SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – 21

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WILLIAM PENA AND WILLI MAR TRANSPORTATION CORP.,

Plaintiffs,

DECISION / ORDER

- against -

Index No. 307279/09

JOSE SANTANA AND HOPE AMBULETTE SERVICE,

Defendants.

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HOPE AMBULETTE SERVICES, INC.,

Plaintiff,

- against -

Index No. 24630/13

WILLIAM PENA,

Defendant.

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Hon. Ben Barbato

An order, dated October 6, 2014 (Schachner, J.), in the action captioned *William Pena and Willi Mar Transportation Corp. v. Jose Santana and Hope Ambulette Service, Inc.*, Index No. 307279/09 ("the Pena action"), joined for trial the Pena action with the action captioned *Hope Ambulette Service, Inc. v. William Pena*, Index No. 24630/13 ("the Hope Ambulette action"). Accordingly, the dispositive motions of William Pena ("Pena") and Willi Mar Transportation Corp. ("Willi Mar") (collectively "the Pena parties"), filed in the respective actions, are consolidation and decided jointly herein.

Upon the foregoing papers, the Pena parties seek an order dismissing the Hope Ambulette action on the grounds that (1) Pena has been misjoined as a defendant (*see* CPLR 1003); (2) it is barred by documentary evidence under CPLR 3211(a)(1); (3) it is duplicative of a pending action (*see* CPLR 3211[a][4]); and (4) Hope Ambulette Services, Inc. ("Hope Ambulette"), lacked the capacity to sue (*see* CPLR 3211[a][3]). The Pena parties also seek sanctions against Jose Santana

("Santana") and Hope Ambulette (collectively "the Santana parties"), pursuant to 22 NYCRR § 130.1-1, for the commencement of an action for the purpose of harassment.

In the Pena action, the Pena parties seek an order dismissing the counterclaim of the Santana parties on the following grounds: (1) as improperly interposed (*see* CPLR 3211[a][6]); (2) for failure to state a cause of action (*see* CPLR 3211[a][7]); and (3) pursuant to CPLR 3212.

Background

On or about September 4, 2009, Pena and Willi Mar commenced the Pena action alleging that the Santana parties (1) breached a September 2007 oral partnership agreement; (2) breached a fiduciary duty of good faith and fair dealing; (3) made fraudulent or negligent misrepresentations surrounding the partnership agreement; (4) breached a "service agreement"; (5) trespassed upon a chattel; and (6) converted personal property.

The Pena parties alleged that in or about September 2007, Pena entered into an oral agreement with Santana, wherein Santana agreed to form a new partnership. Pena was to make a $150,000 investment in the partnership. Pena contends that he paid an initial down payment of $25,000 of this investment. Pena alleges that when Santana failed to form the partnership Pena requested the return of his "down payment," which Santana refused. Pena maintains that Santana owed him a fiduciary duty of good faith and fair dealing, which Santana breached by tortiously misrepresenting that $25.000 would entitle Pena to rights in the partnership.

Pena claims that in December 2006 he entered into an oral "service agreement" with Santana and Hope Ambulette whereby the Santana parties agreed to utilize the Pena parties for the transportation of patients from their homes to medical clinics, hospitals and/or rehabilitation centers. The Pena parties assert that the Santana parties complied with this agreement for several years and that the former were compensated for their services with the exception of an outstanding balance of $14,378.00, for their services.

Pena further alleges that in or about December 2006, the parties entered into an oral agreement for the purchase of an ambulette in the name of Hope Ambulette. Pena contends that he

made a down payment of $9,000.00 towards the purchase and, thereafter, made all required monthly payments. Pena contends that the Santana parties have unlawfully retained possession of the vehicle and have failed to reimburse Pena for the $9,000 down payment.

The Pena parties seek the return of their $25,000 partnership deposit, $14,378.00 in compensation for transportation services, and reimbursement of the $9,000 down payment for the vehicle, together with interest and reasonable attorneys fees.

On or about September 22, 2009, the Santana parties served a verified answer denying the existence of any agreement to make Pena a partner, acknowledging the payment of $25,000 "as security for [the Pena parties'] faithful performance of duties as independent contractors for [Hope Ambulette]," and asserting a counterclaim against the Pena parties for the breach of an agreement not to solicit or compete with Hope Ambulette customers or to interfere with the employment relationship of Hope Ambulette employees. The Santana parties seek $100,000 in damages in their counterclaim.

On December 9, 2013, Hope Ambulette commenced an action against Pena alleging breach of contract and breach of a non-compete agreement. More specifically, Hope Ambulette alleges that it is in the business of providing non-emergency transportation services to patients. It contends that it employed Pena as an ambulette driver in September 2007. Hope Ambulette claims that, on or about December 15, 2007, Hope Ambulette and Pena entered into an agreement whereby Pena would maintain the confidentiality of all Hope Ambulette proprietary and client information, and agreed not to compete with Hope Ambulette for the clients for whom he provided services during the course of his employment with Hope Ambulette. Hope Ambulette alleges that Pena breached such agreements resulting in $500,000 in damages for each breach.

Contentions

In support of his motion to dismiss the Hope Ambulette action, Pena argues that the Hope Ambulette action is duplicative of the Santana parties' counterclaim in the Pena action or an end-run attempt to amend their answer and, therefore, should be dismissed pursuant to CPLR 3211(a)(4).

In addition, Pena argues that the parties' failure to produce copies of a confidentiality agreement or non-solicitation agreement, in response to discovery demands, demonstrates that no such agreements exist, thereby warranting dismissal under CPLR 3211(a)(1). Pena avers that if an agreement were to exist it would have been entered into by Willi Mar and not Pena, and, thus, Pena is an improper party (*see* CPLR 1003, 3211[a][3]). Finally, Pena maintains that the Hope Ambulette action was commenced to harass, inconvenience and financially burden Pena in violation of 22 NYCRR § 130.1-1. Pena seeks a hearing on the issue of sanctions.

In support of their motion to dismiss the Santana parties' counterclaim, as improperly asserted and for failure to state a cause of action (*see* CPLR 3211[a][6], [7]), the Pena parties deny the existence of a written or oral non-solicitation or non-competition agreement and argue that, if one is found to exist, it is unenforceable as against public policy. Specifically, Pena argues that New York law fosters and protects open competition and that the purported agreement, as alleged by Santana during his examination before trial, is unlimited in scope, time and location, and, therefore, contrary to public policy. Moreover, Pena argues that Hope Ambulette's client information, such as the names and addresses of medical facilities, are publicly available to any competitor and, thus, not confidential information. The Pena parties do not address the portion of the counterclaim that alleges that they breached an agreement not to interfere with the employment relationship between the Santana parties and their employees.

In opposition to the Pena parties' motion, the Santana parties supply the affidavit of Santana, the president of Hope Ambulette; Pena's EBT transcript; and a copy of an agreement, dated April 14, 2011, entered into between Pena and non-party Maeleen Ambulette Transport, Inc. ("Maeleen contract"). The Santana parties aver that Pena misappropriated Hope Ambulette's customer records and accounts, started working for Maeleen Ambulette Transport, Inc. (Maeleen) immediately after leaving Hope Ambulette, and sold Hope Ambulette's customer accounts to a third party, which resulted in the loss of business contracts and opportunities, and caused financial damages. Santana avers that the Maeleen contract demonstrates that Pena was paid $30,000 for the sale of Hope

Ambulette accounts to a third party. The Santana parties argue that the counterclaim and Hope Ambulette action are not duplicative as the counterclaim relates to Pena's alleged promise that he would not solicit clients, and compete or cause competition against his then-employer Hope Ambulette, whereas the Hope Ambulette action seeks to recover damages for lost business opportunities and financial damages suffered as a result of Pena's sale of client accounts to a third party. The Santana parties point out that Pena testified that he continued to provide transportation for Hope Ambulette patients and clinics after he began working for Maleen. The Santana parties argue that the non-compete agreement was reasonable in time and scope as it is was limited to the Bronx.[1]

In reply, the Pena parties point out that the Santana parties' contention that the non-compete agreement was limited to the Bronx is introduced solely through the Santana parties' attorney's affirmation. The Pena parties argue that there is no evidence that the parties' attorney has first-hand knowledge of the facts surrounding the alleged contract, and thus the affirmation lacks probative value. Moreover, the Pena parties note the absence of any suggestion in the EBT testimony, the parties' affidavits or the pleadings, that the non-compete agreement was limited in scope. The Pena parties assert that they have sufficiently demonstrated that the putative non-compete agreement is violative of public policy, warranting dismissal of the counterclaim and the Hope Ambulette action.

Discussion

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81

[1] The Santana parties also argue that dismissal is premature as Pena had not responded to outstanding discovery demands and that a discovery-related motion was pending. However, prior to the final submission date of this motion the pending discovery-related motions were withdrawn. The note of issue was filed on January 29, 2015. No party moved to vacate the note of issue or seek further discovery prior to the submission of these motions.

[2003], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In determining a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party, and every available inference must be drawn in such party's favor (*De Lourdes Torres v Jones*, 26 NY3d 742, 762 [2016]; *cf. Rollins v Fencers Club, Inc.*, 128 AD3d 401 [1st Dept 2015]). Summary judgment is a remedy that should only be employed when there is no doubt as to the existence of triable issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The function of the court on a motion for summary judgment is not to resolve issues of fact or to assess credibility, but merely to determine whether such issues exist (*IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 [1st Dept 2011]; *Lawrence Props., Inc. v Brown Harris Stevens Residential Mgt., LLC*, 38 AD3d 377, 379 [1st Dept 2007]).

Here, the Pena parties have failed to establish as a matter of law the absence of triable issues of fact as to (1) whether they entered into an agreement with the Santana parties not to solicit Hope Ambulette clients or otherwise compete with Hope Ambulette, and (2) whether they breached such agreement by continuing to provide services to former Hope Ambulette clients and providing Hope Ambulette client accounts to a third party. In this regard, the Pena parties submitted Santana's EBT transcript. Santana testified that, in 2007, he hired Pena to drive an ambulette for Hope Ambulette and agreed to split the payments received for these services 40% to Santana and 60% to Pena. Santana further testified that Pena paid Santana, personally, $25,000 in order to protect Santana from Pena keeping or selling the accounts that Pena would be responsible for servicing (tr at 36, lines 9-14). The money was to be held in escrow, to secure Santana's accounts, and returned to Pena when the business relationship ended. Santana avers that he is ready and willing to return the money to Pena when Pena returns "the accounts that he took and sold to another company" (tr at 37, line 25; at 38, lines 1-2). Santana testified that Pena left Hope Ambulette and immediately started working for Maeleen.

Santana further testified that he had a meeting with Maeleen's owner, Roberto Garcia, during which Garcia provided Santana with the copy of an agreement in which Pena purported to sell to

Maeleen customer accounts for $30,000. Additionally, Santana testified that Pena offered Santana $150,000 for Pena to keep the accounts that he sold to Maeleen. Santana refused such offer. Finally, Santana contends that he did not posses any written agreement or document demonstrating an exclusive right to service specific clients, and for this reason he requested the $25,000 payment from Pena as security.

The Pena parties' reliance on the absence of a written agreement does not alone entitle them to summary judgment. "While it is true that 'anticompetitive covenants covering the postemployment period will not be implied' and must be express, the covenant can be written or verbal" (*Meghan Beard, Inc. v Fadina*, 82 AD3d 591, 592 [1st Dept 2011]; *see Luxus Aviation, LLC v Kerwin Media LLC*, 91 AD3d 569, 571 [1st Dept 2012]). Here, Santana's testimony supplies sufficient evidence to raise an issue of fact as to whether the parties entered into a verbal agreement that Pena would not compete with Hope Ambulette customers and would maintain the confidentiality of client information. The Pena parties offer no evidence that would narrow or eliminate these material questions of fact.

Alternatively, the Pena parties seek dismissal pursuant to CPLR 3211(a)(1). Dismissal pursuant to that provision is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Ladenburg Thalmann & Co. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000]). Stated otherwise, the documentary evidence must resolve all factual issues and dispose of the subject claim as a matter of law (*Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007]). The Pena parties have failed to eliminate all questions of fact surrounding the existence of oral agreements between the parties and the terms of such agreement as they offer no documentary evidence conclusively establishing the non-existence of the alleged agreements.

With respect to that portion of the Pena parties' motion as seeks dismissal pursuant to CPLR 3211(a)(7), the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory

(*Ladenburg Thalmann & Co. v Tim's Amusements, Inc.*, 275 AD2d at 246; *see Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; *see also Leon v Martinez*, 84 NY2d at 87-88). The court must determine whether the requisite allegations of any valid, cognizable cause of action can be fairly gathered from all the averments (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964]).

Affidavits may be considered to remedy any defects in the complaint, because the question on a CPLR 3211(a)(7) motion is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]; *Sokol v Leader*, 74 AD3d at 1181-1182, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Therefore, as the parties have submitted extrinsic evidence on the instant motions, the court must determine whether the Santana parties have a cause of action as alleged by their counterclaim and the Hope action (*see Asian Ams. for Equality v Koch*, 128 AD2d 99, 137 [1st Dept 1987]). Dismissal should not eventuate "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d at 275).

Here, the Pena parties aver that the counterclaim and the Hope Ambulette complaint fail to set forth a cognizable cause of action because the purported non-compete and/or confidentiality agreements are void as against public policy and, moreover, Hope Ambulette's client information is a matter of public record. The movants supply Santana's EBT testimony and the Maeleen agreement. These documents, together with the pleadings, are sufficient to set forth a claim for breach of the alleged agreements to keep client information confidential and to not solicit or compete with Hope Ambulette's existing clients.

Restrictive covenants, including confidentiality agreements, are subject to enforcement to the extent that they are "'reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee'" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999], quoting *Reed, Roberts Assoc. v*

Strauman, 40 NY2d 303, 307 [1976]; *see Cole Steel Equip. Co. v Art-Lloyd Metal Prods. Corp.*, 1 AD2d 148, 150 [1st Dept 1956]). Similarly, with respect to covenants aimed at protecting against misappropriation of an employer's trade secrets or confidential customer lists, "courts ... recognize the legitimate interest an employer has in safeguarding that which has made [its] business successful and to protect [itself] against deliberate surreptitious commercial piracy" (*Reed, Roberts Assoc., Inc. v Strauman*, 40 NY2d at 307-308; *see Cole Steel Equip. Co. v Art-Lloyd Metal Prods. Corp.*, 1 AD2d at 150 [fairness required enforcement of covenant, where denial would have permitted the defendant to repudiate an express agreement and become a competitor of the plaintiff]). "[A] covenant by which an employee simply agrees, as a condition of his employment, not to compete with his employer after they have severed relations is not only subject to the overriding limitation of 'reasonableness' but is [enforceable] only to the extent necessary to prevent the employee's use or disclosure of his former employer's trade secrets, processes or formulae or his solicitation of, or disclosure of any information concerning, the other's customers" (*Purch. Assoc., Inc. v Weitz*, 13 NY2d 267, 272 [1963] [citations omitted]; *see also Reed, Roberts Assoc., Inc. v Strauman*, 40 NY2d at 307-308).

Enforcement of a restrictive covenant under section 340 of the General Business Law (GBL) requires a similar inquiry into the reasonableness of the agreement. A "negative covenant against competition by an employee following the termination of his [or her] employment is generally enforceable, provided it is reasonably necessary for the protection of the employer and is reasonably limited as to time and place" (*Riccardi v Modern Silver Linen Supply Co.*, 45 AD2d 191, 196-197 [1st Dept 1974], quoting *Bates Chevrolet Corp. v Haven Chevrolet*, 13 AD2d 27, 29 [1st Dept 1961]).

The test of reasonableness of employee restrictive covenants focuses on the particular facts and circumstances giving context to the agreement (*BDO Seidman v Hirshberg*, 93 NY2d at 390). Here, Santana avers that his company has spent the last 20 years nurturing professional and personal

relationships with its clients. He alleges that the nature and high quality of the company's professional relationships allow it to continue providing personal attention and quality transportation services to its clients. Santana testified that the $25,000 was to be held as security only during the duration on the employment relationship and would be returned to Pena, so long as he did not solicit and compete with the clients he provided transportation services for during his relationship with Hope Ambulette.

The restrictive covenants, as alleged by Santana, do not appear to be unreasonable in time and area (*see Frenkel Benefits, LLC v Mallory*, 142 AD3d 835, 838 [2016]; *Gelder Med. Group v Webber*, 41 NY2d 680, 683 [1977]; *Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 105 [the court is free to modify an otherwise valid agreement in duration to one more reasonable under the circumstances], *mod on other grounds* 14 NY3d 774 [2010]). Nor does it appear to prevent Pena from pursuing a similar endeavor in the business of transporting patients to and from medical facilities, so long as the clients were not derived through his prior experience with Hope Ambulette (*see Chernoff Diamond & Co. v Fitzmaurice, Inc.*, 234 AD2d 200, 202 [1st Dept 1996]). Indeed, Pena was immediately hired by a competitor performing similar duties. The protection of customer relationships the employee acquired in the course of his or her employment may indeed be a legitimate interest in preventing former employees from exploiting or appropriating the good will of a client that was created at the employer's expense, especially where, as here, the employee is working closely with the client and his services are a significant part of the total transaction (*see BDO Seidman v Hirshberg*, 93 NY2d at 391-392; *see also Riccardi v Modern Silver Linen Supply Co.*, 45 AD2d at 197). Finally, there is no evidence that the restrictive covenant would place an undue burden on Pena or be harmful to the public.

Santana's testimony that Hope Ambulette's client contacts were sold to another company for $30,000 and that Pena offered to buy such contacts for $150,000 lends support to the proposition that the client contacts were not so readily accessible, contrary to the Pena parties' assertion.

Protection of customer lists and files as trade secrets has been enforced in circumstances "where the customers' patronage had been secured by years of effort and advertising effected by the expenditure of substantial time and money" (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392-393 [1972]). The Pena parties have not submitted sufficient evidence to negate the possibility that Hope Ambulette's customer information was subject to trade secret protection (*see TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 573 [1st Dept 2014]; *see Leo Silfen, Inc. v Cream*, 29 NY2d at 392-393).

Turning to the Pena parties' remaining arguments, Pena contends that he is an improper party in the Hope Ambulette action as any non-solicitation agreement would have been entered into between Willi Mar Transportation, Inc., and Santana, not Pena and Hope Ambulette. Pena's motion for dismissal on this grounds pursuant to CPLR 1003 is denied as the record contains sufficient evidence to raise an issue of fact as to whether an employment agreement existed between Pena, personally, and Hope Ambulette. Moreover, Pena testified that he formed Willi Mar Transportation, Inc. in 2007 with Hope Ambulette and is the sole owner. Thus, Pena has not demonstrated, as a matter of law, that he is an improperly-named party to this action (*see* CPLR 1002).

Under CPLR 3211(a)(4) a court may dismiss an action where "'there is another action pending between the same parties for the same cause of action in a court of any state or the United States' but specifically provides that 'the court need not dismiss upon this ground but may make such order as justice requires'" (*SafeCard Servs. v Am. Express Travel Related Servs. Co.*, 203 AD2d 65, 65 [1st Dept 1994], quoting CPLR 3211[a][4]). Clearly, there is substantial overlap between the counterclaims/claims in the Pena and Hope Ambulette actions. However, it is within the court's discretion whether to grant dismissal on this basis (*Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211 [1st Dept 1990]). Here, in view of the lack of complete identity of parties and the prior joint trial order that has joined (but did not consolidate) the two actions for purposes of trial, dismissal on this ground is not warranted (*see id.*; *see also Murphy v 317-319 Second Realty LLC*,

95 AD3d 443, 445 [1st Dept 2012]; *cf. Packes v Cendant Mortg. Corp.*, 19 AD3d 386, 387 [2nd Dept 2005]; *see also Allen v Waidmann Realty Corp.*, 2010 NY Slip Op 33349[U], *4-5 [Sup Ct, NY County 2010]).

Pena's motion for sanctions pursuant to 22 NYCRR § 130-1.1 is denied, without prejudice. As discussed, the Pena parties have not demonstrated that the Hope Ambulette action is "completely without merit in law" or "asserts material factual statements that are false." Nor have the Pena parties offered evidence to support a finding that the Hope Ambulette action was commenced for the purpose to harass (*see* 22 NYCRR § 130-1.1[c]).

Accordingly, it is ordered that the motions are denied in their entirety.

This constitutes the decision and order of the Court.

Dated: June 29, 2017

ENTER,

BEN BARBATO, J.S.C.