PUBLISH

SHORT FORM ORDER

INDEX
NO.: 606984-15

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

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 7-23-15; 8-27-15; 10-16-15
SUBMITTED: 8-27-15; 10-22-15
MOTION NO.: 001-MD
002-MD
003-MG; CASE DISP

NBTY, INC.,

Plaintiff,

-against-

KIMBERLY O'CONNELL VIGLIANTE, BETH POTERE, JAMES PERRY, and PIPING ROCK HEALTH PRODUCTS, LLC,

Defendants.

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Upon the following e-filed documents read on these motions for preliminary injunction and motion to dismiss; Notice of Motion and supporting papers 5-17; 30-37; 40-46; 65-74; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 47-63; 75-84; Replying Affidavits and supporting papers 86; it is,

ORDERED that the motion by the defendants for an order dismissing the amended complaint is granted; and it is further

ORDERED that the motions by the plaintiff for preliminary injunctive relief are denied as academic.

The plaintiff, NBTY, Inc. ("NBTY"), is a leading global manufacturer, marketer, distributor, and retailer of vitamins and nutritional supplements whose principal place of business is in Ronkonkoma, New York. The defendant Piping Rock Health Products, LLC ("Piping Rock"), was founded in May 2011 by NBTY's former Chief Executive Officer, Scott Rudolph. Its principal place of business is also in Ronkonkoma, New York. Since 2012, Piping Rock has

been a direct competitor of NBTY in the vitamin and nutritional-supplement industry. The individual defendants, Kimberly O'Connell Vigliante ("Vigliante"), Beth Potere("Potere"), and James Perry ("Perry"), were high-level NBTY salespersons who left NBTY to work for Piping Rock. Vigliante was employed by NBTY from October 4, 2004, through February 6, 2015, when she voluntarily resigned from her position as Senior Vice President of VHMS Specialty Brands. Potere was employed by NBTY from August 6, 2001, through October 27, 2014, when she voluntarily resigned from her position as Vice President of Sales, U.S. Nutrition. Perry was employed by NBTY from December 16, 1996, through June 19, 2015, when he voluntarily resigned from his position as Regional Vice President, Broker Management East. They began working for Piping Rock shortly after leaving NBTY.

In 2011, the individual defendants executed stock-option agreements with NBTY's parent company, Alphabet Holding Company, Inc. ("Alphabet Holding"). The agreements gave Vigliante, Potere, and Perry options to purchase specified numbers of shares of common stock that would vest over time, at specified prices, subject to certain terms and conditions. The stock-option agreements contained restrictive covenants prohibiting the individual defendants, inter alia, from engaging in any competing business in North America, Europe, or China for a period of one year following the end of their employment with NBTY and from disclosing any of the confidential and proprietary information of Alphabet Holding and its subsidiaries, including NBTY, in perpetuity. Following the resignations of the individual defendants and their subsequent employment by Piping Rock, NBTY commenced this action to enforce the aforementioned restrictive covenants. The amended complaint contains causes of action against each of the individual defendants for breach of the covenants not to compete, causes of action against Piping Rock for tortious interference with contract and unfair competition, and a cause of action for a permanent injunction against all of the defendants. The defendants move to dismiss the amended complaint pursuant to CPLR 3211 (a) (1) and (7).

The stock-option agreements provide that they shall be administered, interpreted, and enforced under the laws of the State of Delaware. Under Delaware law, the elements necessary to constitute a valid restrictive covenant are the same as those required for a contract in general, namely, a mutual assent to the terms of the agreement by all parties and the existence of consideration (**Faw, Casson & Co. v Cranston**, 375 A2d 463, 466). A restrictive covenant entered into after an employee's service begins is enforceable if supported by new consideration in the form of a corresponding benefit or a beneficial change in employment status (**Id.**). The plaintiff contends that the consideration for the restrictive covenants executed by the individual defendants was the option to purchase NBTY stock and access to NBTY's confidential and proprietary information. However, the plaintiff does not allege, nor does the record reflect, that the individual defendants did not have access to NBTY's confidential and proprietary information before they executed the stock-option agreements or that, after they executed the agreements, they were given access to confidential and proprietary information to which they did not have access before. Moreover, the options expired, by their terms, 90 days after the individual defendants left NBTY's employ, and it is undisputed that the individual defendants

never exercised the options. The record reflects that Vigliante and Potere even made inquiries before leaving NBTY regarding the restrictive covenants and that NBTY advised them that, if they did not exercise the options within 90 days following their termination of employment, the stock-option agreements, including the restrictive covenants contained therein, would become null and void. This interpretation of the agreements is consistent with New York law.

Under the employee-choice doctrine, when an employer conditions the receipt of benefits upon compliance with a restrictive covenant, the employee is given the choice of preserving his or her rights under the contract by refraining from competition or risking forfeiture of such rights by exercising the right to compete (**Lenel Sys. Intl., Inc. v Smith**, 106 AD3d 1536, 1539, *citing* **Morris v Schroder Capital Mgt. Intl.**, 7 NY3d 616, 620-621). Here, as in **Lenel**, the individual defendants agreed to post-termination non-compete provisions in exchange for the receipt of additional incentive compensation, i.e., stock options (**Id.**). Thus, upon their decision to leave NBTY's employ, they had the choice of preserving their rights under the stock-option agreements by refraining from competition with NBTY or risking forfeiture of such rights by exercising their right to compete (**Id.**). By choosing to compete with NBTY, the individual defendants gave up their right to the stock options promised in exchange therefor (**Id.**). They, therefore, made an informed choice between forfeiting their stock options or retaining the benefit by avoiding competitive employment (**Id.** at 1539-1540).

The court finds that NBTY seeks to enforce an agreement that has already expired and for which the individual defendants received no benefit that had any actual value. The stock-option agreements expired by their terms shortly after the individual defendants' employment ceased; and, consistent with the advice they received from representatives of NBTY, the individual defendants made no attempt to exercise the options or obtain any benefits. The plaintiffs do not allege, nor does the record reflect, that the individual defendants received any stock, dividends, or cash payments in exchange for the restrictive covenants found in the stock-option agreements. Moreover, the agreements provide that the individual defendants may not disclose the options or the terms of the agreements to anyone except their spouses and/or tax or financial advisors without prior approval, thereby precluding them from freely transferring the options for value. The agreements further provide that they may be terminated for no consideration. While Delaware law permits continued employment to serve as consideration for an at-will employee's agreement to a restrictive covenant (**Research & Trading Corp. v Powell**, 468 A2d 1301, 1305), the agreements in this case contain a representation by the individual defendants that they were not induced to enter into the agreements in exchange for or as a requirement of continued service with Alphabet Holding or any of its subsidiaries. The agreements further provide that nothing contained therein shall confer upon the individual defendants a right to continued employment or interfere with the right of Alphabet Holding and its subsidiaries to discharge them at any time, for any reason, with or without cause, except pursuant to an employment or consulting agreement. It is undisputed that no such agreements were executed by the parties. Accordingly, the court finds that the stock-option agreements lack consideration.

In addition to meeting general contract-law requirements, covenants not to compete must also be reasonable in scope and duration, both geographically and temporally; advance a legitimate economic interest of the party enforcing them; and survive a balancing of the equities in order to be enforceable under Delaware law (**All Pro Maids, Inc. v Layton**, Del Ch Ct, Aug. 10, 2004, Parsons, VC [2004 WL 1878784] at *5, *affd* 880 A2d 1047). Covenants not to compete covering limited areas for two or fewer years generally have been held to be reasonable under Delaware law (**Id.** at n 23 [and cases cited therein]). Non-competition agreements of greater length and broader geographic scope have been found reasonable in Delaware in cases where the restrictive covenants were executed as part of the sale of a business as a going concern (**Kan-Di-Ki, LLC v Sauer**, Del Ch Ct, July 22, 2015, Parsons, VC [2015 WL 4503210] at *20, n 233 [and cases cited therein]). Here, the covenants were not executed in connection with the sale of a business. They, nevertheless, cover a broad geographic area, i.e., North America, Europe, or China, for a period of one year following the end of the individual defendants' employment with NBTY. While the protection of employer goodwill and confidential information are legitimate interests recognized by Delaware law (**Id.**), the court finds that a geographic limitation covering North America, Europe, and China is unreasonable and imposes an undue hardship on the individual defendants. They would be precluded, without any compensation, from working in an industry in which they had worked for much of their careers and, presumably, from which they had derived their marketable skills. Thus, the balance of the equities is in favor of the individual defendants.

In view of the foregoing, the court finds that the stock-option agreements and the covenants not to compete contained therein are unenforceable. The complaint, therefore, fails to state causes of action against the individual defendants for breach of contract. In the absence of valid and enforceable contracts between NBTY and the individual defendants, the complaint fails to state a cause of action for tortious interference with contract against Piping Rock (**Lama Holding Co. v Smith Barney**, 88 NY2d 413, 424). Accordingly, the first through fourth causes of action are dismissed.

The fifth cause of action for unfair competition alleges that, upon information and belief, Piping Rock obtained NBTY's confidential information from the individual defendants and is using it to the competitive disadvantage of NBTY. The court finds that these allegations are not sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences underlying the unfair-competition claim (*see*, CPLR 3013). The plaintiffs allegations are based upon information and belief and fail to identify what information was purportedly misappropriated. Vague statements that fail to articulate specific acts of misappropriation do not satisfy the pleading standards (**Ferring B. V. v Allergan, Inc.**, 4 F Supp 3d 612, 630), and conclusory statements cannot substitute for minimally sufficient factual allegations (**Dataline, Inc. v MCI WorldCom Network Services, Inc.**, US Dist Ct, SDNY, Feb. 6, 2001, Preska, J. [2001 WL 102336], at *7). The plaintiff merely presumes that, since Vigliante, Potere, and Perry had access to NBTY's confidential and proprietary information, it is likely that they disclosed it to Piping Rock. The court finds such

allegations insufficient to state a claim for misappropriation of confidential information under New York law (*see*, **Affinity LLC v GfK Mediamark Research & Intelligence**, LLC, 547 Fed Appx 54, 57 [2nd Cir] [allegations that competitor "must have" breached non-disclosure agreement was merely conclusory and failed to state a claim for misappropriation of confidential information under New York law]). Accordingly, the fifth cause of action is dismissed.

In the absence of an underlying claim, the plaintiff is not entitled to injunctive relief (**Spiteri v Russo**, US Dist Ct, EDNY, Sept. 7, 2013, Brodie, J. [2013 WL 4806960] at *44 [and cases cited therein]). Accordingly, the sixth cause of action for a permanent injunction is dismissed, and the plaintiff's motions for preliminary injunctive relief are denied as academic.

Dated: November 24, 2015

J.S.C.

ELIZABETH H. EMERSON