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NO.: 34570-11

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

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B.O. TECHNOLOGY, L.L.C.,

Plaintiff,

-against-

JULIEN DRAY,

Defendant.

x

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DECISION AFTER HEARING

In December 2011, the plaintiff, B.O. Technology, L.L.C., a New York limited liability company that provides information technology services, (the "plaintiff") brought an order to show cause seeking to enjoin preliminarily its former employee, Julien Dray (the "defendant") from rendering services to the plaintiff's former customer Maesa Group ("Maesa").[1] The plaintiff based its request for relief on the provisions of a non-competition and non-solicitation agreement dated May 26, 2009 (the "Agreement"), between the plaintiff and the defendant. The plaintiff alleges that the Agreement prohibited the defendant from engaging in a variety of competitive activities for a period of one and one-half years following termination of his employment within the territorial boundaries of the United States or such broader area as covered by the plaintiff's business (defined in the Agreement as the "Geographic Boundary"). The plaintiff alleges that the defendant violated certain portions of the Agreement when he accepted a position with Maesa in or about August 2011. In particular, the plaintiff cites Section (b) subsections (i), (iii) and (iv) of the Agreement which provide, in relevant part, that the defendant shall not engage in the following activities for a period of one and one-half years following termination of the defendant's employment in the Geographic Boundary:

[1] Maesa is a company involved in the beauty products industry. At the time of the defendant's resignation, Maesa was a customer of the plaintiff.

> (i) directly or indirectly engage, own, manage, operate, control, be employed by or consult for, participate in, render services for, or be connected in any manner with the ownership, management, operation, or control of any business in competition with the business of the [plaintiff]....; and
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> (iii) directly attempt in any manner to solicit or accept from any customer (emphasis added) of the [plaintiff], with whom the [defendant] had significant contact during the term of the [defendant's] employment, business competitive with the business done by the plaintiff with such customer; and
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> (iv) interfere with any relationship, contractual or otherwise, between the [plaintiff] and any other party, including, without limitation, any supplier, co-venturer, or joint venturer of the company, or solicit such party to discontinue or reduce its business with the [plaintiff].

The plaintiff claimed that the defendant violated these provisions by accepting a position with Maesa in August 2011. Accordingly, the plaintiff claimed that it suffered irreparable harm and was entitled to injunctive relief.

The defendant opposed the order to show cause arguing, among other things, that the provisions relied upon by the plaintiff were unenforceable under New York law. The defendant also argued that the plain language of the Agreement did not prohibit the defendant from accepting his position with Maesa. Finally, the defendant pointed out that the restrictive covenants have expired in accordance with their terms. For these reasons, the defendant argued that the plaintiff could not demonstrate that it was entitled to the injunctive relief requested.

Initially, with the consent of the parties, the court conducted a series of conferences in an attempt to find a negotiated resolution to the issues presented by this litigation. After numerous conferences, the court determined that a negotiated resolution could not be reached and that the issues presented by the order to show cause must be decided. The parties requested the opportunity to conduct discovery, and the court granted such request. After being advised by the parties that discovery was complete, the court scheduled a hearing. The hearing was held on October 4, 2012, and November 15, 2012. Each side presented and examined a variety of witnesses. The plaintiff presented Thierry Duclay, its President and owner; Oliver Buruchian, its Chief Operating Officer; Jennifer Johnson Sookuasion, its former Human Resources Coordinator; and Veronica Duclay, its Human Resources Director and the wife of Thierry Duclay. The defendant called Julien Dray; Laurence Ternturer, President of France Ligone, a customer of the plaintiff; and Evelin Grullon, Human Resources Director at Maesa. At the conclusion of the hearing, the parties were afforded the opportunity to submit post-hearing memoranda, which they did on March 8, 2013.

As previously noted, the plaintiff is a company that provides information technology support to a variety of customers. The plaintiff's typical customers are French companies operating in the United States, particularly those whose businesses relate to beauty and/or fashion. Also, the

plaintiff's customers are typically small companies that do not have information technology expertise in-house. The defendant began work as a Network Engineer for the plaintiff in or about January 2009. The defendant's duties consisted principally of working directly with the plaintiff's customers on a number of information technology issues as directed by the customer. The defendant acknowledged that, during his employment with the plaintiff, he had been assigned to work for Maesa. However, he claimed that, at the time of his email to Mr. Major, (*see, infra*), he was no longer Maesa's primary contact at the plaintiff and only worked for Maesa occasionally. Both parties agree that, during his employment, the defendant performed his job duties well and that the defendant's assignments became more sophisticated as time progressed. As a French citizen, the defendant required a work visa, which the plaintiff helped him to obtain. Sometime in May 2009, after commencing his employment with the plaintiff, the defendant alleges that he was required to sign the Agreement. The defendant claims that he believed he was required to sign the Agreement as a condition of his continued employment. The defendant claimed that it was of paramount importance that he maintain continuous employment because, if he became unemployed, his visa status would require him to return to France immediately.

Although he continued his employment with the plaintiff through the summer of 2011, the defendant claimed that he was very unhappy working for the plaintiff. The defendant testified that in the spring of 2011 he began to look for another job within the information technology industry. As part of that process, he sent an email to Gregory Major, Co-Chairman and founder of Maesa, asking if Mr. Major knew of any positions that were available and, if so, whether Mr. Major would be willing to forward the defendant's resume. The defendant claimed that he was not attempting to solicit a position with Maesa.

The record reveals that, at or about the time of the defendant's email to Gregory Major, Maesa was re-evaluating their information technology needs. Evelin Gullon, Maesa's HR Director testified that Maesa's business had grown dramatically in the previous year and that such growth had led Maesa to conclude it would be advisable to handle its information technology needs internally. She testified that Maesa believed creating such a position would promote "economic efficiency." She noted that, in June of 2011, the rates charged by the plaintiff for its services had significantly increased and that Maesa and the plaintiff had not been able to reach an agreement as to the rates to be charged by the plaintiff for its services. She testified that Maesa believed its continuing growth would mean that its "help desk" and "server issues" would be best handled internally. She testified that, once Maesa had decided to create a position internally, it stopped using the plaintiff for its information technology needs. Ms. Gullon testified that, in accordance with usual practice at Maesa, she created a job description for the position that was eventually offered to the defendant. Ms. Gullon testified that the position was not created for anyone in particular, nor was it created with the expectation that it would be filled by the defendant. Ms. Gullon testified that the new position would have been filled whether or not the defendant was available to accept it. Ms. Gullon recalled that a meeting was held at Maesa at which the new position was discussed. At this meeting, she recalled that someone suggested the defendant as a potential candidate. She also recalled that the CFO of Maesa suggested that she contact the defendant about the position. Ms. Gullon testified that she approached the defendant about the position and conducted a telephone interview. She stated that she believed the defendant was approached because of his character and customer skills, as well as his general IT skills. Upon completion of the interview process, Maesa offered the position to the defendant.

The defendant testified that he was initially offered a part-time position at Maesa in August of 2011 and that he became a full-time employee in January 2012. He described his responsibilities at Maesa as broader than his responsibilities for the plaintiff. In his position as Director of Information Technology, he is responsible for all aspects of Maesa's IT work in each of its offices in New York, Los Angeles, Paris and China.

In its order to show cause, the plaintiff sought injunctive relief restraining and enjoining the defendant from rendering services to Maesa for a period of one and one-half years from the date of the defendant's resignation.[2] The record reveals that the defendant resigned from his employment on or about August 26, 2011.[3] Thus, the restricted period set forth in the Agreement expired in February 2013. However, the court did not receive the parties' submissions until March 8, 2013. Although the court agrees with the defendant that, as the restricted period has expired, the plaintiff is no longer entitled to injunctive relief, the court finds that, in any event, the plaintiff cannot prevail on the merits.

The party seeking a preliminary injunction must establish (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balancing of the equities in favor of granting the injunction (*see*, **Taub v Kaplan**, 15 Misc 3d 1145[A] at *2 [and cases cited therein]). The party seeking the preliminary injunction has the burden of establishing a prima facie entitlement to such relief (**Id.**). The court finds that the plaintiff has failed to meet its burden.

New York courts have long held that, since there are powerful considerations of public policy which militate against sanctioning the loss of a person's livelihood, restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored by the law (**Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.** 42 NY2d 496, 499 [1977]). Restrictive covenants that restrict an employee's ability to compete must meet the test of reasonableness (**BDO Seidman v Hershberg,** 93 NY2d 382, 388-389 [1999]). A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public (**Id** at 389). A violation of any prong of this three-prong test renders the covenant invalid (**Id**). In addition to the test of reasonableness, a covenant will only be subject to specific enforcement if it is reasonable in time and area (**Id**). In articulating this standard, the Court of Appeals made it abundantly clear that the test of reasonableness focuses on the particular facts and circumstances of the case at bar and that the agreement in question will be evaluated in light of such facts and circumstances. The goal of this test very clearly is to prevent *unfair competition* (emphasis added) while still leaving room for fair and unrestricted competition (**BDO Seidman v Heishberg,** *supra* at 391; *see,* **Columbia Ribbon and Carbon Manufacturing v A-1-A Corp.,** *supra* at 499).

Continuing customer relationships are often the focus of restrictive-covenant litigation. The Court of Appeals has recognized that an employer may have a legitimate interest in preventing an

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[2] Although the plaintiff requested other injunctive relief, referencing alleged activities with other entities, the record is devoid of sufficient facts to support such requests.

[3] The defendant resigned pursuant to a letter dated August 26, 2011, which informed the plaintiff that his last day of employment would be August 29, 2011.

employee from making competitive use for a time of information or relationships which pertain particularly to the employer and which the employee acquired in the course of the employment. (**BDO Seidman v Heishberg,** *supra* at 391, quoting Blake, Employee Agreements Not To Complete, 73 Harv L Rev 625, 647). Thus, New York law has recognized that the employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer that has been created and maintained at the employer's expense to the *employer's competitive detriment* (**BDO Seidman v Heishberg,** *supra* at 392 [emphasis added]). New York law recognizes that not all employee competition is prohibited and that the competition an employer seeks to restrain must contain elements that render the competition unfair. When evaluating a customer relationship acquired during employment, the focus is whether such relationship is being used by an employee to the employer's competitive detriment. A restriction that does not pertain to competitive activity would constitute a restraint greater than is needed to protect the legitimate interest of the employer (**Id.**).

In the present case, the defendant is not competing with the plaintiff. The defendant did not start a competing business, nor did he leave his employment with the plaintiff to work for one of the plaintiff's many competitors. The alleged violation of the Agreement is his accepting the position created by Maesa. Although the defendant was introduced to Maesa through his work for plaintiff, the court finds that he did not violate the terms of the Agreement, exploit customer relationships, or appropriate his employer's good will. It is clear from the record that, by creating an in-house position, Maesa's intent was to end its use of the services provided by the plaintiff. The court finds that Maesa's decision was not brought about by any action by the defendant. Maesa concluded that it would create the in-house position of IT Director due to expanding needs and rising costs, as described by Ms. Gullon. While the defendant freely admitted that he sent an email to Maesa during the period of time when Maesa was creating the position, the defendant's actions did not cause or influence Maesa's decision, and Maesa did not create the position for the defendant. Maesa's goal was to terminate its use of outside IT services such as those offered by the plaintiff. The record demonstrates that the creation of the position had nothing to do with the defendant or any of his activities. That the defendant was familiar to Maesa, that he was seeking new employment, and that Maesa knew the defendant's work and temperament do not constitute the type of exploitation or appropriation of customer good will or employer capital that would support a restriction under New York law. The defendant played no role in bringing about the events in question. The record is clear that the plaintiff would lose Maesa's business whether or not the defendant took the job. Even Thierry Duclay, the President of the plaintiff, recognized that their market niche is small companies in the beauty and fashion industries. He conceded that, although the plaintiff offers efficient low-cost services, its customers sometimes grow big enough to need their own IT staff, which normally causes the plaintiff to lose income. Such circumstances cannot be controlled by the plaintiff's covenant not to compete. Enforcing the covenant would provide no benefit to the plaintiff. It would merely prevent the defendant from accepting the position at Maesa. Therefore, the court finds that the restriction is far broader than the plaintiff's legitimate interest. Accordingly, the motion is denied.

The parties are directed to appear for a conference with the court on September 26, 2013 at 11:00 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

DATED: June 27, 2013

HON. ELIZABETH HAZLITT EMERSON

J. S.C.