[*1]

SCANNED ON 7/1/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Helen E. Freedman Justice PART 39

ELITE TECHNOLOGY

- v -

ABRAHATHOMAS et al.

INDEX NO. 001

MOTION DATE

MOTION SEQ. NO. 002883/07

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum of law.

FILED

JUL 01 2008

COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: June 26, 2008

HEF

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----------X

ELITE TECHNOLOGY NY INC., HANHUI LU,
and YONGHONG FAN,

Plaintiffs,

-against- Index No. 602883/07

ABRAHAM THOMAS, a/k/a THOMAS ABRAHAM,
PHILIP JOHN, UNIVERSAL BUSINESS SOLUTIONS INC.,
and DIPAK PATEL,

Defendants.

----------X

HELEN E. FREEDMAN, J:

In this action based on a claim of breach of a covenant not to compete, plaintiffs move for a) partial summary judgment on its first cause of action against defendants Abraham Thomas ("Thomas") and Philip John ("John") for breach of their non-competition covenant entered into at the time that the latter sold their business to plaintiffs and became shareholders in plaintiffs' business; and b) to dismiss defendants Thomas' and John's Counterclaim for breach of contract. (The Court notes that the Order to Show Cause itself refers to a defendant named Outpost Clinton Hill–an unknown party.)

In a related proceeding Thomas and John have sought dissolution of Elite Technology, Inc. ("Elite") pursuant to Business Corporation Law §§ 1104-(a)(1) and (2) (Index No. 602895) and Lu and Fan filed an election pursuant to BCL 1118 to purchase Thomas and John's shares. The Court stayed the dissolution pending a report concerning valuation of the shares by or from Referee Louis Crespo.

Thomas and John were the co-owners of a consulting company known as Quantum

Ventures ("Quantum")that introduced customers to authorized photocopier equipment dealers. Plaintiffs Elite and Lu and Fan, principals of Elite, were and are in the business of leasing, selling, and servicing photocopier equipment in the New York City metropolitan area. Elite has been an authorized dealer for products of the Savin Corporation. The vast majority of Elite's revenues have resulted from Savin related transactions. Plaintiffs and defendants Thomas and John entered into and agreement on June 30, 2003 (the "Agreement"). Under the Agreement, Thomas and John transferred all of Quantum's business to plaintiffs in exchange ofr a 49% ownership interest in Elite. No funds or tangible assets were transferred. Section 7 of the Agreement contained a non-competition covenant which provided as follows:

> Each and every of the parties herein agrees, represents and covenants.....not to re-establish, re-open, be engaged in, nor in any manner whatsoever become interested, directly or indirectly, either as an employee, as owner, as partner, as agent or as stockholder, director or officer of a corporation, or otherwise, in any business, trade or occupation similar to the Corporation, within the New York City Metropolitan area, including New York, New Jersey and Connecticut, for a term of five (5) years from the date he or she is no longer an employee or a shareholder of the Corporation. Also each and every one of the parties agree (sic) to dedicate at least five years from the date of the agreement towards their respective roles as partners of the company.

Section 13 of the Agreement provides that

> Any willful, capricious or other inexcusable default hereunder on the part of either party shall result in the forfeiture of his or her shares of stocks of the Corporation and entitle the aggrieved party to split his or her shares of stocks of the Corporation equally as liquidated damages for breach of this Agreement.....

Plaintiffs terminated defendants employment approximately three years after the Agreement. Plaintiffs contend that within a few months after termination of Thomas' and John's (or Abraham's) employment, they became employees of Universal Business Solutions, Inc.("UBS"), which plaintiffs contend directly competes against Elite in the sale, leasing and servicing of

photocopier equipment in the New York City metropolitan area. Defendants Thomas and John admit that they have been employed by UBS as of January 2007. Defendants, including Patel, sole shareholder of UBS, did not respond to a "cease and desist" letter sent to them, and this action was commenced in August 2007. Plaintiffs' motion only concerns the non-competition provision of the Agreement.

Plaintiffs indicate that they had been the sole shareholders of Elite starting in 1995, but that because of limited English skills, they entered into the Agreement described above in 2003 with Thomas and John, who then served as their sales representatives. They contend that they had no written employment agreement with Thomas or John, just the stock purchase Agreement. Plaintiffs contend that UBS markets Panasonic photocopier equipment in direct competition with plaintiffs' marketing of Savin photocopier equipment. Thomas acknowledged in his deposition that he is a sales manager for UBS, which plaintiffs contend violates the non-compete provision of the Agreement and which should result in forfeiture of shares in Elite.

In their summary motion, plaintiffs ask this Court, as a matter of law, to find that the non competition clause contained in the Agreement is valid and binding, that defendants have breached its provisions, and that defendants Thomas and John have forfeited their shares in Elite as a result of violation of the Agreement. Plaintiffs also ask that defendants' counterclaim for breach an employment agreement be dismissed, contending that no such agreement existed.

For the foregoing reason, the motion is denied with leave to renew at the conclusion of discovery.

Discussion

With respect to the alleged breach of the non-competition provision and consequential forfeiture, plaintiffs argue that such agreements have been held to be binding and enforceable particularly where they are part of an agreement to sell a business. Plaintiffs contend that the sale of Quantum constituted such a transaction, and that the 49% shares in Elite was payment for that business. Plaintiff cites, inter alia, *Sager Spuck Statewide Supply Co. v. Meyer,* 276 A.D.2d 745 (3d Dept. 2000) where a ten year non-compete clause contained in the sales agreement of a business was enforced. In that case, defendant did not challenge the reasonableness of the clause nor the fact of the competition. See also *Mohawk Maintenance Co. v. Kessler,* 52 N.Y.2d276 (1981) (upholding an agreement not to compete upon the sale of a business).

Both sides invoke *Purchasing Assoc. v. Weitz,* 13 N.Y.2d 267 (1963). In that case, the Court of Appeals found that where a partnership agreed to "sell" its assets to a newly formed subsidiary corporation, and the defendant entered into an employment contract with the new company which contained a two year non-compete clause after the termination of employment, it was important to look behind the sale transaction to ascertain whether there was actually a transfer of a business. The Court concluded that since the "sale" was really an employment agreement inasmuch as nothing of value other than employee services was actually transferred, the only issue for a trial court to determine was the reasonableness of the the non-compete clause The Court added that, "Since.....there are powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood, the courts have generally displayed a much stricter attitude toward covenants of this type."

Defendants argue that the transfer of their business did not involve transfer of any assets

or even of any customer contracts–merely their marketing abilities. They argue that the provision in the Agreement requiring the parties to "dedicate at least five years from the date of the agreement towards their respective roles as partners of the company" amounted to a five year employment agreement that plaintiffs breached by terminating them. They contend that the principal incentive or compensation for their entering into the Agreement was the 49% interest in the business. Thus, they contend, as was in the case of *Purchasing Assoc. v. Weitz,* 13 N.Y.2d 267 (1963), it was not actually a covenant incident to a "sale" of a business. They also aver that even if this were a covenant incidental to a sale, defendants are not actually competing with them because their new employer is the authorized dealer for other products–Panasonic (and not Savin) products and storage and retrieval software called "docStar". Defendants point to the fact that plaintiffs' business improved during the period following their termination.

Moreover, defendants aver that the forfeiture provision contained in the Agreement is drastic and warrants further discovery and a trial. Finally, as indicated, defendants oppose the motion to dismiss the counterclaim contending that the "five year" dedication as partners provision in the Agreement was understood by both sides to be an employment agreement.

Conclusion

At this juncture, defendants have raised sufficient facts to warrant denial of summary judgment on the claim of breach of the restrictive covenant. Even where there is restrictive covenant incident to a sale or stock purchase, it is subject to the rule of reasonableness. *Hadari v. Leshchinsky et al.,* 242 A.D.2d 557 (2d Dept. 1997). Under the facts of this case, it is not clear that the transaction memorialized by the Agreement constituted a sale of a business, nor is it clear that the five year restriction was "reasonable" under the circumstances. Additionally, there is a

triable issue of fact as to whether defendants Thomas and John are actually competing with plaintiff in their new employment. Elite is the authorized dealer for Savin products. UBS is the authorized dealer for Panasonic and docStar products. While there may be overlap in some products, it is unknown whether defendants are actually competing for the same customers.

Finally, the provision in the Agreement concerning five year dedication by partners, while somewhat unusual, has enough of the aspect of an employment commitment to warrant discovery as to what the parties intended.

Based on the above, summary judgment on the first cause of action is denied, dismissal of the counterclaim is denied, and the parties are directed to appear for a preliminary conference on August 5, 2008, as previously scheduled.

Dated: June 26, 2008

Enter:

/s/ E Freedman

Helen E. Freedman, J.S.C.