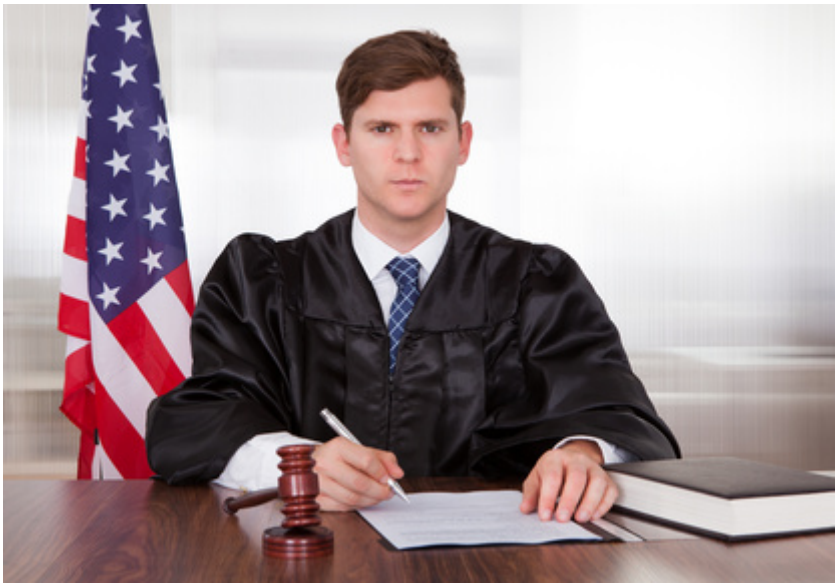
Excuse Me Judge, Could I Be Heard On That?

Insights
10.24.13



A few months ago, I filed a motion for a TRO on behalf of a client. I thought I had a pretty rock-solid case. My client had discovered that in the weeks and months leading up to the resignation of a former employee, the employee had created a detailed spreadsheet containing proprietary customer data. After printing the spreadsheet, instead of deleting it, the employee saved over it with innocuous content to cover his tracks. As if that were not enough, the employee also logged into multiple proprietary databases and pressed the print screen button over 400 times to capture images of proprietary data. When my client confronted the employee about his actions, his story quickly fell apart and he repeatedly told my client to "talk to my lawyer." My client asked the employee directly, "Are you going to solicit our customers in violation of your nonsolicitation agreement?" The employee refused to answer and instead repeated his familiar refrain, "Talk to my lawyer." Following the employee's directive, we asked his lawyer whether the employee was going to comply with his nonsolicitation agreement, and his lawyer likewise refused to answer the question. Consequently we filed our action seeking a TRO to preclude the employee from violating his nonsolicitation obligations.

I recounted these facts to the judge and explained that we were merely seeking an injunction to preserve the status quo pending an expedited arbitration. That is, the dispute between my client and this employee was arbitrable, and we merely needed the court to issue an injunction to stop the

impending solicitation until the arbitration forum could appoint an arbitration panel to hear our dispute.

The judge was not as impressed with my case as I was. At first I thought he must not understand the facts as I had presented them, so I tried to explain them again. But he understood me. From his perspective, he said, "You think that this employee took these documents, but you don't know that he took them. And you think that he is going to solicit clients, but you don't know that he is going to solicit them."

I suggested to the court that it was applying the wrong standard of proof. When considering whether to issue an injunction, the court must ask whether the plaintiff is likely to succeed on the merits. The standard of proof in a civil action is preponderance of the evidence, or in other words, what is more likely than not. I asked the judge to consider what is more likely – is it more likely that this employee created this spreadsheet and captured 400+ screenprints and refused to answer whether he intends to solicit because he in fact does intend to solicit my client's customers or because he does not intend to solicit my client's customers? The judge was still not persuaded.

At this time, I reached the point that every litigator hates to reach in any hearing. I knew I had lost. Still worse, I had lost and the defense had not even been required to answer my client's allegations! Wow, that hurts. One would think that the judge would have at least turned to defense counsel and asked him whether his client intended to solicit my client's customers, but I could understand that he was not going to require a lawyer to testify. So I said to the judge (in more or less these words), "Thank you, Your Honor. You have been very gracious this morning and patient as you have given me a lot of time to hear my argument. Given that the Court has questions concerning whether the defendant in fact took the proprietary data and intends to solicit customers, I would ask for leave to conduct expedited discovery so that I can present evidence at the preliminary injunction hearing."

This is where things got interesting. There was not going to be a preliminary injunction hearing. The judge decided that because my case was arbitrable, and because I had no conclusive proof that the defendant had taken the documents nor already engaged in solicitation, he was going to dismiss the entire case without prejudice! The defendant would not even be required to answer the complaint. In fairness to the judge, he said I was welcome to come back at any time if I had proof that the defendant was soliciting my client's customers. While this was of some comfort, it seemed to be a little off the mark.

My client had filed a lawsuit. We had made allegations. The defendant had yet to answer those allegations. Were we not entitled to have the defendant answer those allegations? Were we not entitled to a hearing? It seemed to me that we were particularly entitled to a hearing where the facts were in dispute; or at least were presumably in dispute – remember, defense counsel was never asked by the court whether the defendant disputed our allegations. In fact, the defendant had not answered the complaint, nor had he even filed an opposition to my client's emergency motion for a TRO.

The United States Court of Appeals for the 5th Circuit recently spoke to this issue in a noncompete case. Reversing a district court's denial of a preliminary injunction, the 5th Circuit commented, "it is troubling that the district court failed to hold an evidentiary hearing to resolve the factual dispute apparent from the parties' conflicting evidence." The Court noted that although it has "frequently affirmed district courts' decisions to rule on such motions without conducting an oral hearing, [it has] done so exclusively in cases that involved no genuine factual dispute." The Court added, "In cases such as this one, however, where the parties' affidavit testimony is in direct contradiction as to material questions of fact, 'the propriety of proceeding upon affidavits becomes the most questionable.'"

If the 5th Circuit felt it was improper to deny a hearing where there are conflicting affidavits, you can imagine how I felt when I was denied a hearing where the defendant had not even been required to answer the allegations. But as I said, the court was extremely gracious and provided me with ample opportunity to argue my point of view and made it clear that I was free to return with evidence in the event that the defendant engaged in solicitation.

For those of you who may be wondering how things turned out, soon thereafter, the defendant in fact began soliciting clients and I returned to the court with evidence in hand. True to its word, the court promptly issued a preliminary injunction. The wheels of justice turn slowly, but grind exceedingly fine.

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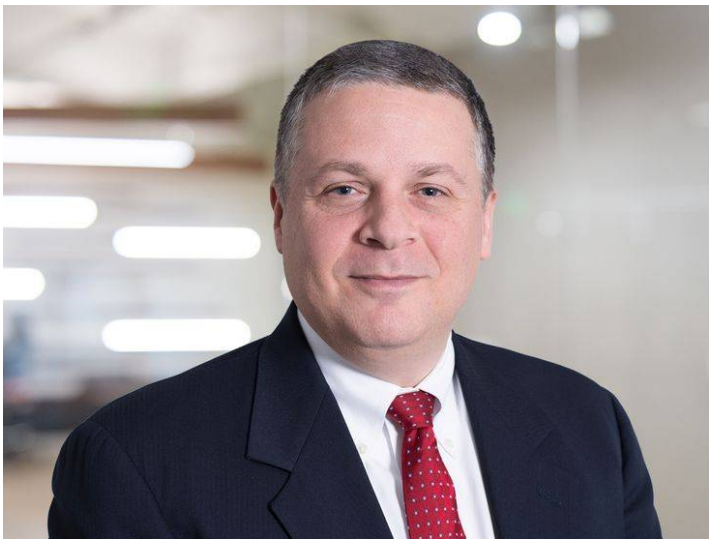

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