

SUFFOLK, SS.

SUPERIOR COURT  
CIVIL ACTION  
NO. 08-0979-BLS1

BEAR STEARNS & COMPANY, INC.,  
Plaintiff

vs.

DANIEL McCARRON, FRANK BOTTA, and MICHAEL COYNE,  
Defendants

*M. B. L.  
3/15/08*

*S. H. W.*

*J. S. P.  
H. H.*

*L. W.  
P. W.  
(mt)*

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION  
FOR A PRELIMINARY INJUNCTION**

The defendants Daniel McCarron, Frank Botta, and Michael Coyne were financial advisors employed by the plaintiff Bear Stearns & Company, Inc. ("Bear Stearns") in its Private Client Services Group in Boston. On February 29, 2008, without advance warning to Bear Stearns, the defendants resigned from Bear Stearns and joined a competitor, Morgan Stanley & Co. Inc. ("Morgan Stanley"), where they intend to continue to provide financial advice to private clients. Three sales assistants who had worked closely with the defendants at Bear Stearns left with them to join Morgan Stanley that same day. Bear Stearns now moves for a preliminary injunction that would:

- require them to quit their new jobs at Morgan Stanley and return to Bear Stearns for a period of up to 90 days,
- bar them from soliciting their private clients at Bear Stearns to transfer their accounts to Morgan Stanley,
- bar them from soliciting any Bear Stearns employees to join Morgan Stanley, and
- bar them from keeping or using any information regarding their Bear Stearns clients.

For the reasons detailed below, Bear Stearns' motion for a preliminary injunction is

**DENIED.**

**FINDINGS OF FACT**

“By definition, a preliminary injunction must be granted or denied after an abbreviated presentation of the facts and the law.” Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980). Here, the evidence presented by Bear Stearns is unusually sparse. While it has filed a Verified Complaint, all the information in support of its motion, apart from the Bear Stearns’ documents attached to the Complaint, are presented upon “information and belief.” Consequently, while many serious allegations are made against the defendants, this Court does not know the source of the information, the reliability of the source, or whether the source observed the facts at issue or is relying on hearsay or rumor.

What is undisputed is that the defendants never signed any document that described itself as an employment agreement, or a non-competition or non-solicitation agreement. Indeed, based on the preliminary injunction record, there is no evidence that the defendants ever signed any document that promised that they would give Bear Stearns prior notice of their termination, or that they would not compete with Bear Stearns upon their termination, or that they would not solicit Bear Stearns employees for a period of time following their termination.

Rather, each of the defendants accepted deferred compensation in various forms, in which they were granted either restricted stock units through a Restricted Stock Unit Plan or a CAP Unit Award under a Capital Accumulation Plan. Each of these Plans had written Terms and Conditions applicable to an award of restricted stock units or CAP unit awards. Under Section 2.3 of the Terms of Conditions of both these Plans, if a Plan Participant “does not agree to be subject to the provisions of Section 3.1” of the Terms and Conditions, all Earning Units and Base Units that have not yet vested shall not vest and shall be cancelled for no value, all Earning Units that have vested shall be replaced by Replacement Units, and all Replacement Units and vested

Base Units shall be replaced by Dividend Equivalent Units. In short, without getting into the details of these deferred compensation plans, there are adverse financial consequences to the employee for having failed to adhere to the requirements in Section 3.1.

Section 3.1 of the Terms and Conditions imposed various requirements upon the employee in consideration for receiving the restricted stock units or CAP units. Among these requirements were the following:

1. The Employee is required to provide Bear Stearns with 90 days advance written notice prior to his termination. Bear Stearns does not promise an equivalent notice period prior to terminating the Employee. Indeed, during this 90 day period, Bear Stearns can terminate the Employee immediately (or whenever during the 90 days it chooses) but, if it chooses to retain him, it must pay him his salary. If it retains him, Bear Stearns need not provide him with any work.
2. The Employee shall not solicit or hire any Bear Stearns employee until at least 90 days after the close of the 90 day period (i.e. 180 days after he declares his intent to resign).
3. The Employees shall not take or disclose any confidential or proprietary information of Bear Stearns.

It is these requirements in the Terms and Conditions in Section 3.1 that Bear Stearns now seeks to enforce through the Preliminary Injunction.<sup>1</sup> However, there is no evidence in the preliminary injunction record that any of the defendants signed any document adopting or accepting these Terms and Conditions, or that they received a copy of the Terms and Conditions, or that they were told of the promises they had supposedly made in consideration of their receipt of deferred compensation.

As to the first of these three requirements, the evidence is clear that the defendants did

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<sup>1</sup> In the Terms and Conditions of some of the Plans (but not all), the Employee agrees not to compete with Bear Stearns in any area in which Bear Stearns conducts business. There is no time limit on this covenant not to compete. Bear Stearns apparently does not seek to enforce this requirement, perhaps because it was not universally included in the Plans or perhaps because it is plainly overbroad in duration and geographic scope.

not provide Bear Stearns with 90 days written notice of their intent to resign.

As to the second, there is no dispute that the defendants' three sales assistants resigned from Bear Stearns on the same day as the defendants, and joined Morgan Stanley with them that same day. While Bear Stearns asks this Court to infer solicitation from this fact alone, the defendants and the sales assistants have credibly testified in their affidavits that they were not solicited to leave by the defendants but were simply told by the defendants of their intent to leave and chose to leave with them, in large part because their compensation depended on the commissions earned by the three defendants and they feared for the future of Bear Stearns. This Court finds, on this record, that Bear Stearns is unlikely to prove that these three sales assistants were solicited.

As to the third, Bear Stearns argues that the defendants took with them to Morgan Stanley the most recent financial statements for all their Bear Stearns private clients. If this were proven, it would plainly constitute a breach of the defendants' obligation to protect the financial information of their clients, who remain Bear Stearns' clients unless and until they execute an ACAT form transferring their account to another financial institution. Bear Stearns bases this allegation on its "information and belief" that the defendants directed Bear Stearns personnel to print all their clients' account statements just eleven days before they left Bear Stearns for Morgan Stanley. The defendants, however, have attested that they did not take their clients' financial statements with them, and took only their clients' contact information – names, addresses, telephone numbers, and email addresses. Botta has admitted that he did ask for the account statements of all his clients during the week of February 18, but that he did so solely to provide a copy to his clients to assist them in tax return preparation, and not to take with him to Morgan Stanley. He denies that he took anything beyond contact information with him to

Morgan Stanley. This Court finds, on this record, that Bear Stearns is unlikely to prove that the defendants breached their obligation to protect the confidential financial information of Bear Stearns clients, because the only information that the defendants appeared to have taken was contact information, which is not confidential financial information.

#### CONCLUSIONS OF LAW

In determining whether to grant a preliminary injunction, this Court must perform the three-part balancing test articulated in Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980). First, the court must evaluate the moving party's claim of injury and its likelihood of success on the merits. Id. at 617. Second, it must determine whether failing to issue a preliminary injunction would subject the moving party to irreparable injury -- losses that cannot be repaired or adequately compensated upon final judgment. Id. at 617 & n. 11. Third, "[i]f the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party." Id. at 617. In balancing these factors, "[w]hat matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." Id. In an appropriate case, like this, "the risk of harm to the public interest also may be considered." Brookline v. Goldstein, 388 Mass. 443, 447 (1983).

Bear Stearns' motion for preliminary injunction fails on a number of fronts. First, this Court does not specifically enforce "stealth" restrictive covenants. If the employer wishes to restrict an employee's freedom to change his employment and compete against his former

employer, the employer must do so in an agreement executed by the employee in which the employee is fairly told of the restrictions and knowingly accepts them. Such restrictions will not be enforced when they are buried in the Terms and Conditions of a deferred compensation plan, especially when the employee is not asked to sign those Terms and Conditions and may not have ever seen them.

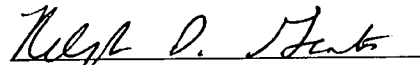
Second, this Court finds that, on this record, Bear Stearns is not likely to prevail in arbitration on its claim that the defendants solicited their sales assistants to leave Bear Stearns or that the defendants took with them confidential client financial information. Since they are unlikely to prevail on these points, a preliminary injunction would be justified only if Bear Stearns persuaded this Court that they would suffer substantial irreparable injury during the pendency of this case that could not reasonably be compensated if they were to prevail, and that the balance of harms strongly favored Bear Stearns. Here, there is a rather weak showing of irreparable injury since the Terms and Conditions of the deferred compensation plans provide for financial penalties in the event the Employee violates Section 3.1, and arbitrations resolving this type of dispute routinely determine money damages for proven violations of restrictive covenants. Nor does the balance of harms strongly favor Bear Stearns here since, if the preliminary injunction sought by Bear Stearns were granted, the defendants would be required to fire the sales assistants they had just hired (with no assurance that they could return to their old jobs at Bear Stearns), and would be unable to continue advising the private clients they had served for many years.

Third, as to the 90 day notice of termination provision in Section 3.1 of the Terms and Conditions, this Court declines specifically to enforce it because it would be fundamentally unfair to the defendants' private clients at Bear Stearns. If this Court were to issue a preliminary

injunction enforcing this provision, Bear Stearns would almost certainly decide to retain the defendants for some or all of the 90 days, forbid them from working or otherwise providing financial advice to their clients, pay them their base salaries, and use the time to persuade the defendants' clients to remain with Bear Stearns. During this period, if a client wished to remain with a defendant and obtain financial advice from him during these turbulent financial times, the client would be denied that opportunity because the defendants would be in employment limbo – unable to perform work at Bear Stearns and not yet able to perform work for Morgan Stanley. This Court will not enforce a contract provision that may deny clients their choice of financial advisors for up to 90 days. Portfolios can be significantly harmed during this length of time without proper financial advice. While this type of provision may not violate the letter of any NASD rule, it certainly violates the spirit of NASD Notice to Members 79-7, which states that unnecessary delays in transferring customer accounts, including delays accompanied by attempts to cause customers to change their mind about transferring their accounts, are not consistent with just and equitable principles of trade.

**ORDER**

For the reasons stated above, this Court hereby **DENIES** the plaintiff's motion for a preliminary injunction.

  
Ralph D. Gants  
Justice of the Superior Court

DATED: March 5, 2008