IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 27, 2020
Lyle W. Cayce
Clerk

No. 19-20864

REALOGY HOLDINGS CORPORATION,

Plaintiff - Appellee

v.

SEITA JONGEBLOED,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before DAVIS, JONES, and SMITH, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Defendant Seita Jongebloed appeals the district court's preliminary injunction enforcing a non-competition agreement between her and her former employer, Plaintiff Realogy Holdings Corporation ("Realogy"). Jongebloed asserts that the district court failed to: (1) make the specific findings required by Rule 52(a) for the issuance of a preliminary injunction, (2) perform a proper conflicts-of-law analysis, and (3) apply the proper standard in determining whether she entered into the non-competition agreement and whether the agreement was enforceable. Jongebloed further contends that the one-year term of the injunction is too long under the express provisions of the non-competition agreement and in light of the equities. Because we conclude that

the district court did not abuse its discretion, we AFFIRM the preliminary injunction and LIFT the stay we previously imposed. We further REMAND this matter and instruct the district court to conduct a trial on the permanent injunction as soon as possible and, when rendering its judgment, to reweigh the equities with respect to the term of the injunction in light of the time that has passed during the pendency of this appeal.

I. BACKGROUND

Jongebloed, a Texas resident, is a former sales manager and vice president of sales at Martha Turner Sotheby's International Realty ("Martha Turner"). Martha Turner is a luxury residential real estate brokerage firm serving the Houston metropolitan area. It employs approximately 280 real estate agents and has six offices. Martha Turner is a subsidiary of Plaintiff Realogy, which is a Delaware corporation with its principal place of business in New Jersey. Jongebloed worked for Martha Turner for just over four years, from December 2014 until her resignation on February 1, 2019.

In May 2018, approximately nine months before she resigned, Realogy notified Jongebloed that it had selected her to participate in the company's stock compensation program through an equity grant. Realogy awarded Jongebloed the equity grant in recognition of her 2017 accomplishments and based on its determination that Jongebloed was "in a position to lead others, leverage opportunities and add value to [the] company." The grant was in the form of restricted stock units, which gave Jongebloed the opportunity to receive shares of Realogy's common stock upon vesting of the award after a three-year period. Realogy informed Jongebloed that she would have to go online in order to accept the grant and that an explanation of the grant acceptance process would be emailed to her.

On August 15, 2018, Realogy emailed Jongebloed reminding her that an equity grant was awaiting her acceptance and advising her that Fidelity Stock

Plan Services was administering the company's equity grants. The email explained how to activate a Fidelity "NetBenefits" account online in order to accept the grant. Additionally, the email stated that prior to accepting the grant, Jongebloed would be required to review certain documents and then click on a tab to indicate her assent to the documents. [1] These documents included a Notice of Grant, which had two exhibits: (1) a Restricted Stock Unit Agreement ("RSUA"), and (2) a Restrictive Covenants Agreement ("RCA"). The email indicated that the documents to be reviewed also included Realogy's Long-Term Incentive Plan ("Plan") and the Prospectus for the Plan.

The first document to be reviewed, the Notice of Grant, provided that Realogy's equity grant to Jongebloed consisted of 644 restricted stock units, one-third of which would vest on each of the first three grant anniversary dates. The Notice indicated that the award was subject to the terms of the Notice, the RSUA, and the Plan. The Notice further stated that, "as a condition to receiving" the award, "the Participant understands and agrees to be bound by and comply with the [RCA]" and that the RCA "shall survive the grant, vesting or termination" of the stock units or sale of shares, as well as "any termination of employment of the Participant."

The second document, the RSUA, stated that the grant of restricted stock units was "[i]n consideration of the Participant's past and/or continued employment with or service to the Company or any Affiliate and for other good and valuable consideration" and "subject to the Participant's full compliance at all times with the . . . [RCA]." The RSUA further provided that if the employee terminated employment with the company, "then the Restricted Stock Units, to the extent not vested, shall be forfeited to the Company without payment of any consideration by the Company." The RSUA additionally stated

[1] Such online agreements are often referred to as "clickwrap" agreements.

that "[t]he laws of the State of Delaware shall govern [its] interpretation . . . regardless of the law that might be applied under principles of conflicts of laws." Finally, the RSUA provided that it, along with the Plan, the Notice, and the RCA constituted "the entire agreement of the parties and supersede[d] in their entirety all prior undertakings and agreements."

The third document, the RCA, required the employee to acknowledge and agree that Realogy's business is "intensely competitive and that Participant's employment by the Company has required, and will continue to require, that Participant has access to, and knowledge of, Confidential Information," the disclosure of which "could place the Company at a serious competitive disadvantage and could do serious damage" to the Company's business. The RCA further stated that "Participant has received good and valuable consideration for the restrictive covenants set forth herein, including without limitation, the right to acquire and own securities of the Company, the continued employment by the Company . . . and other good and valuable consideration, the sufficiency of which is hereby acknowledged."

The RCA contained various restrictive covenants. The non-solicitation provision prohibited the employee, for one year after termination of employment, to solicit or engage in any business competitive with Realogy's business with any client or prospective client of Realogy, to induce any employee of Realogy to leave the company, or to interfere in any of Realogy's business relationships. The non-competition provision prohibited the employee, for one year after termination of employment and within fifteen miles of any branch where the employee worked, to "perform services for a commercial or residential real estate brokerage business that are the same as or similar to the services Participant provided to the Company . . . or that are otherwise likely or probable to result in the use or disclosure of Confidential Information." The non-disclosure provision required the employee "not [to]

disclose or use at any time, either during his or her employment with the Company and its affiliates or thereafter, any Confidential Information of which Participant is or becomes aware."

The RCA provided that if the employee violated the RCA and Realogy was required to bring legal action for injunctive relief, then the term of the injunction would be one year "from the date the relief is granted but reduced by the time between the period when the restricted period began to run and the date of the first violation of the restrictive covenant by the Participant."

Although Jongebloed testified at the preliminary injunction hearing that she does not recall seeing the August 2018 email nor does she remember reviewing and clicking her assent to the various documents on the Fidelity website, she admitted that she did receive the restricted stock units because they "showed up" on her Fidelity statements.

In late August 2018, Jongebloed began inquiring about employment opportunities with Urban Compass, Inc., and Compass RE Texas, LLC ("Compass"), a direct competitor of Realogy, which had plans to open an office in Houston in the coming months. Compass officially began its Houston operations in November 2018. In late December 2018, after Jongebloed interviewed with various Compass executives, Compass notified Jongebloed that it intended to make her an offer. In early January 2019, Compass offered Jongebloed the position of sales manager of its newly-opened Houston office.

On February 1, 2019, Jongebloed resigned from her employment at Realogy and accepted Compass's offer. The next day, an attorney with Realogy called Jongebloed to ask if she was aware of the restrictive covenants applicable to her, including the non-competition restriction contained in the clickwrap agreement she agreed to when accepting her restricted stock units online. Jongebloed replied that she was unaware of a non-competition restriction. The attorney stated that he would send her a copy of the agreement

containing the restriction. Jongebloed thereafter contacted Compass to inform them about the phone call, and Compass requested that she send them a copy of the agreement upon her receipt.

On February 5, 2019, Realogy sent Jongebloed a letter advising her that her employment at Compass was a "clear violation" of the non-competition provision set forth in the RCA and that she must "cease and desist" from such activity. A copy of the letter was also sent to executives at Compass.

Despite Realogy's warning, Jongebloed started working at Compass on February 11, 2019. Three days later, however, "in the interest of cooperation" with Realogy, Compass placed Jongebloed on a "nonworking leave of absence." Jongebloed remained on leave until March 16, 2019, when she began working for Compass again. At that point, Jongebloed's counsel sent a letter to Realogy contending, inter alia, that although the RSU contained a choice-of-law provision selecting Delaware law, under a proper conflicts-of-law analysis, Texas law applied to the RCA. Jongebloed's counsel further contended that under Texas law, the RCA was not enforceable because it was not supported by sufficient consideration.

Five days after Jongebloed returned to work at Compass, Realogy filed the instant action seeking injunctive and other relief. Realogy contended that Jongebloed was violating the RCA through her employment with Compass and that it was entitled to an injunction prohibiting her from working there. In response, Jongebloed filed a Rule 12(b)(6) motion to dismiss for failure to state a claim, arguing that the RCA was not enforceable under Texas law because it lacked sufficient consideration. She also filed a motion to dismiss pursuant to the Texas Citizens Participation Act.

Realogy thereafter filed a motion for preliminary and permanent injunction. Realogy contended that the parties' contractual choice of Delaware law applied and that under that law, it established all four factors in favor of

a preliminary injunction. Realogy further asserted that, under both Delaware and Texas law, the RCA was supported by sufficient consideration and enforceable. After conducting a hearing, the district court ruled in favor of Realogy and issued a preliminary injunction enforcing the restrictive covenants in the RCA. More specifically, for one year from the entry of the order, the injunction prohibits Jongebloed from working for Compass or any other real estate brokerage in a similar role to her position at Martha Turner within fifteen miles of Martha Turner's offices in Houston. Jongebloed filed a motion for reconsideration and a motion for a stay pending appeal, which the district court denied. Jongebloed timely appealed and also moved this court for a stay pending appeal. This court granted a stay and ordered expedited consideration of Jongebloed's appeal, which we now consider.

II. DISCUSSION

A. Standard of Review

This court has jurisdiction over a district court's interlocutory order granting a preliminary injunction.[2] "A party seeking a preliminary injunction generally must show (1) a substantial likelihood of success on the merits, (2) irreparable injury if the injunction is not granted, (3) that the injury outweighs any harm to the other party, and (4) that granting the injunction will not disserve the public interest."[3] We review the district court's findings of fact for clear error and its conclusions of law de novo.[4] A factual finding is clearly erroneous when, based on the evidence as a whole, we are "left with the definite and firm conviction that a mistake has been made."[5] "The ultimate

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[2] 28 U.S.C. § 1292(a)(1).

[3] *Brock Servs., L.L.C. v. Rogillio*, 936 F.3d 290, 296 (5th Cir. 2019) (citing *Cardoni v. Prosperity Bank*, 805 F.3d 573, 579 (5th Cir. 2015)).

[4] *Cardoni*, 805 F.3d at 579.

[5] *Brock Servs., L.L.C.*, 936 F.3d at 296 (citation omitted).

decision for or against issuing a preliminary injunction is reviewed under an abuse of discretion standard."[6]

B. Sufficiency of District Court's Findings under Rule 52(a).

At the outset, Jongebloed argues that the district court made findings only as to the first factor—the substantial likelihood of success on the merits—of the preliminary injunction test and failed to make any findings as to the three remaining factors. She asserts that the district court consequently violated Rule 52(a) and that this court should vacate and remand for further findings. We disagree.

Under Rule 52(a), when "granting or refusing an interlocutory injunction," the district court is required to "state the findings and conclusions that support its action."[7] As with a bench trial, "[t]he findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court."[8] We have noted that "Rule 52 is satisfied if the district court's findings give the reviewing court a clear understanding of the factual basis for the decision."[9]

Although the district court addressed only the first factor of the preliminary injunction test in its written order, the transcript from the injunction hearing shows that the district court considered the remaining three factors at the conclusion of the hearing. Specifically, the district court found that the injury or harm to Realogy was "not likely to be redressable." The district court further determined that the injury to Realogy outweighed the harm to Jongebloed. The court noted that restrictive covenants place

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[6] *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 463 (5th Cir. 2003) (citation omitted).

[7] FED. R. CIV. P. 52(a)(2).

[8] FED. R. CIV. P. 52(a)(1).

[9] *Burma Navigation Corp. v. Reliant Seahorse MV*, 99 F.3d 652, 657 (5th Cir. 1996) (citation omitted).

employees such as Jongebloed "at some modest disadvantage, but that [was] part of the price of having all the advantages [of employment with Martha Turner] for four years."

While the district court admittedly could have been more detailed regarding its findings on these factors, its oral findings together with its written order nonetheless give us "a clear understanding of the factual basis for the decision" to issue a preliminary injunction.[10] Therefore, we conclude that the district court's decision in this matter satisfies the requirements of Rule 52.

C. Substantial Likelihood of Success Factor

In challenging the district court's determination that Realogy was substantially likely to succeed on its claims against her, Jongebloed argues that "the evidence [was] unclear on whether the contract was formed in the first place." She also faults the district court for not performing a proper conflicts-of-law analysis to determine whether Texas or Delaware law applies. Jongebloed contends that under a proper conflicts-of-law analysis, Texas law applies, and the non-competition agreement is not enforceable.

1. Contract Formation

Jongebloed argues that the district court erred in determining that she entered into the RCA. She asserts that she does not remember clicking on and assenting to either the RSUA or the RCA and that the evidence Realogy produced did not establish that she did so.

As Realogy contends, we review the district court's factual finding that Jongebloed electronically agreed to the RCA for clear error. [11] A factual finding

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[10] *Id.*

[11] When determining the preliminary question of contract formation, we do not resort to any contractual choice-of-law provision. *See Edminster, Hinshaw, Russ and Assoc., Inc. v. Downe Township*, 953 F.3d 348, 351 (5th Cir. 2020) ("[T]he choice-of-law provision has force only if the parties validly formed a contract.").

is clearly erroneous when, based on the evidence as a whole, we are "left with the definite and firm conviction that a mistake has been made."[12]

Realogy presented documentary evidence indicating that the restricted stock units Jongebloed was awarded in May 2018 could be accepted only by going online. A follow-up email addressed to Jongebloed on August 15, 2018, provided further detail about how to accept the award through the Fidelity NetBenefits website and listed the documents, including the RCA, that Jongebloed would need to review and agree to before accepting her grant. Realogy also presented electronic evidence indicating that Jongebloed assented to the RCA on August 22, 2018, just a week after the date of the reminder email.

Jongebloed argues that the electronic evidence is not reliable because it states that the RCA was accepted at 12:54 P.M. "Eastern Standard Time," when it should have denoted "Eastern Daylight Time." However, she acknowledged during the hearing that other electronic evidence indicated UTC, or the Uniform Time Code, and that the UTC time matched the eastern time stamped on the RCA. Realogy also produced the affidavit of a custodian of records for Fidelity, explaining that business records exported from Fidelity's computer systems indicated activity on its NetBenefits website starting at 12:53:54 P.M. eastern and ending at 12:56:21 P.M. eastern on August 22, 2018. Realogy also produced the deposition testimony of Paul Gallo, manager of forensics and eDiscovery at Realogy. Gallo testified that he used EnCase computer program to forensically image and copy the contents of the hard drive from the Martha Turner laptop assigned to Jongebloed during her employment there. Gallo testified that the information generated from Jongebloed's laptop indicated that she accessed the Fidelity website on

[12] *Brock Servs., L.L.C.*, 936 F.3d at 296 (citation omitted).

August 22, 2018, and also accessed a document identified as "PlanInformationDocument [1].pdf" at 12:54 P.M.[13]

Although Jongebloed testified that she did not remember the August 15, 2018, email and that she did not have an independent recollection of clicking and accepting the documents, she admitted that she received the restricted stock units because "[t]hey showed up" on her Fidelity statements. Jongebloed testified that she was not an expert in determining whether she in fact clicked on and agreed to the RCA, stating: "I would defer to what the experts would say. This is not my area of expertise."

Based on the above documentary evidence and testimony, we are not left with a definite and firm conviction that a mistake has been made. Consequently, we cannot say that the district court clearly erred in finding that Jongebloed assented to the RCA.

2. Conflicts of Law Analysis and Application

As both parties acknowledge, the district court addressed the issue whether Texas or Delaware law should be applied in this matter during an initial pretrial conference conducted approximately three months before the injunction hearing. At that point, Jongebloed's motions to dismiss, in which she asserted that Texas law should be applied, and Realogy's motion for preliminary injunction, in which it asserted Delaware law should be applied, were pending before the district court. Realogy contends that during the conference, the district court correctly ruled against Jongebloed on this issue because Jongebloed "never fully applied the analysis for avoiding a contractual choice of law provision."

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[13] The exhibits to the Fidelity custodian's affidavit and Gallo's deposition were not included in the record of this appeal but are contained on a USB drive kept by the clerk for the Southern District of Texas. We nonetheless are able to determine, based on the deposition testimony, affidavit, and documentary evidence that is contained in the record, that the district court did not clearly err regarding its finding that Jongebloed assented to the RCA.

Close review of the transcript from the initial pretrial conference reveals that Jongebloed identified the proper conflicts analysis to be applied and attempted to argue its application. The district court, however, refused to consider Jongebloed's argument, instead stating Delaware law applied because "[the contract] says so." As described below, under a proper conflicts-of-law analysis, Texas law should apply to this matter. Although the district court failed to conduct a proper conflicts-of-law analysis, we nonetheless find no abuse of discretion because the district court's preliminary injunction in favor of Realogy is valid under Texas law.

Under the longstanding rule set forth by the Supreme Court in *Klaxon Company v. Stentor Electric Manufacturing Co.*, when a federal court sits in diversity jurisdiction, it must apply the conflicts-of-law rules of the forum state, in this case Texas.[14] Texas law recognizes the "party autonomy rule" that parties can agree to be governed by the law of another state.[15] As we have noted, however, and as the district court herein failed to acknowledge, contractual choice-of-law provisions are not "unassailable" under Texas law.[16] As set forth by the Texas Supreme Court in *DeSantis v. Wackenhut Corp.*, Texas applies the framework set forth in Section 187 of the Restatement (Second) of Conflict of Laws in determining the enforceability of a contractual choice-of-law provision.[17]

Section 187 provides, in pertinent part:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless either

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[14] 313 U.S. 487, 496 (1941).
[15] *Exxon Mobil Corp. v. Drennen*, 452 S.W.3d 319, 324 (Tex. 2014).
[16] *Cardoni v. Prosperity Bank*, 805 F.3d 573, 580 (5th Cir. 2015).
[17] *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex.1990).

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.[18]

Thus, under paragraph (a), if Delaware "has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice," then Delaware law should not apply. In this matter, there is a reasonable basis for the parties' choice of Delaware law because Realogy is incorporated under the laws of Delaware.[19] Thus, Delaware law should apply unless this case falls within the exception of Section 187(2)(b).

Texas courts consider the factors under subsection (b) "in reverse order."[20] Specifically, we next determine (1) whether Texas has a more significant relationship with the parties and the transaction at issue than Delaware does under Restatement § 188[21]; (2) whether Texas has a materially greater interest than Delaware in the enforceability of the non-competition provision in the RCA; and (3) whether application of Delaware law would be contrary to a fundamental policy of Texas. If all of these circumstances are present, Texas law should apply.

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[18] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

[19] *See Cardoni*, 805 F.3d at 581 (holding that when one party was headquartered in certain state, reasonable basis existed for choosing that state's law); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (providing that when state is "where one of the parties is domiciled or has his principal place of business," then "reasonable basis" for choice of that state's law exists).

[20] *Cardoni*, 805 F.3d at 582.

[21] Section 188 provides a list of the factors to consider when determining which state has the most significant relationship to the transaction and the parties.

The "more significant relationship" determination is made by examining various contacts, including the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, place of incorporation, and place of business of the parties.[22] In this case, Texas has the more significant relationship. Specifically, Jongebloed was hired to work at a Realogy subsidiary that served the Houston area; the subsidiary, Martha Turner, has six offices throughout Houston and employs 280 real estate agents; Jongebloed is a Texas resident; she agreed to the RCA in Texas; and the non-competition agreement prohibits her from working within a certain area in Texas. As Jongebloed contends, the only connection to Delaware is that it is Realogy's place of incorporation. We conclude that Texas has a more significant relationship than Delaware with the parties and the transaction in this matter.

Texas also has a "materially greater interest" than Delaware in the enforceability of the non-competition agreement in this matter. Much like the circumstances in *DeSantis*, which similarly involved a non-competition agreement, Texas is directly interested in Jongebloed as an employee working within its borders. Texas is also interested in Realogy as a national employer doing business in the state and in Compass as a new competitive business in the state. Finally, Texas is interested in consumers of the services furnished in Texas by Realogy and Compass and performed by Jongebloed.[23] Delaware's interest is limited to protecting a national business incorporated under its laws. Under these circumstances, Texas has a materially greater interest than Delaware in the enforceability of the non-competition agreement.

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[22] *See Cardoni*, 805 F.3d at 582.
[23] *See DeSantis*, 793 S.W.2d at 679.

Finally, we address whether the application of Delaware law to decide the enforceability of the non-competition provision would contravene a fundamental policy of Texas. Although we have noted that the meaning of "fundamental policy" is frequently an "elusive concept,"[24] in *DeSantis*, the Texas Supreme Court held that "the law governing enforcement of noncompetition agreements is fundamental policy in Texas, and that to apply the law of another state to determine the enforceability of such an agreement in the circumstances of a case like this would be contrary to that policy."[25] Furthermore, as described below, the Texas Covenants Not to Compete Act requires that a non-competition agreement be ancillary to or part of an otherwise enforceable agreement. Delaware law does not contain such standards and even permits continued employment to serve as consideration for an at-will employee's agreement to a restrictive covenant, while Texas does not. Based on *DeSantis* and because application of Delaware law could be contrary to fundamental policy in Texas regarding the enforceability of non-competition agreements, we hold that Texas law applies here.

3. Enforceability of the Non-Competition Provision

Jongebloed asserts that the non-competition provision in the RCA is unenforceable under Texas law because it is not supported by sufficient consideration. Specifically, Jongebloed argues that the restricted stock units constituted "illusory consideration" for the non-competition provision because the units were unvested and had to be entirely forfeited when she resigned. She further asserts Realogy did not agree to provide her any other actual, valuable consideration to support the non-competition provision. As described below, under Texas law, the non-competition provision is supported by

[24] *Cardoni*, 805 F.3d at 585.
[25] 793 S.W.2d at 681.

sufficient consideration—namely Realogy's provision of confidential information to Jongebloed.

Under Texas law, "a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made" and contains "limitations as to time, geographical area, and scope of activity to be restrained that are reasonable."[26] The Texas Supreme Court has held that "otherwise enforceable agreements can emanate from at-will employment so long as the consideration for any promise is not illusory."[27]

Jongebloed argues that the non-competition agreement is unenforceable because it was ancillary to an agreement for unvested restricted stock units. Because her rights under the stock units disappeared when she resigned, Jongebloed argues that the noncompetition provision was supported only by illusory consideration. She further asserts that the only other consideration identified in the RCA was her "continued employment," which is also invalid consideration for a non-competition agreement under Texas law.

As Realogy contends, however, it provided Jongebloed with confidential information after she agreed to the RCA. Paul Killian, vice president of operations at Martha Turner, testified that before and after Compass opened its office in Houston, Jongebloed participated in Martha Turner and Realogy's meetings about how to compete against Compass and how to retain their top agents, who were being recruited by Compass. Killian shared his agent retention talking points with Jongebloed. He further testified that Jongebloed received confidential information regarding Realogy's proprietary recruitment and retention tools, as well as economic information about recruitment and

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[26] TEX. BUS. & COM. CODE § 15.50(a).

[27] *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 849 (Tex. 2009) (internal quotations marks and citation omitted).

retention. Moreover, Jongebloed met with Realogy's top, national executives regarding Compass's expansion to Houston.

The Texas Supreme Court specifically held in *Alex Sheshunoff Management Services, L.P. v. Johnson* that if an employer provides confidential information to an employee who has promised in return to preserve the confidences of the employer, then a non-competition covenant executed as part of that agreement is enforceable.[28] Because, as the district court correctly found, Realogy provided Jongebloed with confidential information, and Jongebloed promised not to disclose that information, the non-competition covenant she executed as part of that agreement is enforceable.

Jongebloed argues that her case is distinguishable because Realogy did not make an express promise to provide any confidential information to her. The Texas Supreme Court, however, has held that an employer's promise to provide the employee with confidential information need not be express. Rather, "[w]hen the nature of the work the employee is hired to perform requires confidential information to be provided for the work to be performed by the employee, the employer impliedly promises confidential information will be provided."[29] The RCA states that Jongebloed's employment "has required, and will continue to require, that [Jongebloed] has access to, and knowledge of, Confidential Information." This language shows that Realogy impliedly promised to provide confidential information to Jongebloed. Based on the foregoing, the district court did not abuse its discretion in determining that

[28] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 655 (Tex. 2006).

[29] *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 850 (Tex. 2009).

Realogy showed a substantial likelihood of success regarding the enforceability of its non-competition agreement with Jongebloed.[30]

D. Term of the Injunction

Jongebloed argues that even if the non-competition provision is enforceable under Texas law, the one-year term imposed by the district court is too long. The district court ordered that the injunction should last for one year starting from the date of the entry of the court's order, i.e., from November 15, 2019, through November 15, 2020. Jongebloed asserts that under the express provisions of the RCA, the one-year term should be reduced by about six weeks. She additionally argues that the equities at play in this matter call for a reduction in the term.

As Jongebloed contends, the RCA allows for a reduction, but in her case, the injunction should be reduced by nine days, rather than six weeks. The RCA states that when injunctive relief is granted, the duration should still be one year "computed from the date the relief is granted but reduced by the time between the period when the restricted period began," which in this case is February 2, 2019, the day after Jongebloed resigned, and "the date the *first* violation of the restrictive covenant by the Participant," which in this case is February 11, 2019, the first day Jongebloed started at Compass.

Jongebloed also argues that the one-year term of the injunction should be reduced in the interest of equity. Considering the time that has passed during the pendency of this appeal, the district court on remand should

[30] Contrary to Jongebloed's contentions, our decision in *Olander v. Compass Bank*, 363 F.3d 560 (5th Cir. 2004) is inapposite. In that case, we held a non-competition agreement unenforceable because it was supported by a stock option agreement that contained only illusory promises. *Id.* at 565. Furthermore, although the agreement also contained a non-disclosure clause, no evidence was presented establishing that the employee actually received any confidential information. *Id.*

reweigh the equities in this matter when rendering its judgment, especially with regard to the term of any injunction.

III. CONCLUSION

Based on the foregoing, the district court's preliminary injunction is AFFIRMED. We LIFT the stay we previously imposed and REMAND this matter for further proceedings consistent with this opinion. We additionally instruct the district court to conduct a trial on the permanent injunction as soon as possible and, when determining the term of any injunction, to reweigh the equities in this matter in light of the time that has passed during the pendency of this appeal. The mandate shall issue forthwith.

AFFIRMED; STAY LIFTED; REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; MANDATE ISSUED FORTHWITH.