SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden PART 11
Justice

American Media Inc.

-v-

Stephanie Green

INDEX NO. 113224/04
MOTION DATE 10-14-04
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this ~~motion~~ petition to/for Preaction discovery.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the annexed memorandum, Decision & Judgment.

COPY
UNFILED JUDGMENT

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 8, 2005

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

- X

In the matter of the Application of
AMERICAN MEDIA, INC.,

Petitioner,

Index No: 113224/04

To Obtain Pre-Action Disclosure
Pursuant to CPLR 3102(c) in aid
of bringing an action from

STEPHANIE GREEN,

Respondent.

- X

JOAN A. MADDEN: J.

Petitioner American Media Inc. ("AMI") moves for pre-action discovery from the respondent Stephanie Green ("Green") pursuant to CPLR 3102(c). Green opposes the petition, which is denied for the reasons below.

Background

AMI is the owner of several nationally distributed newspapers and magazines, including the *Star*, a weekly publication based in New York City which concerns the lives of movie stars and other celebrities. AMI employed Green as a fact checker/researcher for the *Star* from November 17, 2003 to June 18, 2004. As a prerequisite to her employment, Green was required to execute a "Confidentiality & AT-Will Agreement"

(hereinafter "the Confidentiality Agreement").

Under terms of the Confidentiality Agreement, Green agreed that "at all times during and after her employment with [AMI]" she

> [would] hold in confidence all Confidential Information..regarding the Company,.... [with] Confidential Information defined as all non-public information regarding [AMI], its officers, and employees (and all information that has become public by your actions or actions of persons obtaining access to that information directly or indirectly from you.)
>
> [would] not without prior written consent of the President of [AMI] (i) use any Confidential Information for yourself or anyone else, (ii) disseminate any Confidential Information to any person other than the President of the [AMI] or (iii) discuss with the media any aspect of your employment with [AMI]; and
>
> [would] not write, speak or give interview, either directly or indirectly, on or off the record about your work at [AMI] including without limitation facts and information you have learned during your employment at [AMI] and about [your] assignments, for purposes of publication in any media in any way, directly or indirectly, without prior approval of [AMI].

Green also agreed that should would "not make any statements regarding [AMI], its officers or employees that are intended or may reasonably be expected to disparage or impugn them or to otherwise make a statement that will adversely affect

the reputation of [AMI], its officers or employee or otherwise disrupt, damage, impair or interfere with [AMI] or its operations or business prospects."

On September 10, 2004, *The New York Post* published an article stating that Green had written a 281-page manuscript of a book entitled "Dischalicious", based on her experiences at the *Star*. The article depicts the manuscript as a "tell-all" book which uses characters based on real employees at the *Star*, including the *Star's* Editorial Director. The article states that the book has gone out to about ten New York publishers. The article also states that Green admitted she was working on the manuscript while she was still working for AMI. Green is quoted as saying, "Yes, it was inspired by my life, but I haven't talked about what went on at the *Star*. The book is obviously a work of fiction."

In this proceeding for preaction discovery, AMI seeks a copy of the manuscript, asserting that the document is required so it may plead in its complaint the specific statements made by Green and support its claims for breach of the Confidentiality Agreement and breach of fiduciary duty. AMI also seeks copies of any documents evidencing Green's communications with prospective publishers of the manuscript so as to obtain Green's description of the manuscript and "to give the publishers notice of Green's

contractual obligations so that they won't tortiously interfere with such obligations."

In opposition, Green submits her affidavit in which she states that although she was required to sign the Confidentiality Agreement, it was never mentioned to her during her employment at the *Star*, no one explained to her what it was intended to cover, and she never saw any documents labeled "confidential" or "proprietary." Likewise, Green states that she was never advised or provided information as to what kind of statements would "disparage" AMI.

According to Green, "the manuscript ... is a work-in-progress unfinished draft of a work of fiction," and that she did not start to write it until after she left the *Star*. Green states that the manuscript "has never been published or circulated publicly" and "has been rejected by publishers to whom it has been submitted and it is not currently under active consideration by any publisher." Green also states that the *New York Post*, "apparently obtained a copy of an earlier version of the manuscript from some third party..."

Green argues that preaction discovery is not appropriately granted as AMI has no actionable claim for breach of the Confidentiality Agreement, or for breach of fiduciary duty. Green also asserts that purpose of AMI's application is to obtain

a prohibited prior restraint on publication.

Discussion

CPLR 3102(c) provides for preaction disclosure by court order. The court has discretion to grant preaction disclosure "'to aid in bringing an action (or) to preserve information.'" Thomas v. New York City Transit Police Department, 91 AD2d 898, 899 (1st Dept. 1983)(quoting CPLR 3201(c)) Specifically, CPLR 3102(c) has been held to authorize discovery "to allow plaintiff to frame a complaint and to obtain the identity of prospective defendants." Stewart v. New York Transit Authority, 112 AD2d 939 (2d Dept 1985).

However, preaction disclosure "is available only where there is a demonstration that the party bringing such a petition has a meritorious cause of action and the information being sought is material and necessary to an actionable wrong." Liberty Imports, Inc. v. Bourguet, 146 AD2d 535 (1st Dept 1989); Stewart v. New York Transit Authority, supra at 940. In other words, "preaction disclosure is not allowed to determine whether facts supporting a cause of action exist," Gleich v. Kissinger, 111 AD2d 130, 132 (1st Dept 1985). The purpose of this limitation is:

> To prevent the initiation of troublesome and expensive procedures, based upon mere suspicion, which may annoy and intrude upon an innocent party. Where, however, the facts alleged state a cause of action, the protection of a party's affairs is no

> longer the primary consideration and an examination to determine the identities of the parties and what form the action should take is appropriate.

Stewart v. New York Transit Authority, supra at 940.

Here, AMI has not met its burden of demonstrating that it has a potential cause of action against Green for breach of contract or breach of fiduciary duty, such that pre-action disclosure is proper to assist AMI in framing the complaint.

Restrictive covenants not to compete and confidentiality agreements will be enforced only "if reasonably limited temporally and geographically, and to the extent necessary to protect the employer's use of trade secrets and confidential information. " Steipleman Coverage Corp. V. Raifman, 258 AD2d 515, 516 (2d Dept 1999) The purpose of such agreements is "to protect the employer from unfair competition from former employees." Scott, Stackrow & Co. v. Skavina, 9 AD3d 805 (3d Dept), lv denied, 3 NY3d 612 (2004); see also, CBS Corp. V. Dumsday, 268 AD2d 350 (1st Dept 2000)(allegations that employees breached employment agreement by disclosing confidential information to a competitor to divert work from employer to competitor was sufficient to state a cause of action).

In this case, the Confidentiality Agreement cannot be enforced to prevent Green from using her observations regarding employees and supervisors at the *Star*, to write a fictional account since such information does not qualify as a trade secret, and is not otherwise entitled to confidentiality. See, Reed, Roberts Assocs., Inc. v Strauman, 40 NY2d 303, 309, reargument denied, 40 NY2d 918 (1976)(holding that former employee is not prohibited from using knowledge of his former employer's business operations which do not qualify as trade secrets); See Buhler v. Michael P. Maloney Consulting Inc., 299 AD2d 190 (1st Dept 2002)(noting that an employee's recollection regarding the needs and habits of particular customers is not confidential). Indeed, AMI cites no case authority which would permit the enforcement of the broad provisions of the Confidentiality Agreement.

Moreover, AMI does not claim that Green, as a fact checker and researcher, had access to trade secrets or proprietary information entitled to confidentiality, nor does AMI assert that Green intends to use any information to unfairly compete with AMI.

AMI's intended claims also arise out of Green's alleged breach of the no-dispargement clause. Such clauses

are intended to prevent false representations regarding another's product or services, and to prevent unfair competition. Electrolox Corp v. Val-Worth, Inc., 6 NY2d 556 (1959); 104 NYJur2d Trade Regulation,§ 268. To state a claim for breach of a no-dispargement clause, the employer must sufficiently allege damages resulting from statements by the former employee. Arts4all, Ltd v. Hancock, 5 AD3d 106, 110 (1st Dept 2004).

In this case, AMI submits no proof that statements in the manuscript disparage the services provided by *Star* and, in any event, AMI does not claim the unpublished manuscript has resulted in economic harm to AMI.

Moreover, in contrast to a defamation claim, the particular words used by a plaintiff need not be pleaded to state a claim for breach of contract or breach of fiduciary duty. Thus, as AMI requires the manuscript or other documents to determine if a cause of action exists, rather than for the purpose of framing a complaint, the petition must be denied. Holzman v. Manhattan & Bronx Surface Transit Operating Auth., 271 A.D.2d 346 (1st Dept. 2000); Gleich v. Kissinger, 111 AD2d at 132; Compare Hoo v. Forest Pharmaceuticals Inc., 225 AD2d 504 (1st Dept 1996)(permitting preaction disclosure where petitioner

alleged facts sufficient to establish prima facie case for defamation except for the requirement that the particular words complaint of be pleaded)

Finally, contrary to AMI's suggestion, preaction disclosure is not properly used as device to identify publishers contacted by Green so that AMI can notify them of their potential liability in the event they publish her manuscript.

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that AMI's request for preaction disclosure pursuant to CPLR 3102(c)is denied.

DATED: April 8 ,2005

J.S.C.