Town New Dev. Sales & Mktg., LLC v Reuveni
2017 NY Slip Op 30949(U)
May 5, 2017
Supreme Court, New York County
Docket Number: 652250/17
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

---X

TOWN NEW DEVELOPMENT SALES AND MARKETING, LLC,

Plaintiff,

-against-

SHLOMI REUVENI and REUVENI REAL ESTATE LLC,

Defendants.

---X

INDEX NO. 652250/17

DECISION & ORDER

MOTION SEQ. NO. 001

OSTRAGER, J:

This motion for a Preliminary Injunction with a Temporary Restraining Order ("TRO") pursuant to CPLR § 6301 is brought by plaintiff, Town New Development Sales and Marketing, LLC (hereinafter, "TND") to enforce restrictive covenants, including non-competition, non-solicitation and non-disparagement provisions, contained in an Employment Agreement and Confidentiality and Non-Competition Agreement annexed thereto, both dated March 31, 2014 and entered into by TND and defendant Shlomi Reuveni ("Reuveni") (Complaint, Exh. A). TND is one of five divisions of its parent company Town Residential, LLC ("Town"), and was formed in 2010. As of July 27, 2016, Town is wholly owned by Andrew Heiberger ("Heiberger"). TND primarily engages in "new development sales" of ground up real estate developments and the re-development of existing properties in New York City.

Reuveni who has had approximately 30 years' experience in real estate brokerage in New York City, including new development sales, re-sales, and rentals, was recruited to work as TND's Managing Director in 2014 for an annual salary of $900,000 and other benefits. Reuveni was recruited to head TND by Joseph Sitt ("Sitt") who, in 2014, owned 50% of Town and controlled Town's Board of Directors. The other 50% of TND was then owned by Heiberger. A dispute erupted between Sitt and

Heiberger in early 2016 when Sitt sought to sell his 50% share in Town to third parties. The dispute ultimately settled in July 2016 with Heiberger buying out Sitt's interest in Town and Heiberger becoming the 100% owner of Town.

Defendant Reuveni's Employment Agreement was drafted in such a way that Reuveni is bound by the non-compete restriction in the Agreement if he voluntarily resigns but not if he serves as TND's Managing Director until the expiration of his three-year employment term of March 31, 2017.[1] Plaintiff TND asserts that defendant Reuveni abruptly resigned on December 2, 2016, primarily because Reuveni could not obtain certain concessions pertaining to his continued employment at TND, thereby triggering the non-compete restriction in Reuveni's Employment Agreement. Reuveni, on the other hand, claims that he was compelled to leave TND on December 2, 2016 by unreasonable misconduct on the part of Heiberger, Town's Chief Executive Officer and owner, and that the restrictive covenant should not be enforced. The plaintiff's motion for a preliminary injunction that is presently before the Court was precipitated by an article and a press release that appeared in two trade publications on April 7, 2017 which announced that Reuveni had launched Reuveni Real Estate,[2] headquartered in Manhattan, Reuveni's own new development brokerage business (*see* Pestana Affidavit, Exhs. B and C).

In order to resolve disputed issues of fact raised by the parties' submissions on the motion as to whether or not defendant Reuveni "resigned" from TND, the Court denied the TRO and scheduled an immediate evidentiary hearing which lasted significant parts of May 3, 4, and 5, 2017 at which

[1] Paragraph 2(a) of the Employment provides for a three-year employment term. Paragraph 4(c) of the Employment Agreement provides that TND may terminate the employment relationship with defendant Reuveni at any time "with Cause" (as defined in the Agreement) by providing Reuveni written notice and setting forth a final termination date in the termination notice. Plaintiff introduced into evidence a letter dated October 17, 2016 from TND to Reuveni, advising Reuveni that his employment would not be extended beyond March 31, 2017.

[2] *See* http://www.reuvenirealestate.com/

testimony was adduced from multiple witnesses and at which approximately two dozen documents were introduced into evidence.

Exhibit 1 to the Employment Agreement entitled" Employee Assignment of Intellectual Property, Confidentiality, and Non-Competition Agreement" (hereinafter, "Non-Compete Agreement") provides in relevant part in Section 3 as follows:

3. Agreement not to Compete.

(a) Employee acknowledges and agrees that during the course of his employment with the Company, Employee shall have access to past, present or future strategies, plans, business activities, methods, processes, training programs, platforms, guides and materials, and/or other information of the Company which is not only confidential and/or trade secrets, but may also afford the Company certain competitive or strategic advantages in the marketplace. Accordingly, in consideration for the employment by the Company and compensation and other benefits, during the period of his employment with the Company, and, for a period of two (2) years following the termination of his employment for Cause (as defined above in Section 4(c) of the Agreement)) or the Employee resigns, the Employee shall not directly or indirectly:

(i) anywhere in the Territory (as defined in paragraph (c) below) participate in. compete, engage in, manage or operate (whether as a director, officer, employee, agent, representative, security holder, consultant or otherwise) any business or activities involving the Business of the Company (as defined in paragraph (c) below) ("Competitive Activities"), for any customer, client, individual or company with whom you have worked, collaborated with, have had contact with, or provided services to during the course of your employment with the Company, including, without limitation, (A) developing, franchising, licensing, selling or providing products, sites, buildings or services which compete with the Business of the Company, whether by means of electronic or traditional commerce; and (B) assisting any person or entity in any way to do, or attempt to do, anything prohibited by clause (A) above; or

(ii) perform any action, activity or course of conduct which is detrimental in any material respect to the business or business reputation of the Company (or any of its affiliates).

(b) The term "compete" as used herein means to engage, directly or indirectly, either as a proprietor, partner, employee, agent, independent contractor, consultant, franchisor, franchisee, director, officer, stockholder or in any other capacity or manner whatsoever. [...]

(c) As used herein, the term: (i) "Business of the Company" means engaging in the business of real estate development, brokerage, rental, and/or sales, including, without limitation, any of the following

activities: (1) condominium conversion; (2) building acquisition and development; (3) residential new construction; (4) land acquisition and development; (5) residential rentals; and (6) residential sales, or engaging in a new development manager/managing director role, or any position which is the same in nature for a real estate brokerage company engaged in the business of real estate development, brokerage, rentals, and/or sales, and (ii) ***"Territory" means all sections of the borough of Manhattan, New York. Notwithstanding the foregoing, in the event this Agreement is terminated for any reason whatsoever, the Employee may subsequently work as an independent contractor as a licensed real estate salesperson or licensed associate real estate broker in the Territory, without violating this Section 3.*** (Emphasis added).[3]

To be entitled to a preliminary injunction, a drastic remedy, the moving party must demonstrate: (1) the likelihood of success on the merits, (2) irreparable harm if the provisional relief is not granted, and (3) the equities tipping in the movant's favor. *J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 406 (1986). To make a *prima facie* showing of likelihood of success on the merits, a restrictive covenant in an employment agreement must meet a three-pronged "reasonableness" test. A

[3] In addition, Section 4 of the Non-Compete Agreement provides in relevant part:

4. Non-Solicitation Covenants.

(a) Employee acknowledges and agrees that solely as a result of employment with the Company, the Employee has access to and awareness of confidential information regarding the Company's employees, their salaries, bonuses, benefits, skills qualifications and abilities, all of which confidential information is not generally available to the public but has been developed, compiled and acquired by the Company at their great effort and expense, and any use, disclosure or divulgence of such information about the Company's employees will cause the Company great and irreparable harm. Accordingly, the Employee agrees that for the period of his employment by the Company and for two (2) years after the date of termination of employment with the Company for any reason (whether voluntary or involuntary), Employee shall not, directly or indirectly, individually or on behalf of others, aid or endeavor to solicit or induce or recruit any employee of the Company to leave the employ of the Company.

(b) For the period of his employment by the Company and for two (2) years after the date of termination of employment with the Company for any reason (whether voluntary or involuntary), Employee shall not, directly or indirectly, individually or on behalf of others, solicit (other than on behalf of the Company) any customer, supplier, financing source or any other entity with whom the Company does business, and with whom or for whom Employee provided services, or encourage any such person or entity to use any products or services that compete with the Business of the Company or to terminate his or its employment or other arrangement with the Company or otherwise change its relationship with the Company.

Furthermore, Section 6 in the Employment Agreement provides:

6. Non-Disparagement. Employee shall not criticize, defame, be derogatory towards, or otherwise disparage or denigrate the Company (or the Company's past and present officers and directors, agents, representatives, employees or affiliates), or its or their business or marketing plans or actions to any third party, either orally or in writing at any time; [...]

restraint is reasonable if it: (1) is no greater than required to protect the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) does not injure the public. *BDO Seidman v Hirshberg*, 93 NY2d 382, 389 (1999) (citations omitted). An employer has a legitimate interest in protecting its confidential and proprietary information (*id.* at 391).

Plaintiff's motion for a preliminary injunction is granted because plaintiff has established a strong likelihood of success on plaintiff's claim that defendant Reuveni breached his unexpired employment contract by unilaterally terminating the contract by resigning prior to the expiration of his employment term (without the requisite 60-days' written notice required by Paragraph 4(c)(ii) of the Employment Agreement) and subsequently opening a competing business in the limited geographic market (Manhattan) in which he was prohibited by his contract from competing with plaintiff. Plaintiff has demonstrated that the terms of the restrictive covenants, particularly the non-compete, are reasonable *and* that both the balance of the equities tips in plaintiff's favor and the harm to plaintiff by defendant's breach of the contract is not easily calculated in monetary terms (*see Wills of N.Y. v DeFelice*, 299 AD2d 240, 242 [1st Dept 2002]) and can fairly be characterized as irreparable.

Plaintiff was highly compensated TND with base pay of $900,000 a year and various other financial incentives such as additional 15% to 20% share of any gross profits on new development contracts that TND executed during Reuveni's tenure.[4] Plaintiff recruited to TND as salaried employees a significant number of former Brown Harris Stevens employees,[5] who, like defendant, worked for Brown Harris Stevens on an unsalaried, commission basis. Because plaintiff had major client responsibility for interfacing with the real estate developers with whom TND represented and had access to sensitive client, customer, and other proprietary information such as TND client contracts and

[4] *See* Paragraph 2(b)(i) of the Employment Agreement.
[5] Including Karin Rathje-Posthuma who testified at the hearing and others.

commission terms, the Non-Compete Agreement contains reasonable restrictions on competition and solicitation of clients and employees.

During the last year of defendant's three-year contract that was set to expire on March 31, 2017, there was a change of control of TND and Heiberger became the CEO and 100% owner of TND and its various divisions. Almost immediately thereafter Heiberger and Reuveni engaged in a dialogue precipitated by Reuveni concerning Reuveni's short- and long-term relationship with TND (*see* Plaintiff's Exhibit or "PX" 30).

The evidence adduced at the three-day preliminary injunction hearing established that the nature of the TND new development brokerage business is that TND provides significant services to developers without charge in the planning states of a new development, the so-called "pre-development" stage, which often takes years, in anticipation of ultimately realizing commissions on the sales of units in the developments. It is clear that Heiberger believed that the business model Reuveni had developed under Sitt's management was unduly expensive as Reuveni's staff had generated millions of dollars in losses, mostly in the form of salaries, without producing significant offsetting revenue during the period March 31, 2014 to September 2016 (*see* PX 4, 14). For his part, Reuveni believed he needed more resources. And, as Reuveni's testimony strongly suggested, Reuveni was dissatisfied with his contract both because he made more money in commissions at Brown Harris Stevens than as a TND employee and because he was subject to the non-compete provision.

According to Reuveni, by October 4, 2016 it became clear to Reuveni that the relationship between Reuveni and Heiberger was becoming unworkable from Reuveni's perspective (*see e.g.,* PX 20). At the same time, Heiberger had concerns about Reuveni's performance and far greater concerns about the reality that Reuveni was unwilling to remain an *employee* of TND beyond the expiration of his contract. There were negotiations about Reuveni's future role at TND before and after October 17,

2016, but on October 17, 2016 Heiberger instructed the general counsel of TND to advise Reuveni that Reuveni's employment contract would not be renewed after March 31, 2017 (PX 5). The October 17 letter outlined a plan for an orderly transition of Reuveni's professional responsibilities and contemplated that Reuveni would continue his employment until the expiration of his contract. The testimony adduced at trial from Heiberger and Reuveni established that the plaintiff took no steps at any time to terminate Reuveni's employment and that at least through early November, 2016 the parties were discussing potential alternate arrangements with each other inasmuch as Heiberger believed that Reuveni's departure would be disruptive to TND as it ultimately turned out to be (*see* PX 13, 31, 32). Indeed, on November 6, TND sent Reuveni an elaborate independent contractor proposal that would have extended Reuveni's association with TND well beyond March 31, 2017 (*see* Defendant's Exhibit or "DX" E). And, on November 3, 2016, Reuveni expressly requested in writing an independent contractor agreement with plaintiff offering a detailed recital of "deal terms" to which Reuveni claims Heiberger had agreed (*see* PX 30).

The entirely credible testimony of Heiberger established that Heiberger was interested in retaining Reuveni on some basis and intended to honor plaintiff's obligations under the contract while taking steps to assure that Reuveni was making a contribution to the business of TND and cooperating with an orderly transition of Reuveni's responsibilities. By contrast, Reuveni's testimony established that as early as 2015 Reuveni was interested in alternate arrangements with TND that would free him from his restrictive covenant.

On December 2, 2016 Reuveni abruptly resigned in violation of the 60-day notice provision for resignation in Reuveni's employment contract. Approximately four months later, Reuveni established a competing business. The testimony at the preliminary injunction hearing established that although Reuveni took no actions that intentionally caused harm to TND during Reuveni's tenure other than

abruptly resigning. During Reuveni's tenure and subsequent departure, TND lost the benefit of millions of dollars of investment and additional millions of dollars of anticipated profits.[6]

As previously noted, Paragraph 3 of the Non-Compete Agreement allows defendant Reuveni to work as a licensed real estate salesperson or broker in Manhattan or anywhere else without violating the non-compete restriction. In addition, as Heiberger conceded at the hearing, Reuveni is free to engage in new development sales brokerage in Brooklyn, Queens, and other boroughs in the City of New York. At TND, Reuveni worked on at least two new development projects in Brooklyn, one of which was the "280 Marks Avenue" project (PX 8). Reuveni is also free to hire anyone who is not presently a TND employee and not bound by any non-compete provision.

In sum, Reuveni breached his Employment Agreement and Non-Compete Agreement, and plaintiff has satisfied the requirements for a preliminary injunction enjoining Reuveni from competing with plaintiff in the new development sales brokerage in Manhattan for a period of two years effective December 2, 2016, the date of Reuveni's resignation (*see* PX 21).

CPLR § 6312(b) requires that TND post an undertaking as a prerequisite to the granting of a preliminary injunction. The purpose of the undertaking is to "reimburse the defendant for damages sustained if it is later finally determined that the preliminary injunction was erroneously granted." *Margolies v Encounter, Inc.*, 45 NY2d 475, 477 (1977). Since TDN's motion for preliminary injunction is granted, the Court sets the undertaking for the instant injunction at $50,000.

[6] For example, Heiberger testified that TND lost a contract for a development project entitled "212 Fifth Avenue" within 13 days of Reuveni's resignation, resulting in approximately $6 million in losses to TND (*see also* PX 31, 32)

The findings recited above are based solely on the record before the Court at the preliminary injunction hearing. If, as, and when the case proceeds to ultimate trial, pre-trial discovery may establish another and different factual record.

Accordingly, it is hereby

ORDRED that plaintiff TND's motion for a preliminary injunction is granted; and it is further

ORDERED that the undertaking is fixed in the sum of $50,000 conditioned that plaintiff, if it is finally determined that it was no entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendants Shlomi Reuveni and Reuveni Real Estate is enjoined and restrained, for a period of two (2) years effective December 2, 2016, from competing with plaintiff Town New Development Sales and Marketing, LLC ("TND") in new development sales brokerage in the borough of Manhattan, New York; and it is further

ORDERED that defendants are directed to file an answer within 20 days. Counsel are directed to appear for a preliminary conference in Room 232, 60 Centre Street, on June 13, 2017 at 10 a.m.

Dated: May 5, 2017

J.S.C.
BARRY R. OSTRAGER
JSC