

Scope of General Releases within Employee Separation Agreements

By Leo K. Barnes Jr.

Recently in *WSP USA Corp. v. Marinello*, 2013 WL 6704885 (S.D.N.Y. 2013), a Southern District of New York decision analyzed whether a broad separation agreement and release executed upon an employee's voluntary departure from his employment will bar claims made by the former employer.



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defined confidential information broadly and included "any data or information regarding the business of [WSP] that is not generally known to the public which has economic value, and which the company keeps confidential ..." Separately, the Agreement included parallel general release provisions for both WSP and Marinello, that released "any and all claims,

known and unknown ... which the Company has or may have against [Marinello] as of the date of execution of the Agreement and General Release."

Subsequently, WSP commenced an action against Marinello for breach of contract, misappropriation of trade secrets, defamation, conversion, and sought an accounting. Specifically, the Complaint alleged numerous instances of alleged misconduct, including:

That upon Marinello's voluntary departure from WSP, he appropriated and retained confidential company information in violation of the parties' Agreement, and, upon information and belief, shared that information with his new employer;

That he failed to return valuable electronics equipment belonging to WSP (including two laptops, an iPad and three phones), and that he ignored requests to return the items; and

That on or about May 1, 2013, Marinello had opened a Twitter account using WSP's name, and that he posted "libelous and disparaging" statements about the company.

Marinello moved to dismiss the complaint in its entirety, pursuant to Rule 12(b)(6), arguing that a general release provision in the Agreement barred WSP's claims. Applying New York law, the court held that the express language of the Agreement established that WSP released "any and all claims, known and unknown,

asserted or unasserted" that WSP had or may have had as of the February 28, 2013 execution of the Agreement. Thus, the release barred WSP not only from bringing claims that were in existence on

February 28, but also barred claims that had not yet been discovered.

The court held that because WSP's claims for breach of contract, mis-

(Continued on page 25)

Employee Separation Agreements (Continued from page 15)

appropriation of trade secrets, and conversion did not arise until after the Agreement's execution, those claims were not barred by the release. However, the Court held that WSP's claims for defamation and an accounting were barred by the release provision, and dismissed the same.

Concerning the breach of contract claim, the court noted that although Marinello may have accessed the confidential information prior to execution of the Agreement, the complaint alleged *ongoing* conduct that specifically violated the Agreement, namely that he retained WSP's confidential information and shared it with his new employer. Thus, the Court found that the complaint sufficiently alleged a breach of contract claim.

For the same reasons, the court found that the complaint plausibly alleged that Marinello misappropriated trade secrets. The court noted that WSP's claim is not premised merely on Marinello's alleged improper access of company information during his employment at WSP, but also his *subsequent ongoing* misuse of this information. As such, WSP's misappropriation claim was not barred by the Agreement's release provision. Concerning plaintiff's conversion claim based upon Marinello's failure to return various electronics equipment, the court noted that "a conversion does not occur until after a demand and refusal to return the property" where the original possession is lawful, and this plaintiff had no

conversion claim until June 2013, when defendant allegedly refused plaintiff's demand. As such, the court held that WSP's arose after the execution of the Agreement and was not barred by the release provision.

In dismissing WSP's defamation claim, the court held that because the complaint does not identify any statements that post-date the Agreement's execution (Feb. 28), plaintiff's defamation claim is barred by the release. Notwithstanding the release, the court held that the majority of WSP's defamation claim would be dismissed due to the failure to allege actionable statements of defamation. Likewise, the court dismissed plaintiff's claim for an accounting, because the complaint set forth no allegations that established a fiduciary relationship between WSP and defendant Marinello. Instead, the court found that the complaint merely alleged a typical employer-employee relationship. Furthermore, the court found that the complaint did not contain allegations that could support a conclusion that WSP lacked adequate remedies at law.

In light of the *WSP* analysis, employers must carefully determine whether it is appropriate to include a broad release in an employee separation agreement while the employee remains obligated to protect the employer's confidential info.

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