

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-1514

ANAQUA, INC.

vs.

MARK BULLARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Mark Bullard, appeals from a preliminary injunction granted on July 24, 2014, by a Superior Court judge in favor of the plaintiff, Anaqua, Inc. (Anaqua), enjoining him from working for his new employer, Lecorpio, LLC (Lecorpio), for 150 days after the date the injunction enters and from disclosing Anaqua's confidential information or trade secrets.¹ Bullard asserts the judge abused his discretion in granting the injunction because Anaqua failed to establish its likelihood of success on the merits and failed to demonstrate that it will suffer irreparable harm without an injunction. We affirm.²

¹ On July 24, 2014, the motion judge also dismissed Lecorpio, originally listed as a defendant, from this action.

² While the injunction preventing Bullard from working for Lecorpio has expired, the prohibition on disclosure of confidential material or trade secrets has not.

Background. We summarize the facts set forth by the motion judge in his order granting the preliminary injunction. Anaqua was formed in 2004 and sells intellectual property management software, intellectual property maintenance services, data security services, and professional consulting services. On or about February 1, 2008, Bullard began employment with Anaqua as its business development director. At that time, he signed a proprietary information, noncompetition and inventions agreement (agreement) by which he agreed to hold in confidence, and not use except in his work for Anaqua, the company's proprietary information. In addition, the agreement contained a noncompetition, and nonsolicitation clause with a duration of twelve months after Bullard left Anaqua's employ, by which Bullard agreed not to participate, as employee, contractor, officer, director, or equity holder, in "any business which is competitive, directly or indirectly, with the business of the Company anywhere in the world," and not to solicit Anaqua's employees or its actual or prospective clients or customers. While employed by Anaqua, Bullard came into possession of its proprietary and confidential information and trade secrets, including "client lists, prospective client lists, knowledge of Anaqua's pricing methods, Anaqua's pricing to current customers, knowledge of Anaqua's negotiations with and offers to

prospective clients, product development roadmaps, and corporate strategy plans."

On September 20, 2013, Bullard voluntarily left Anaqua with the intention of writing a book. Approximately four months later, executives from Lecorpio, Anaqua's competitor, approached Bullard and offered him a position in the company. Bullard began work as Lecorpio's vice president of product management three months later in April, 2014. Anaqua learned of Bullard's new employment and sent him a cease and desist letter on April 29, 2014. Anaqua then filed suit for breach of contract against Bullard and for tortious interference with contractual relationships against Lecorpio in May, 2014. Anaqua filed a motion dated June 23, 2014, for a preliminary injunction to prevent Bullard from continuing his employment with Lecorpio for a period of 150 days from the entry of the order granting the injunction and from disclosing any of Anaqua's confidential or proprietary information or trade secrets to Lecorpio. Anaqua also requested that Bullard and Lecorpio be enjoined from using any of Anaqua's confidential or proprietary information or trade secrets.

On appeal, Bullard advances two arguments in support of his claim that Anaqua failed to establish its likelihood of success on the merits. First, Bullard claims that the information Anaqua seeks to protect does not qualify as trade secrets or

confidential information and, in any event, most of the information in question had become public knowledge. Second, Bullard claims that the agreement does not protect a legitimate business interest because he has a different position at Lecorpio with different responsibilities. Finally, Bullard asserts that Anaqua failed to establish irreparable harm.

Discussion. "We review the grant or denial of a preliminary injunction to determine whether the [motion] judge abused his discretion, that is, whether the judge applied proper legal standards and whether there was reasonable support for his evaluation of factual questions." Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 741 (2008). "A party seeking a preliminary injunction must show that success is likely on the merits; irreparable harm will result from denial of the injunction; and the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party." Doe v. Superintendent of Schs. of Weston, 461 Mass. 159, 164 (2011) citing Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980).

Here, the motion judge determined that Bullard possessed Anaqua's confidential business information regarding plans for future product development and that by accepting employment with Lecorpio he likely breached the noncompetition clause of the agreement. The judge's well-reasoned and thorough decision is

amply supported by the record, particularly by the affidavits submitted by Anaqua executives regarding the information made available to Bullard during the weekly executive management team teleconferences. While many of the materials in the record detail sales strategies, the judge concluded that understanding those strategies necessarily involved discussion of product development, which is confidential business information.³ Indeed, the judge found that "[i]t would be difficult, if not impossible, for [Bullard to] put such information out of his mind, particularly if he is motivated to turn in his best possible performance." Further, although Bullard asserts that the business information forming the basis of the injunction was no longer confidential and at the very least outdated, the judge determined that the product roadmap was confidential information, a factual determination that deserves our deference.⁴ See Fremont Inv. & Loan, supra.

Finally, Bullard challenges the judge's finding that Anaqua would suffer irreparable harm without an injunction in place. The judge found that there was potential for Bullard to disclose

³ For example, Bullard was involved in discussing and coordinating certain product enhancements.

⁴ Bullard points only to his own affidavit and deposition to contradict Anaqua's evidence that he possessed confidential information.

confidential information⁵ that could cause harm not completely compensable by money damages. See generally Aspect Software, Inc. v. Barnett, 787 F. Supp. 2d. 118, 130 (2011). The judge, therefore, did not abuse his discretion in granting the preliminary injunction.

Order granting preliminary
injunction affirmed.

By the Court (Cypher,
Grainger & Vuono, JJ.⁶),

Clerk

Entered: August 28, 2015.

⁵ The judge was also careful to note, however, that he believed Bullard and Lecorpio were making a sincere effort to ensure that Bullard did not disclose any confidential information.

⁶ The panelists are listed in order of seniority.