

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Daniel Patrick Moynihan
3 United States Courthouse, 500 Pearl Street, in the City of
4 New York, on the 25th day of March, two thousand eleven.
5

6 **PRESENT: DENNIS JACOBS,**
7 Chief Judge,
8 ROSEMARY S. POOLER,
9 PETER W. HALL,
10 Circuit Judges.

11
12 - - - - -X
13 IDG USA, LLC,
14
15 Plaintiff-Counter-Defendant-
16 Appellee,

17
18 -v.- 10-3405-cv (L)
19 10-3955-cv (Con)

20 **KEVIN J. SCHUPP,**
21
22 Defendant-Counter-Claimant-
23 Appellant.

24 - - - - -X
25
26 **FOR APPELLANT:** Linda H. Joseph
27 Schroder, Joseph & Associates LLP
28 Buffalo, NY

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2 **FOR APPELLEE:** Kevin Joseph English
3 Christopher L. Hayes (*on brief*)
4 Phillips Lytle LLP
5 Buffalo, NY
6
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8 Appeal from the grant of a preliminary injunction by
9 the United States District Court for the Western District of
10 New York (Skretny, J.).
11

12 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
13 **AND DECREED** that the district court's decision is **AFFIRMED**
14 **in part, VACATED in part,** and **REMANDED** in part.
15

16 The Appellant, Kevin Schupp, appeals the district
17 court's grant of a preliminary injunction preventing him
18 from: (1) working for competitors of the Appellee, IDG USA,
19 LLC ("IDG"), in a capacity similar to the one he had while
20 at IDG; (2) soliciting IDG customers that he managed while
21 at IDG; and (3) disclosing IDG's trade secrets and
22 confidential information. We assume the parties'
23 familiarity with the underlying facts, the procedural
24 history, and the issues presented for review.
25

26 We review a district court's grant of a preliminary
27 injunction for abuse of discretion. Metro. Taxicab Bd. of
28 Trade v. City of New York, 615 F.3d 152, 156 (2d Cir. 2010).
29 A grant of preliminary relief is an abuse of discretion
30 when: (1) the decision rests on an error of law; (2) the
31 decision rests on a clearly erroneous factual finding; or
32 (3) the decision, though not the product of a legal error or
33 clearly erroneous factual finding, cannot be located within
34 the range of permissible decisions. Sec & Exch. Comm'n v.
35 Dorozhko, 574 F.3d 42, 45 (2d Cir. 2009).
36

37 To obtain a preliminary injunction, a party must
38 establish both "irreparable harm absent injunctive relief,
39 and either a likelihood of success on the merits, or a
40 serious question going to the merits to make them a fair
41 ground for trial, with a balance of hardships tipping
42 decidedly in [its] favor." Almontaser v. N.Y.C. Dep't of
43 Educ., 519 F.3d 505, 508 (2d Cir. 2008) (quoting Louis
44 Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108,
45 113-14 (2d Cir. 2006)). The district court was well within
46 its discretion to conclude that IDG had shown a likelihood
47 of success on the merits and irreparable harm. Therefore,

1 the district court properly issued a preliminary injunction
2 against Schupp.

3
4 Schupp argues that IDG cannot show a likelihood of
5 success on the merits because (i) the non-compete agreement
6 ("NCA") with him is inherently unenforceable, (ii) he never
7 breached the NCA, and (iii) IDG breached the NCA thereby
8 making it unenforceable against him. An NCA is enforceable
9 if its restrictions are reasonable. BDO Siedman v.
10 Hirshberg, 93 N.Y.2d 382, 388 (1999). A restriction is
11 reasonable if it is no more than is needed to protect the
12 employer's legitimate interests, it imposes no undue
13 hardship on the employee, and it does not injure the public.
14 Id. at 388-89. Under New York law, an employer has a
15 legitimate interest in both its relationships with its
16 customers and its trade secrets. Id. at 389, 391. The
17 limited term and scope of the NCA at issue here do not
18 offend public policy. Therefore, the district court did not
19 abuse its discretion in concluding that the NCA is
20 enforceable.

21
22 The district court was within its discretion to
23 conclude on the evidence presented at the preliminary
24 injunction proceedings that Schupp breached the NCA. IDG
25 presented substantial evidence that, immediately after he
26 left IDG, Schupp began working nearby for one of IDG's
27 competitors, soliciting IDG's clients, and disclosing IDG's
28 confidential information. This evidence is sufficient to
29 reasonably conclude that Schupp violated the non-compete,
30 non-solicit, and non-disclosure provisions of the NCA.

31
32 The district court was also within its discretion to
33 conclude on the record of the preliminary proceedings that
34 IDG did not breach the NCA. Schupp's sole consideration for
35 signing the NCA was a one-time payment of \$3,000 by IDG,
36 which IDG paid and Schupp accepted. Schupp's constructive
37 termination claim fails because he did not establish that
38 IDG intentionally created a work environment so unpleasant
39 that a reasonable person in Schupp's position would feel
40 compelled to resign. See Morris v. Schroder Capital Mgmt.
41 Int'l, 7 N.Y.3d 616, 622 (2006) ("[T]he atmosphere in the
42 workplace must be so intolerable as to compel a reasonable
43 person to leave."). In any event, Schupp was employed "at
44 will."

45
46 To establish irreparable harm, a plaintiff must
47 establish both that an injury is likely absent the

1 injunction and that the injury cannot be adequately remedied
2 with money damages. Grand River Enter. Six Nations, Ltd. v.
3 Pryor, 481 F.3d 60, 66 (2d Cir. 2007); Moore v. Consol.
4 Edison Co., 409 F.3d 506, 510 (2d Cir. 2005). Threatened
5 dissemination of trade secrets generally creates a
6 presumption of irreparable harm. See FMC Corp. v. Taiwan
7 Tainan Giant Indus. Co., 730 F.2d 61, 63 (2d Cir. 1984) (per
8 curiam). IDG presented substantial evidence that Schupp was
9 disseminating IDG's secrets, including to IDG's customers
10 and one of IDG's primary competitors. The district court
11 was within its discretion to conclude that IDG satisfied the
12 irreparable harm requirement and that a preliminary
13 injunction was justified.

14
15 However, while the district court was within its
16 discretion to issue a preliminary injunction, the terms of
17 the injunction fail to meet the specificity requirement of
18 Federal Rule of Civil Procedure Rule 65(d) for two reasons.
19

20 First, the district court's injunction insufficiently
21 specified the trade secrets and confidential information
22 that Schupp is forbidden to disclose. To satisfy Rule
23 65(d), "the party enjoined must be able to ascertain from
24 the four corners of the order precisely what acts are
25 forbidden." Sanders v. Air Line Pilots Ass'n Int'l, 473
26 F.2d 244, 247 (2d Cir. 1972). An injunction that simply
27 prohibits the disclosure of trade secrets or confidential
28 information, with no additional description of what secrets
29 or confidential information are to be protected, is
30 insufficiently specific to satisfy Rule 65(d). Corning Inc.
31 v. PicVue Elecs., Ltd., 365 F.3d 156, 157-58 (2d Cir. 2004).
32 Because with respect to trade secrets and confidential
33 information, the district court's injunction here is no more
34 specific than the one rejected in Corning, we vacate that
35 portion of the preliminary injunction and remand to the
36 district court to add additional specificity. The district
37 court may consider tracking the words of the NCA, which
38 defines trade secrets and confidential information. While
39 an order granting a preliminary injunction may not
40 incorporate extrinsic documents by reference, it can track
41 language from such documents in order to add specificity to
42 the injunction. The language in the NCA should be
43 sufficient to satisfy Corning and Rule 65(d).

44
45 Second, the district court's injunction does not
46 specify the duration of any of its prohibitions. We remand
47 for that amendment. The district court should consider that

1 the non-compete and non-solicit clauses of the NCA--but not
2 the non-disclosure clause--have a one-year limit. The
3 district court therefore should consider whether the
4 prohibitions of these two clauses remain current. If on
5 remand the district court determines that any of the time
6 limits have expired, the district court should further
7 modify the terms of the preliminary injunction to
8 accommodate such circumstances.

9
10 Finally, we reject Schupp's argument that the district
11 court's preliminary injunction is somehow invalid because
12 the court failed to require IDG to post a bond until after
13 Schupp specifically requested one almost a month after the
14 preliminary injunction first issued. While the bond should
15 have been required sua sponte at the time the injunction
16 first issued (or the district court should have explained
17 when issuing the injunction why no bond was being imposed),
18 such error is harmless because the district has now required
19 such a bond.

20
21 We hereby **AFFIRM** the district court's grant of a
22 preliminary injunction, but we **VACATE in part** and **REMAND** the
23 district court's specific injunctive order with instructions
24 to further specify the nature of the confidential
25 information and trade secrets that the Appellant is enjoined
26 from disclosing and duration of each of the injunction's
27 prohibitions.

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30 FOR THE COURT:
31 CATHERINE O'HAGAN WOLFE, CLERK
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