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SHORT FORM ORDER

INDEX NUMBER: 41900-08

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 04-24-2009
Motion Submit Date: 06-24-2009
Motion Sequence No's.: 002 MD

X

RMS HOLDINGS, INC., RMS INSURANCE BROKERAGE, LLC d/b/a EAST END INSURANCE SERVICES,

Plaintiffs,

-against-

DAVID FUJITA, JASON WAHL, JASON LUHRS, and SHORELINE INSURANCE BROKERAGE, LLC,

Defendants.

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Attorney for Plaintiff
David S. Kritzer & Associates
187 East Main Street
Huntington, New York 11743

Attorney for Defendant
The Law Offices of Jason L. Abelove
666 Old Country Road, Suite 304
Garden City, New York 11530

ORDERED, that the motion (motion sequence numer002) by defendants pursuant to CPLR to dismiss the Complaint is denied; and it is further

ORDERED, that a compliance conference is scheduled for September 9, 2009 at 9:30 a.m. before the undersigned.

Plaintiffs commenced this action against defendants seeking damages and injunctive relief arising out of defendants' alleged breach of certain restrictive covenants and intentional interference with business relations. The submissions reflect that in or about October 1, 2005, plaintiff, RMS Insurance Brokerage LLC ("RMS")[1] purchased the assets of plaintiff East End Insurance Agency, Inc., d/b/a East End Insurance Services ("East End") and at the time of the purchase, defendants David Fujita ("Fujita"), Jason Wahl ("Wahl") and Jason Luhrs ("Luhrs") were employees of East End. Each of these defendants had entered into employment contracts with East End (which were

[1]RMS is a wholly owned subsidiary of plaintiff, RMS Holdings, Inc.

assigned to RMS on the purchase) containing restrictive covenants.[2] Specifically, on September 15, 2005, Fujita, Wahl and Luhrs each executed a separate, yet identical "CONFIDENTIALITY AND NONSOLICITATION AGREEMENT" (the "Agreement") which contained the following provisions:

> 3. You understand and agree that, as a result of being employed and trained by EEIS and being given access to EEIS' Confidential Information, you will gain valuable skills and will be able to develop contacts and relationships with EEIS' employees, customers, and vendors.
>
> 4. Therefore, you promise to abide by the following restrictions, which you agree are reasonable and necessary for the protection of EEIS' legitimate business interests:
>
> > (b) You agree that after your employment with EEIS ends, you will not disclose any of EEIS' Confidential Information to anyone outside EEIS, except if it is necessary for the performance of your duties for EEIS and you are acting solely in EEIS' interests.
> >
> > (c) You agree that when your employment with EEIS ends, you will immediately return to EEIS all originals and copies of any documents and other materials you received or obtained from EEIS during your employment including, but not limited to, keys, customer and/or vendor lists, computer discs and/or programs, CD's, equipment and manuals.
> >
> > (e) You agree that during your employment with EEIS and for twelve months after your employment with EEIS ends, you will not, directly or indirectly, induce, encourage or solicit any other employee or officer of EEIS to leave EEIS' employ or assist any person, company or entity to engage in such conduct.
> >
> > (f) You agree that during your employment with EEIS and for twelve months after your employment with EEIS ends, you will not, directly or indirectly, on your own behalf or on behalf of any person or entity, induce, encourage, solicit or initiate any contact with any customer of EEIS, with the intent of influencing such customer to cease doing business with EEIS or otherwise interfering with EEIS' relationship with any of its customers.

Subsequently, on or about January 1, 2007, RMS entered into a "Producer Employment Agreement" with Luhrs which superceded all prior agreements between these parties. This Producer Employment Agreement also contained a restrictive covenant which provided that:

> 13. **Covenant Not to Solicit and Compete**.
>
> > (a) Producer agrees, that for a period of two (2) years after the date which Producer ceases, for any reason, to be employed by Broker or any of its affiliates, Producer shall not, directly or indirectly within a territory comprising of and falling within New York City, Nassau and Suffolk Counties and a radius of 50 miles from the corporate borders thereof:

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[2] At the time the Summons and Complaint was filed, plaintiff was unable to locate the employment agreement with Wahl. However, subsequently same was located and is annexed to the opposition papers. Plaintiff states that it will be amending its Complaint to reflect the existence of the agreement with Wahl.

> (i) solicit, accept or service any existing or future insurance business; (x) from any customer (including any active and/or prospective customer who is an actual or intended object of substantive solicitation by Broker) that Producer (either alone or in combination with others) solicited, accepted, or serviced during or prior to Producer's employment with Broker or its affiliates (whether pursuant to this Agreement or otherwise); and/or (y) from any of the parents, subsidiaries, associated entities, successors and/or assigns of any such customer; and/or
>
> (ii) assist or be employed, retained, or engaged by any person in soliciting, accepting, or servicing any existing or future insurance business: (x) from any of the customers referenced in subparagraph (i) of Section 13(a); or (y) from any of the parents, subsidiaries, associated entities, successors and/or assigns of any such customer; and/or
>
> (iii) request, advise, and/or encourage any of the customers referenced in subparagraph (i) of this Section 13(a), or any of the parents, subsidiaries, associated entities, successors and/or assigns of such customers, to withdraw, cancel, curtail, relocate, or assign or reassign to, or place with others any of its existing or future insurance with respect to any new, renewal and/or replacements policies;

Plaintiffs allege that Wahl terminated his employment with RMS in May of 2008, Fujita in June of 2008 and Luhrs in October of 2008 and that *prior* to such termination, defendants Fujita, Wahl and Luhrs formed defendant Shoreline Insurance Brokerage, LLC ("Shoreline"). In the First Cause of Action against Fujita, plaintiffs assert that he breached the Agreement by operating Shoreline, which is located only three tenths of a mile from plaintiffs' principal place of business. Moreover, plaintiffs allege that Fujita has breached the Agreement by soliciting customers of East End and soliciting other employees to leave plaintiffs' employ. Plaintiffs seek both injunctive relief enjoining Fujita from breaching the restrictive covenants and money damages arising from the breach. Similarly, the Second Cause of Action is against Luhrs and alleges that he breached the Producer Employment Agreement as a result of the formation of Shoreline, solicitation of East End Customers and solicitation of employees. Plaintiffs also seek injunctive relief and money damages against Luhrs. The Third Cause of Action is asserted against all defendants and sounds in tortious interference with business relations. Here, plaintiffs assert that defendants have targeted plaintiffs' customers with the intention of diverting them to other insurance agencies and seek money damages.

Defendants now move to dismiss the Complaint on the ground that it fails to state a cause of action. Specifically, defendants argue that the restrictive covenants contained within the respective agreements are not enforceable because the plaintiffs' customer lists are not a protected trade secret. They argue that the customer lists are readily ascertainable and thus not afforded trade secret protection. With regard to the cause of action alleging tortious interference with business relations, defendants assert that plaintiffs have failed to plead the essential elements of this cause of action, specifically, wrongful

conduct on the part of defendants which caused third parties to fail to enter into a contractual relationship with plaintiffs. Thus, defendants urge the Court to dismiss the Complaint in its entirety.

Plaintiffs oppose the motion and argue that defendants' opposition wholly ignores the fact that defendants were obligated to comply with the subject agreements and that defendants breached those agreements. Plaintiffs assert that the agreements at issue here clearly and unambiguously restricted the post-employment conduct of defendants and included the customer lists in the definition of trade secrets. Plaintiffs argue that the restrictive covenants contained within these agreements are enforceable in that they are reasonable and specific with regard to geographic scope and time period and do not limit defendants from earning a livelihood. With regard to the cause of action for tortious interference, plaintiffs argue that they have established wrongful conduct by defendants; to wit, a breach of their fiduciary duty to plaintiffs in the formation of Shoreline prior to the termination of their employment with RMS. Thus, plaintiffs request that the motion to dismiss be denied.

It is well settled that on a motion to dismiss pursuant to CPLR §3211(a)(7), "the complaint must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true." ***Pacific Carlton Development Corp., v. 752 Pacific, LLC.,*** 62 A.D.3d 677, 878 N.Y.S.2d 421 (2d Dept. 2009). The Court must determine whether the facts as alleged fit within any cognizable legal theory. ***Beja v. Meadowbrook Ford,*** 48 A.D.3d 495, 852 N.Y.S.2d 268 (2d Dept. 2008). "The standard is not whether the complaint states a cause of action, but whether the plaintiff has a cause of action." ***Morales v. Copy Right, Inc.,*** 28 A.D.3d 440, 813 N.Y.S.2d 731 (2d Dept. 2006).

Restrictive covenants are generally disfavored by the courts and will only be enforced if reasonably limited in time and geography, and only as necessary to protect the employer's use of trade secrets or confidential information. ***Gilman & Ciocia, Inc., v. Randello,*** 55 A.D.3d 871, 866 N.Y.S.2d 334 (2d Dept. 2008); ***Natural Organics v. Kirkendall,*** 52 A.D.3d 488, 142 92d Dept. 2008); ***Ricca v. Ouzounian,*** 51 A.D.3d 997, 859 N.Y.S.2d 238 (2d Dept. 2008). Moreover, to establish a claim of tortious interference with prospective contractual relations, "the plaintiff must prove that the defendant engaged in culpable conduct which interfered with a prospective contractual relationship between the plaintiff and a third party." ***Lyons v. Menoudakos & Menoudakos, P.C.,*** 63 A.D.3d 801, 880 N.Y.S.2d 509 (2d Dept. 2009); ***citing, NBT***

Bancorp v. Fleet/Norstar Fin. Group, 87 N.Y.2d 614, 641 N.Y.S.2d 581, 64 N.E.2d 492 (1996). The plaintiff must prove that the motive for the interference was malicious. ***RSA Distributors, Inc., v. Contract Furniture Sales Ltd.,*** 248 A.D.2d 370, 669 N.Y.S.2d 842 92d Dept. 1998). ***See also, Anesthesia Assoc. v. Northern Westchester Hospital,*** 59 A.D.3d 473, 873 N.Y.S.2d 679 (2d Dept. 2009). Wrongful conduct includes "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." ***Smith v. Meridian Technologies, Inc.,*** 52 A.D.3d 685, 861 N.Y.S.2d 687 (2d Dept. 2008)(internal quotations omitted). Wrongful conduct could also result from a breach of fiduciary duty. ***RSA Distributors, supra.***

In applying the above principles to the case at bar, the Court finds that the Complaint is sufficient to state a cause of action for breach of the restrictive covenants and tortious interference with business relations. It is undisputed that defendants executed the employment agreements which contained the restrictive covenants, which, essentially, limited them from soliciting any of plaintiffs' customers or employees for a period of one year (for Fujita and Wahl), and two years (for Luhrs). The Complaint alleges that defendants actively solicited RMS customers and employees in violation of the agreements and restrictive covenants contained therein. The Court finds that the restrictive covenants were narrowly tailored to protect plaintiffs' legitimate business interests and neither prevent fair competition nor defendants' ability to earn a living. Moreover, the allegations that defendants formed a competing corporation while employed by RMS and contacted plaintiffs' customers are sufficient to state a cause of action for tortious interference with business relations.

Based on the foregoing, the motion to dismiss is denied. A compliance conference is scheduled for September 9, 2009 at 9:30 a.m. before the undersigned.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: August 24, 2009
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.