Insight Direct USA, Inc. v. Kelleher Doc. 19

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

INSIGHT DIRECT USA, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	1:17-CV-252-RP
	§	
CHRISTOPHER KELLEHER,	§	
	§	
Defendant.	§	
	§	

ORDER

Before the Court is Plaintiff Insight Direct USA, Inc.'s ("Plaintiff") Motion for a Temporary Restraining Order. (Dkt. 3). After considering the parties' arguments and the relevant law, the Court finds that Plaintiff's Motion should be **GRANTED**.

I. Overview

This suit involves an alleged breach of a non-compete covenant. Defendant Christopher Kelleher ("Defendant") accepted an offer of employment with Plaintiff in February 2014. (Compl. ¶ 18). At that time, he entered into a Confidentiality, Intellectual Property, Non-Solicitation, and Non-Competition Agreement ("Non-Compete Agreement") with Plaintiff. (*Id.* ¶ 24). That agreement prohibits Defendant, who was employed by Plaintiff as a director, from engaging in "competing business" in the "restricted territory" for a period of nine months. (Non-Compete Agreement, Dkt. 1-3, at 6).[1] Defendant also twice entered into a Restricted Stock Unit Agreement ("RSU Agreement") with Plaintiff, which contained a similar non-compete covenant. (*Id.* ¶ 26).

[1] "Competing business" is defined as "any information technology reseller, provider or seller of information technology services, or any other individual or entity that is directly engaged in or is preparing to engage in any business which involves the sale, lease, or provision of information technology services that are available from Insight or an Insight Company at any time relevant to this Agreement." (Non-Compete Agreement, Dkt. 1-3, at 5). The term "restricted territory" refers to the United States. (*Id.*).

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While employed by Plaintiff, Defendant oversaw Plaintiff's channel-partner sales relationship with Dell, EMC Corporation, and VMware. (*Id.* ¶¶ 34–35). Defendant notified Plaintiff that he was leaving to join VMWare on February 28, 2017; his last day with Plaintiff was March 7, 2017. (*Id.* ¶¶ 52–53). At VMware, Defendant is responsible for "building, coaching, and developing VMWare's inside sales teams in the Americas." (Resp., Dkt. 12, at 2).

Plaintiff seeks a temporary restraining order enjoining Defendant "and all other persons or entities in active concert or participation with [Defendant] who receive notice of the Temporary Restraining Order by personal service or otherwise" from:

a) Rendering services for any person or organization, or engaging directly or indirectly in any business, that is competitive with Plaintiff;
b) Disclosing to anyone outside Plaintiff or using, without prior written authorization from Plaintiff, any trade secrets or other confidential or proprietary information acquired by Defendant during his employment with Plaintiff;
c) Soliciting, interfering, inducing, or attempting to cause any employee of Plaintiff to leave his or her employment;[2] and
d) Soliciting, interfering, inducing, or attempting to cause any client of Plaintiff to terminate or reduce its business relationship with Plaintiff.[3]

(App. TRO, Dkt. 3, at 11).

The Court held a hearing on Plaintiff's Application for a Temporary Restraining Order on March 31, 2017. (*See* Dkt. 16).

[2] Section 7(b) of the Non-Compete Agreement provides that an employee may not "directly or indirectly encourage, induce, or otherwise solicit, directly or indirectly, any employee of an Insight Company to terminate his or her employment or otherwise interfere with the business relationship of an Insight Company with its employees" for a period of twelve months following the termination of that employee's employment with Plaintiff. (Non-Compete Agreement, Dkt. 1-3, at 7).

[3] Section 7(a) of the Non-Compete Agreement provides that an employee may not "directly or indirectly encourage, induce, solicit, or accept business from any client or potential client of an Insight Company, with whom Employee had contact, for whose account Employee worked, or about whom Employee has knowledge of Trade Secrets, Confidential and Proprietary Information, or Third-Party Information" for a period of twelve months following the termination of that employee's employment with Plaintiff. (Non-Compete Agreement, Dkt. 1-3, at 7).

II. Legal Standards

A. Temporary Restraining Orders

A temporary restraining order is an extraordinary remedy that should not be granted unless the party seeking it clearly carries the burden of persuasion on all of the four requirements described below. *See PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). The Supreme Court has cautioned that temporary restraining orders "should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974).

The movant for a temporary restraining order must show: (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the restraining order is not granted, that is, there is no adequate remedy at law, such as monetary damages; (3) the movant's threatened injury outweighs the threatened harm to the party whom the movant seeks to enjoin; and (4) that granting the request for a temporary restraining order will not disserve the public interest. *PCI Transp.*, 418 F.3d at 545; *see also Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987).

B. Non-Compete Covenants

This Court has diversity jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1332 and must, therefore, apply the substantive law of Texas. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

While non-compete covenants are generally enforceable under Texas law, *see generally* Tex. Bus. & Com. Code § 15.50(a), they must be reasonable with respect to the geographical area and scope of activity to be restrained. Tex. Bus. & Com. Code § 15.50(c). "Geographic restrictions are reasonable to the extent they are commensurate with the territory in which the employee worked during his employment with the employer." *Daily Instruments Corp. v. Heidt*, 998 F. Supp. 2d 553, 567

(S.D. Tex. 2014). As to scope of activity, Texas courts have held that the scope of activity restrained must "bear some relation to the activities of the employee" on the former employer's behalf and should not "restrain [the employee's] activities in a territory into which his former work has not taken him or given him the opportunity to enjoy undue advantages in later competition with his employer." *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 386–87 (Tex. 1991).

Should a court find that a non-compete agreement is unreasonably broad in scope, Texas law requires the court to reform the agreement "to the extent necessary to cause the limitations constrained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable." Tex. Bus. & Comm. Code § 15.51(c).

III. Discussion

A. Likelihood of Success on the Merits

Despite Defendant's contention otherwise, the Court is satisfied that the geographic scope of the non-compete covenants at issue—the entire United States—is "commensurate with the territory in which [he] worked during his employment with [Plaintiff]." *See Daily Instruments*, 998 F. Supp. at 567. Texas courts have "upheld nationwide geographic limitations in non-compete agreements when it has been clearly established that the business is national in character." *Vais Arms, Inc. v. Vais,* 383 F.3d 287, 296 n.20 (5th Cir. 2004). While at Plaintiff, Defendant oversaw channel-partner sales throughout the United States. (Compl., Dkt. 1, ¶¶ 22–23, 25).

Defendant also argues that the scope of activity restrained by the non-compete covenants at issue is unreasonably overbroad. (Resp., Dkt. 12, at 4). While the Court agrees that the definition of "competing business" incorporated into the covenants is likely overbroad, Texas law requires the Court to reform the agreement if that is found to be the case. It is unclear whether reformation is appropriate at the temporary injunction stage of litigation. *TransPerfect Translations, Inc. v. Leslie*, 594 F. Supp. 2d 742, 756 (S.D. Tex. 2009) (citing *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289, 298–99

(Tex.App.—Beaumont 2004, no pet.) (vacating an overbroad injunction and declining to reform the non-compete because it determined that further factual information was required); *Poole v. U.S. Money Reserve, Inc.*, No. 09–08–137CV, 2008 WL 4735602 (Tex.App.—Beaumont Oct. 30, 2008) (mem. op., not designated for publication)). The Court therefore declines to reform the non-compete covenants at this point. However, the Court is satisfied that Defendant's employment with VMware in a sales-focused managerial role would fall within the scope of even a significantly reformed non-compete covenant. Plaintiff has therefore demonstrated that it has a substantial likelihood of prevailing on the merits.

B. Threat of Irreparable Harm to Movant

Defendant contends that Plaintiff "fails to meet its burden to show that denial of a temporary restraining order would result in a substantial threat of irreparable injury" because Defendant's "position with VMware is not in direct competition" with Plaintiff. (Resp., Dkt. 12, at 9). This Court disagrees. Materials prepared by Defendant during his employment with Plaintiff demonstrate that VMware and Plaintiff are in competition, a fact not mitigated by Defendant's emphasis on channel-partner sales versus direct sales. Because Defendant had access to confidential information regarding strategy and pricing while employed by Plaintiff, his subsequent employment with VMware represents a significant threat to Plaintiff's business.

C. Balance of Harms

Defendant represents that Plaintiff "cannot show any threatened injury to it that outweighs the harm an injunction would cause" to Defendant because granting the temporary restraining order would "put [Defendant] out of work and utterly den[y] [him] a livelihood in the industry in which he has worked for nearly two decades." (Resp., Dkt. 12, at 9–10). The Court is sensitive to the hardship associated with enjoining Defendant from pursuing employment with VMware at this time, but is unconvinced that it represents a greater harm than that faced by Plaintiff should the Court decline to

grant relief. Given the potential irreparable harm outlined in the previous section, the lack of evidence that Defendant will be unable to otherwise find employment, and the Court's intention to hold a hearing on Plaintiff's request for a preliminary injunction in short order, the Court is satisfied that Plaintiff has met its burden with respect to this element. *See, e.g.*, *McKissock, LLC v. Martin*, No. EP-16-CV-400, 2016 WL 8138815, at *12–13 (W.D. Tex. Nov. 10, 2016) ("Although [the defendant] claims that she will have to file for unemployment and will not be able to earn a living if the injunction is issued, the Court is not convinced that this will necessarily be the case").

D. Public Interest

Non-compete clauses are disfavored as a restraint on business in Texas. *See, e.g.*, *Sirius Computer Solutions, Inc. v. Sparks*, 138 F. Supp. 3d 821, 843 (W.D. Tex.). However, both the Fifth Circuit and Texas state courts routinely uphold such clauses; the same courts grant injunctions enforcing the clauses when doing so is appropriate. *Id.* "Upholding reasonable noncompetes is within the public interest." *Id.* (citing *TransPerfect*, 594 F. Supp. 2d at 758; *AmeriSpec, Inc. v. Metro Inspection Serv., Inc.*, No. 3:01-CV-0946, 2001 WL 770999, at *6 (N.D. Tex. July 3, 2001)); *McKissock*, 2016 WL 8138815, at *13 ("Texas has clarified the public interest through its noncompete statute, and . . . enforcing reasonable non-compete agreements is within the public interest."). The Court therefore concludes that Plaintiff has met its burden with respect to this element.

IV. Conclusion

In light of the foregoing, it is hereby **ORDERED** that Plaintiff's Application for a Temporary Restraining Order (Dkt. 3) is **GRANTED**. Pending a preliminary injunction hearing, Defendant Christopher Kelleher is temporarily restrained from:

a) Rendering services in a sales or managerial capacity for any person or organization that is competitive with Insight, including VMware, Inc.;
b) Disclosing to anyone outside Insight or using, without prior written authorization from Insight, any trade secrets or other confidential or proprietary information acquired by Christopher Kelleher during his employment with Insight;

c) Soliciting, interfering, inducing, or attempting to cause any employee of Insight to leave his or her employment; and

d) Soliciting, interfering, inducing, or attempting to cause any client of Insight to terminate or reduce its business relationship with Insight.

This Temporary Restraining Order shall be binding upon Defendant and all persons in active concert or participation with Defendant who receive actual notice of this Order by personal service or otherwise.

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 65(c), Plaintiff is required to post a $30,000.00 bond.

IT IS FINALLY ORDERED that the parties confer with each other and file a written notice with the Court on or before April 10, 2017. The notice should identify potential dates for a preliminary injunction hearing in this matter.

SIGNED on April 5, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE