff's "Trade Secrets" for any extrinsic purpose or "retain upon termination" any such "Trade Secrets." While the agreement broadly defines "Trade Secrets," that definition is cabined by California law, which, in turn, defines "trade secret" as follows.

*2 "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to 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.

Cal. Civ.Code § 3426.1(d).

Defendants do not deny that they had access while employed by plaintiff to one or more specially designed computer programs that constitute trade secrets and that they are barred from retaining or re-creating them in their new employment. While defendants deny that they have done so, the Court finds that the intense rivalry and strong emotions characterizing the present relations between plaintiff and defendants warrants a preliminary injunction of any such misappropriation. But plaintiff, pushing much further, would include within its "trade secrets" its employees' knowledge of such amorphous information as the particular investment philosophy and strategy of particular clients and would bar defendants from "exploiting" such knowledge by competing with plaintiff for the same clients. The effect would be to transmute a prohibition against misappropriating trade secrets into a broad non-competition injunction of potentially unlimited duration, in seeming contravention of basic principles underlying the applicable California law. While the relevant California cases are perhaps not wholly reconcilable between themselves on this issue, none goes as far as plaintiff would have the Court go here.

Moreover, even if California law so permitted, plaintiff has failed to meet its evidentiary burden in this regard. Rather, the Court credits the testimony of defendant Nankoff to the effect that in the niche occupied by plaintiff and its competitors,[FN1] pension funds select their investment counselors primarily on the basis of personal relationships. As Mr. Nankof testified, "It could be boiled down to two things; the trust and the confidence that clients have placed in us, the individuals, myself." Tr. at 246. Because of the emphasis on personal relationships, Mr. Nankof testified, it is not unusual for clients to follow consultants when they switch firms, or for firms to be replaced when a client hires a new manager who wants to maintain a relationship with a consultant at another firm with whom the manager has previously worked. *See* Tr. 247. These kinds of relationships, rather than any special knowledge of the client's investment information or strategy, are the key to the competition. But under California law, these kind of personal and professional relationships, developed over time, are not considered a "trade secret" the exploitation of which would prevent an employee from soliciting a former employer's clients. *See Sarkes Tarzian, Inc. v. Audio Devices, Inc.,* 166 F.Supp. 250, 265 (D.C.Cal.1958).

FN1. Mr. Nankof testified that there are two types of pension fund investment consulting firms-firms that provide investment consulting services along with a host of other services, and firms that exclusively provide investment consulting services-and that plaintiff and defendants' new firm are both in the latter category. It is especially in this category, Mr. Nankof testified, that personal relationships, for which clients are willing to pay a premium, are particularly critical. *See* Tr. at 248-49.

*3 The Court further finds that much of the information about particular clients that plaintiff claims constitutes "trade secrets," such as specific client profile information, is often not maintained in secret by the client itself but rather is publicly available through, *inter alia,* the Freedom of Information Act and industry directories such as " Nelson's". Moreover, the clients themselves are typically willing to disclose this information to any consultant with whom they are at all interested in doing business. *See* Nankof testimony, Tr. at 245-46. Thus, here again, the information does not fit the definition of a "trade secret" protectible by plaintiff.

Accordingly, plaintiff has failed to carry its burden with respect to enjoining defendants' from soliciting business from plaintiff's clients.

The agreement between plaintiff and defendants also contains one paragraph-¶ 11-that, in contrast

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

to the rest of the agreement, is expressly governed by Connecticut law (essentially because it is a non-compete provision that might be barred by California law). Paragraph 11, in relevant part, precludes a former employer from competing " unfairly" with plaintiff. The meaning of "unfairly" is derived, not only from the face of the agreement, but also from the Connecticut Unfair Trade Practices Act and from general fiduciary principles. Nothing in any of this law, however, precludes defendant from competing for plaintiff's clients.

What it does preclude, however, is defendants' disparaging plaintiff or its remaining employees. An earlier hearing in this case, on April 5, 2002, provided evidence that defendants were already bordering on such disparagement, *see* transcript of April 5 hearing. Accordingly, the Court finds it appropriate to enjoin defendants from any such future activity. Likewise, it would constitute an unfair practice in these circumstances for defendants to "raid" plaintiff for its remaining employees, and accordingly, it is appropriate to enjoin defendants from so doing, although not from responding to unsolicited inquiries from plaintiff's remaining employees.

In sum, for the foregoing reasons, the Court, by Order dated April 16, 2002, preliminarily enjoined the defendants, their agents, and all those acting in concert or participation with them from: (a) disparaging their former employer or its successors-in-interest; (b) misappropriating any confidential or proprietary information of their former employer or its successors-in-interest; and (c) affirmatively soliciting any employee of their former employer or its successors-in-interest to terminate such employee's employment. In all other respects, the Court denied plaintiff's motions.

S.D.N.Y.,2002.
Rogerscasey Inc. v. Nankof
Not Reported in F.Supp.2d, 2002 WL 726655 (S.D.N.Y.)

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.