UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

APEX PHYSICAL THERAPY, LLC,

Plaintiff,

v.

ZACHARY BALL, TODD LINEBARGER, and ADVANCED PHYSICAL THERAPY, LLC,

Defendants.

Case No. 17-cv-00119-JPG-DGW

MEMORANDUM AND ORDER

This matter comes before the Court on defendant Zachary Ball's Motion (Doc. 13) to Dismiss for Failure to State a Claim and defendant Todd Linebarger's Motion (Doc. 14) to Dismiss for Failure to State a Claim. The plaintiff filed a timely response to each motion. (Docs. 19 and 20).

1. **Background**.

This matter was initially filed in the Circuit Court of the Third Judicial Circuit, Madison County, Illinois and removed to this Court pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 (diversity of citizenship). The complaint alleges breach of contract and injunctive relief against defendants Ball and Linenbarger and tortious interference with business expectancy and civil conspiracy against all defendants.

Generally, the complaint alleges that the defendants, Ball and Linenbarger, worked for the plaintiff and left to become employed by defendant Advance. Plaintiff operates a network of physical therapy rehabilitation services for industrial clients and defendant Advance is a competitor providing the same services. Plaintiff alleges that once defendants Ball and

Linenbarger became employed with Advance, they solicited the plaintiff's customers in violation of their employment and confidentiality agreements.

2. **Standards.**

When reviewing a Rule 12(b)(6) motion to dismiss, the Court accepts as true all allegations in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To avoid dismissal under Rule 12(b)(6) for failure to state a claim, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This requirement is satisfied if the complaint (1) describes the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests and (2) plausibly suggests that the plaintiff has a right to relief above a speculative level. *Bell Atl.*, 550 U.S. at 555; *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *EEOC v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl.*, 550 U.S. at 556).

In *Bell Atlantic*, the Supreme Court rejected the more expansive interpretation of Rule 8(a)(2) that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *Bell Atlantic*, 550 U.S. at 561–63; *Concentra Health Servs.*, 496 F.3d at 777. Now "it is not enough for a complaint to avoid foreclosing possible bases for relief; it must actually suggest that the plaintiff has a right to relief . . . by providing allegations that 'raise a right to relief above the speculative level.'" *Concentra*

Health Servs., 496 F.3d at 777 (quoting *Bell Atl.*, 550 U.S. at 555).

Nevertheless, *Bell Atlantic* did not do away with the liberal federal notice pleading standard. *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007). A complaint still need not contain detailed factual allegations, *Bell Atl.*, 550 U.S. at 555, and it remains true that "[a]ny district judge (for that matter, any defendant) tempted to write 'this complaint is deficient because it does not contain . . .' should stop and think: What rule of law *requires* a complaint to contain that allegation?" *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005) (emphasis in original). Nevertheless, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl.*, 550 U.S. at 555. If the factual detail of a complaint is "so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8," it is subject to dismissal. *Airborne Beepers*, 499 F.3d at 667.

The Court may review all exhibits attached to the complaint and "[w]here an exhibit and the complaint conflict, the exhibit typically controls. A court is not bound by the party's characterization of an exhibit and may independently examine and form its own opinions about the document." *Forrest v. Universal Sav. Bank, F.A.*, 507 F.3d 540, 542 (7th Cir. 2007).

In this matter, there is a choice of law provision that neither party challenges. The choice of law provision mandates that the law of the State of Illinois will govern.

3. **Analysis**.

a. Defendant Zachary Ball's Motion (Doc. 13) to Dismiss for Failure to State a Claim.

Defendant Ball first moves for dismissal arguing a lack of consideration. According to defendant Ball, he "was not employed by Plaintiff for the requisite two years in order for the

restrictive covenant Plaintiff attempts to rely upon to be enforceable." (Doc. 20 at 1). Mr. Ball was employed by Apex from April 30, 2007 until August 17, 2016, but the contract at issue was not signed until February 3, 2015.

"Illinois courts have repeatedly held that there must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant." *Fifield v. Premier Dealer Services, Inc.*, 993 N.E.2d 938, 943 (Ill. App. 1st Dist. 2013). However, when a federal court sitting in diversity applies state substantive law, it must apply the law as it believes the highest court of the state would apply it if it were hearing the issues. *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 669 (7th Cir. 2001). When the highest state court has not spoken on an issue, the federal court must give great weight to decisions of intermediate appellate courts unless there are persuasive reasons to believe the highest court would rule differently. *Id.*

Five federal courts in the Northern District of Illinois and one federal court in the Central District of Illinois have predicted that the Illinois Supreme Court will reject the Illinois appellate court's bright-line rule in favor of a more fact-specific approach. *See Allied Waste v. Tibble,* 177 F.Supp.3d 1103, 1108 (N.D. Ill. April 7, 2016*); R.J. O'brien & Associates, LLC v. Williamson*, 14 C 2715, 2016 WL 930628, at *3 (N.D. Ill. Mar. 10, 2016); *Traffic Tech, Inc. v. Kreiter,* 2015 WL 9259544, at * 5 (N.D. Ill. Dec. 18, 2015); *Bankers Life & Casualty v. Miller*, 2015 WL 515965 at *4 (N.D. Ill. Feb. 6, 2015); *Montel Aetnastak, Inc., v. Miessen*, 998 F.Supp.2d 694, 716 (N.D. Ill. Jan. 28, 2014)(*see also LKQ Corp., v. Thrasher*, 785 F.Supp.2d 737, 744 (N.D. Ill. May 23, 2011); *Cumulus Radio Corp. v. Olson*, 80 F.Supp.3d 900, 909 (C.D. Ill. Feb. 13, 2015)(all concluding that the Illinois Supreme Court would reject a two year bright-line rule in favor of a fact specific totality-of-the-circumstances test.)

One federal court of the Northern District of Illinois has predicted that the Illinois Supreme Court will uphold the two-year rule. *Compare, Instant Tech., LLC v. DeFazio*, 40 F. Supp. 3d 989, 1010 (N.D. Ill. 2014), aff'd, 793 F.3d 748 (7th Cir. 2015) ("This court, however, predicts the Illinois Supreme Court upon addressing the issue would not alter the doctrine established by the recent Illinois appellate opinions, which clearly define a "substantial period" as two years or more of continued employment.") Although the judgment in *Instant Tech* was affirmed by the United States Court of Appeals for the Seventh Circuit, the bright-line rule was not addressed on appeal. *Instant Tech.*, 793 F.3d 748.

This Court agrees with reasoning of the Courts that have held that the Illinois Supreme Court will most likely reject the two year bright-line rule in favor a fact specific totality-of-the-circumstance approach. Bright-line rules can result in unequable results. For example, say employee "A" and employee "B" both execute restrictive contracts on the same day. "A" works for 25 months after the contract, but "B" voluntarily terminates his employment at 23 months. Holding that the employer can only enforce the restrictive contract against employee "A" simply because "A" was employed for an additional two months would not serve and protect the intent of a restrictive contract. What if "B" was given additional bonuses over "A"? Or access to more confidential information? Or was simply aware of the two year bright-line test and knew to terminate his employment prior to hitting the magical two year mark?

The purpose of substantial consideration is to ensure that an employer could not terminate an employee immediately after signing a non-compete or non-disclosure agreement. Substantial consideration is intended to ensure that the employee receives a benefit from the agreement; however, this Court believes that consideration can be comprised of benefits beyond continued

employment for two years. As such, substantial consideration is an issue of fact that is undeveloped at the pleading stage. Therefore, dismissal under Federal Rule of Civil Procedure 12(b)(6) for lack of sufficient consideration is not appropriate.

Next, defendant Ball argues that provision 4.3 of the employment agreement, "is far broader than necessary to protect Plaintiff's interest in preventing Defendant Ball from abusing the specific client relationships he built up during his time with the company." He further argues that, "it is unreasonable and unenforceable as a matter of law." (Doc. 13 at 9). Provision 4.3 provides:

> 4.3 *Non-Solicitation of Referral Sources.* For a period of two (2) years after the expiration, or termination of Employee's employment with Employer for any reason, and whether voluntary or involuntary and whether for cause or without cause, Employee will not, directly or indirectly solicit, and will not directly or indirectly contact any existing Referral Source or identified prospective Referral Source with whom Employee has had direct or indirect contact or about whom Employee has learned confidential information and/or trade secrets by virtue of his/her employment with Employer, other than Referral Sources that Employer has not had contact with within the two (2) years immediately preceding the expiration or termination my employment *with* Employee. A "Referral Source" is a person or entity which refers or can refer patients to Employer, such as a physician, a hospital, a physician assistant, a nurse practitioner, a nurse case manager, or a business.

"A restrictive covenant, assuming it is ancillary to a valid employment relationship, is reasonable only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public. Further, the extent of the employer's legitimate business interest may be limited by type of activity, geographical area, and time." *Reliable Fire Equip. Co. v. Arredondo*, 965 N.E.2d 393, 396–97 (Ill. 2011)(internal citations omitted.) Further, "[w]hether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee's acquisition of

confidential information through his employment, and time and place restrictions. No factor carries any more weight than any other, but rather its importance will depend on the specific facts and circumstances of the individual case." *Id.* at 403.

As stated earlier, this matter is at the pleading stage and the parties have not been given an opportunity to develop the necessary facts. When analyzing a Rule 12(b) motion, the question is whether the plaintiff has describes the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and that the claim plausibly suggests that the plaintiff has a right to relief above a speculative level. The Court finds that plaintiff's complaint meets the pleading requirements with regard to defendant Ball. As such, dismissal under Federal Rule of Civil Procedure 12(b)(6) is also not appropriate for the non-solicitation of referral sources provision being overbroad and unenforceable.

b. Defendant Todd Linebarger's Motion (Doc. 14) to Dismiss for Failure to State a Claim.

First, it should be noted that defendant Linebarger only executed a Confidentiality and Nondisclosure Agreement. There is nothing in the record to indicate that he executed an Employment Agreement. The Non-Solicitation of Referral Sources (provision 4.3), discussed above, is contained is the Employment Agreement and is therefore not applicable to defendant Linebarger. However, the plaintiff's complaint does allege that defendant Linebarger's actions violated the Confidentiality and Nondisclosure Agreement.

Defendant Linbarger makes the same argument as defendant Ball with regard to a lack of consideration. He also claims that he was not employed by the plaintiff, "for the requisite two years." (Doc. 14 at 1). This argument fails for the reasons stated above.

Next, defendant Linebarger argues that the confidentiality agreement "is invalid and unenforceable on its face because it is not limited in scope, including geographic area and duration." (Doc. 14 at 1).

> The Illinois courts have held unenforceable nearly identical provisions in confidentiality agreements because (1) they contain no limitation on the duration of the nondisclosure provision, instead restricting disclosure "during and subsequent to the period of said employment," and (2) they contain no geographical limitation or other kind of limit on the parties to whom the employee is prohibited from disclosing information. Confidentiality agreements without such limitations constitute, in the view of the Illinois courts, unreasonable restraints on trade which unduly restrict the free flow of information necessary for business competition.

AMP Inc. v. Fleischhacker, 823 F.2d 1199, 1202 (7th Cir. 1987) (*internal citations omitted.*), *superseded by statute*, Illinois Trade Secrets Act, 765 ILCS 1065, *as recognized in PepsiCo, Inc. v. Redmond,* 54 F.3d 1262, 1269 (7th Cir. 1995).

The plaintiff makes the same argument that it tendered in response to defendant Ball's motion to dismiss. That is, "geography and duration go the reasonableness of the restrictive covenant" and are fact specific. Plaintiff again cites to *Reliable Fire Equipment Co. v. Arredondo*, 9965 N.E. 393 (Ill. 2011) which held:

> Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions. No factor carries any more weight than any other, but rather its importance will depend on the specific facts and circumstances of the individual case.

Id. at 403.

However, the *Reliable* court was addressing a restrictive covenant not to compete – not a confidentiality agreement. "[A] covenant not to compete is easier to enforce than a covenant that forbids the former employee to use confidential information." *Outsource Intern., Inc. v. Barton*, 192 F.3d 662, 671 (7th Cir. 1999)(Posner, *dictum in dissent*). But again, the Court agrees with the

plaintiff that this is a fact specific inquiry not ripe at the pleading stage and that dismissal at this stage is not appropriate.

4. **Conclusion.**

For the reasons stated above, defendant Zachary Ball's Motion (Doc. 13) to Dismiss for Failure to State a Claim is **DENIED** and defendant Todd Linebarger's Motion (Doc. 14) to Dismiss for Failure to State a Claim is **DENIED**.

IT IS SO ORDERED.

DATED: 7/19/2017

s/J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE