SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 48

WL ROSS & CO. LLC, WLR RECOVERY ASSOCIATES II, LLC, and WLR RECOVERY ASSOCIATES III, LLC,

Plaintiffs,

-against- Index No. 650107/2016

DAVID H. STORPER,

Defendant.

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Masley, J.

Defendant David H. Storper moves, pursuant to CPLR 3212, for an order granting summary judgment against plaintiffs WL Ross & Co. LLC (WL Ross), WLR Recovery Associates II, LLC (WLR II), and WLR Recovery Associates III, LLC (WLR III).

WL Ross is a global investment and private equity firm. WLR II and WLR III are the general partners of non-parties WLR Recovery Fund II (Fund II) and WLR Recovery Fund III (Fund III) (collectively, the Funds), investment vehicles managed by WL Ross. Storper, an investment professional, was employed by WL Ross from 2000 to October 2012, ending his tenure as senior managing director. After Storper announced his intention to retire, WL Ross and Storper entered into negotiations, culminating in a separation agreement, executed on October 15, 2012.

During his time at WL Ross, Storper became a controlling member of WLR II and WLR III, and executed the limited liability company amended and restated agreements (LLC Agreements) for those companies. Those LLC Agreements set forth provisions governing the rights and obligations of controlling members and retired members,

including identical covenants not to compete. By a letter agreement dated June 21, 2012, WL Ross and Storper modified those covenants to permit Storper to be employed by a competing company.

Following his separation from WL Ross, Storper accepted employment with non-party Seaport Global Holdings LLC (Seaport Global).

In the complaint, plaintiffs allege that Storper breached the covenants not to compete when, among other actions, he co-founded nonparty Armory Merchant Holdings LLC (Armory Merchant), a merchant banking firm, on February 22, 2013, after his retirement from plaintiffs in October 2012.

On those allegations, plaintiffs assert two causes of action for breach of the LLC Agreements' noncompetition provisions and the WL Ross Separation Agreement. Plaintiffs seek money damages to be established at trial and a permanent injunction enjoining Storper from further competing with WLR II and WLR III, and from further violating the Separation Agreement.

Prior to joinder of issue, Storper moved, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the complaint. By decision and order dated and entered July 7, 2016, Justice Jeffrey Oing granted the motion in part, and dismissed the third cause of action for breach of the WL Ross Separation Agreement (the prior order).

In the answer, Storper denies all allegations of improper conduct and breach of the noncompetition provisions. He also asserts 11 affirmative defenses, including release, waiver, estoppel, violation of New York public policy, unenforceability under Delaware

law, and plaintiffs' material breach.

Storper now seeks summary judgment on, and dismissal of, the remaining causes of action for breach of the LLC Agreements' noncompetition provisions on the grounds that he has not breached the provisions.

In opposition, plaintiffs contend that the evidence shows that Storper is a principal of Armory Merchant, that the company adopted investment strategies similar to the strategies employed by Fund II and Fund III, invested in similar industries, and traded stocks of a company constituting Fund III's main holdings. Plaintiffs also contend that the evidence demonstrates that Storper improperly took confidential information relating to WL Ross's investment funds, allegedly in order to solicit the Funds' investors and compete with the Funds.

Summary judgment is denied. Summary judgment is a drastic remedy that will only be granted where the movant demonstrates that no genuine triable issue of material fact exists (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see* CPLR 3212). Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[M]ere conclusions, expressions of hope or unsubstantiated

allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562).

As a threshold matter, the court notes that each LLC Agreement provides that Delaware law applies to disputes arising under the agreement. However, because Delaware law regarding noncompetition covenants is substantively similar to New York's, the court may apply New York law as the law of the forum on the question of enforceability of such covenants (*see TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 [1st Dept 2014]).

It is well established in New York that, because of the "powerful considerations of public policy which militate against sanctioning the loss of [an individual'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] [internal quotation marks and citations omitted]). Therefore, covenants restricting an individual's employment "will be deemed unenforceable unless reasonable in scope, duration and geographical area and either necessary to protect the employer from unfair competition that stems from the employee's use or disclosure of trade secrets or confidential customer lists or related to an employee whose services are unique or extraordinary" (*Chernoff Diamond & Co. v Fitzmaurice, Inc.*, 234 AD2d 200, 201-202 [1st Dept 1996] [citations omitted]). "A contrary holding would make those in charge of operations or specialists in certain aspects of an enterprise virtual hostages of their employers" (*Reed, Roberts Assoc., Inc. v Strauman*, 40 NY2d

303, 309 [1976]).

The LLC Agreements include identical noncompetition provisions which provide, in relevant part, as follows:

> "**Commencing from the date hereof, . . . , and continuing until twelve months from the date that a Controlling Member ceases to be a Controlling Member**, each Controlling Member shall not, directly or indirectly, **either individually or as a principal, manager, agent, consultant, officer or employee**, except for the account of and on behalf of the Fund, the Company or any Affiliate of WL Ross . . . , carry on or be engaged in or have any financial interest in (except as otherwise expressly permitted by this Agreement) **any business that is competitive with the business activities of the Fund or the Company**, as such business activities are described in the Fund Partnership Agreement and the Fund's Private Placement Memorandum"

(WLR II LLC Agreement § 4 [g] [emphasis added]; WLR III LLC Agreement § 4 [f] [emphasis added]).

Those provisions were modified by a June 21, 2012 letter agreement in which WL Ross released Storper to accept employment with a company in a competing business. The modification provides that:

> "[b]eginning July 1, 2012, **the Company [WL Ross] and its affiliates hereby release Storper from any and all restrictions on his ability to seek employment elsewhere** provided, however, that no announcement regarding any subsequent employment may be made until November 1, 2012. For avoidance of doubt, all other restrictions in any agreement to which Storper and [WL Ross] or its affiliates are a party shall remain intact (including, but not limited to, non-recruitment of employees and non-solicitation of clients and customer of WL Ross and its affiliates) (the 'Other Restrictions')"

(June 21, 2012 letter agreement [emphasis added]).

Thus, the provisions, as modified, and in relevant part, prohibit Storper from competing with the business activities of WLR II, WLR III, WL Ross, or a WL Ross affiliate, in any capacity, except in the capacity of an employee of a competing company.

The parties dispute, first, whether Storper is the co-founder and principal of Armory Merchant, and whether Armory Merchant is an entity independent of Seaport Global, or is "merely a branding platform for . . . Storper to carry out his pre-existing duties as a commissioned employee of Seaport Global" (Storper memorandum in support at 16).

The Armory Merchant Operating Agreement provides that the company is a limited liability company formed under Delaware law, and is wholly owned by its sole member, Seaport Global. That agreement identifies Storper as Armory Merchant's vice president and treasurer. Thus, the Operating Agreement provides some evidence in support of each side's contention, and does not conclusively demonstrate that Storper co-founded an independent company.

The marketing materials issued by Armory Merchant describe it as an "independent merchant banking firm," co-founded by Seaport Global's senior management team, including Storper, identified as "Managing Member & Co-Chief Investment Officer" (Armory Merchant Feb. 11, 2014 Press Release). In its private placement memorandum (PPM), Armory Merchant identifies itself as an affiliate of Seaport Global (*see* Armory Merchant Q4 2015 Presentation PPM at 3). However, those

materials were created merely to advertise the company, not to serve as legal admissions, and cannot constitute conclusive proof for purposes of this motion that Armory Merchant is not a brand of Seaport Global.

Contrary to Storper's contention, the prior order does not include a holding determining Storper's status at Armory Merchant – whether he is an employee or a principal, officer or manager. Instead, in the prior order, Judge Oing held that the June 21, 2012 letter agreement created an exception to the noncompetition provisions, permitting Storper to accept employment with a competitor, and made no ruling of fact regarding Storper's actual status (*see* prior order at 7).

Next, the parties dispute whether Storper has engaged in business activities which are prohibited by the noncompetition provisions.

Storper contends that those provisions bar only activities that actually compete with the business activities of WL Ross, it affiliates, WLR II and WLR III, and that, inasmuch as WLR II and WLR III have not been active for some years, no actionable competition could have occurred. Storper further contends that those provisions do not prohibit the potential for competition.

In opposition, plaintiffs contend that the evidence demonstrates that Armory Merchant's investments directly competed with the business of Fund II and Fund III.

Whether Armory Merchant competed with the Funds' business activities by investing in the same type of business opportunities presents a genuine issue of fact to be resolved at trial.

The noncompetition provisions prohibit Storper from engaging, or having a financial interest, in "any business that is competitive with the business activities of" Fund II or Fund III (WLR II LLC Agreement § 4 [g]; WLR III LLC Agreement § 4 [f]). The Funds' partnership agreements describe their respective businesses as locating, analyzing, and investing in "securities, claims and other interests of companies experiencing financial distress" (Fund II Limited Partnership Agreement § 2.04; Fund III Limited Partnership Agreement § 2.04).

Armory Merchant's marketing materials indicate that it "intends to implement an expansive co-investment program on deep value, cash flow and other alternative investments . . . [and] opportunities that will create and expand long-term platforms in infrastructure and industrials, energy and utilities, financial services and special situations" (Armory Merchant Feb. 11, 2014 Press Release). In its PPM, Armory Merchant describes itself as having "a focus on long-only, deep-value, and income producing investments" (Armory Merchant Q4 2015 Presentation PPM at 1).

The record also includes some evidence that Storper contacted at least one Fund II investor about an investment opportunity that might have competed with the Funds' business activities, and may have used information from a WL Ross confidential investor and potential investor list to do so (*see* Storper June 18, 2013 email to Permal/A. Pillersdorf).

Contrary to Storper's contention, Stephen Toy, senior managing director and co-head of WL Ross, did not concede that no actual competition occurred, and that no harm

was suffered as a result of Armory Merchant's competitive activities, if any. Instead, Toy testified that he "has not been privy to the activities of Armory" Merchant, and that, in his view, both actual and potential competition constitute competition (plaintiffs by Stephen J. Toy Aug. 10, 2016 tr at 201, lines 3-22).

Next, Storper contends that the noncompetition provisions, as modified, do not prohibit him from potential competition, and that the mere creation of a website and publication of marketing material, absent any action to carry out the activities described, is not actionable.

In opposition, plaintiffs contend that Storper has misinterpreted those provisions, and that creating the potential for competition and competing are one in the same, and, thus, are both prohibited by the provisions.

The noncompetition provisions do not distinguish between the creation of a potential for competition and the carrying out of business activities that compete with those of WLR II and WLR III. However, such a distinction would appear to be more a matter of semantics than of reality. It is impossible to compete in any industry, without first creating the potential for competition. Therefore, the provisions can only be interpreted as barring both activities.

However, inasmuch as threshold triable issues exist regarding whether Storper acted solely as a Seaport Global employee, and whether Armory Merchant is a company independent of Seaport Global, nothing in this decision may be interpreted as a holding that Storper breached the noncompetition provisions.

Contrary to Storper's contention, the record is devoid of evidence demonstrating that WLR II, WLR III, or the Funds were in dissolution or liquidation at the time that Storper allegedly breached the noncompetition provisions. Instead, the record includes documents demonstrating that the terms of Fund II and Fund III were extended to December 31, 2016 and August 8, 2016, respectively (*see* Consent of Limited Partners of WLR Recovery Fund II, L.P. § 1; Fourth Amendment to the Amended & Restated Limited Partnership Agreement of WLR Recovery Fund III, L.P. § 2).

Next, the parties dispute whether summary judgment must be granted on the ground that plaintiffs have failed to identify actual damages caused by Storper's breach.

Contrary to Storper's contention, plaintiffs are not required to prove actual damages. In the complaint, plaintiffs do not seek lost profits, other consequential damages, or liquidated damages, but, instead, demand reimbursement of an amount equal to the carried interest Storper received as a controlling member of WLR II and WLR III, presumably during the period of the alleged contractual breaches.

Plaintiffs base their demand on the noncompetition provisions which provide, in relevant part, that "[e]ach Controlling Member hereby acknowledges that, in consideration for agreeing to be bound by the non-competition provision referred to in the preceding sentence, he or she has received the Controlling Member's Carried Interest Percentage in the Company" (WLR II LLC Agreement § 4 [g]; WLR III LLC Agreement § 4 [f]).

In seeking reimbursement of the carried interest, plaintiffs are seeking a return of

the consideration that they paid to Storper in exchange for his agreement to refrain from competing with WLR II and WLR III. Therefore, plaintiffs' failure to demonstrate actual damages does not constitute a ground for summary relief.

Contrary to Storper's contention, the noncompetition provisions are not overbroad, and are not void ab initio. Judge Oing rejected that argument in the prior order, holding that Storper relied on inapposite case law regarding post-termination restrictions, and that the claims here concern Storper's breach of noncompetition provisions while remaining a controlling member of WLR II and WLR III (*see* prior order at 8).

In any event, the noncompetition provisions, as amended, are not void as against public policy. "[A] restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" (*Reed, Roberts Assoc., Inc. v Strauman*, 40 NY2d at 307). As amended, the provisions permit Storper to seek employment at a competing business, without geographic or time limitation.

Next, the parties dispute whether the claims for breach of the noncompetition provisions are barred by the doctrines of equitable estoppel or waiver.

Storper contends that plaintiffs must be estopped from invoking the noncompetition provisions because, by their terms, they apply only in the event that Storper is a controlling member of WLR II and WLR III, and plaintiffs deny that he remains such a member.

In opposition, plaintiffs contend that equitable estoppel is not warranted because they seek to enforce the noncompetition provisions based on Storper's own allegations that Storper remains a controlling member, and because Storper cannot prove any of the elements of that doctrine.

Here, the doctrine of equitable estoppel will not operate to estop plaintiffs from seeking to enforce the noncompetition provisions. The doctrine will apply whenever a party seeking to estop another "lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; relied on the conduct of the party against whom estoppel is claimed; and suffered a prejudicial change of position as a result of his reliance" (*Waggoner v Laster*, 581 A2d 1127, 1136 [Del 1990]; *Bantum v New Castle County Vo-Tech Educ. Assn.*, 21 A3d 44, 51 [Del 2011]).

Given that Storper is a sophisticated business person, was represented by counsel in every phase of the negotiations surrounding his separation from WL Ross and affiliated entities, and has, at various times, represented himself to be a WLR II and WLR III controlling member or a retired member, Storper cannot demonstrate that he lacked the knowledge or the means of discovering whether he was a controlling member. Therefore, he cannot demonstrate his entitlement to assert the doctrine.

Next, triable issues sufficient to preclude summary judgment exist regarding whether plaintiffs waived such breaches, if any, by their conduct. Pursuant to Delaware law, "a party claiming waiver [must] show three elements: (1) that there is a requirement or condition to be waived, (2) that the waiving party must know of the requirement or

condition, and (3) that the waiving party must intend to waive that requirement or condition" (*Bantum v New Castle County Vo-Tech Educ. Assn.*, 21 A3d at 50-51 [internal quotation marks and citations omitted]; *see Golfo v Kycia Assoc., Inc.*, 45 AD3d 531, 532-533 [2d Dept 2007]). The "standards for proving waiver under Delaware law are quite exacting" (*Bantum v New Castle County Vo-Tech Educ. Assn.*, 21 A3d at 50 [internal quotation marks and citations omitted]).

A contractual obligation may be waived by conduct (*see e.g. Amirsaleh v Board of Trade of the City of N.Y., Inc.*, 27 A3d 522, 529-530 [Del 2011]; *Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 469 [1978]). The right to enforce a noncompetition provision may be waived when the former employer invited the allegedly breaching conduct or gave the impression that the alleged breach would not be considered a breach (*see Davidge, Van Cleef, Jordan & Wood, Inc. v Baker*, 290 A2d 319, 321 [Del 1972]; *see also Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d at 469).

Storper once again relies on a February 11, 2014 congratulatory email sent to Storper by Ross, upon Ross's learning of Storper's co-founding of Armory Merchant. In the prior order, Judge Oing held that the email, by itself, did not conclusively establish that plaintiffs intended to waive their rights to enforce the noncompetition provisions, and, therefore, denied that branch of the motion to dismiss on the ground of waiver (*see* prior order at 6-7).

While discovery has revealed additional facts that might be held sufficient proof of waiver, none of that evidence constitutes conclusive proof of waiver, particularly in view

of plaintiffs' repeated denial that a waiver occurred. It appears that WL Ross was aware of the Armory Merchant founding, website, and marketing materials, and that no one affiliated with plaintiffs objected to that founding, or warned Storper to desist from violating the non-compete provisions. On the other hand, there is insufficient evidence that plaintiffs were aware that Storper was still subject to the noncompetition provisions, given their professed belief that Storper was no longer a WLR II and WLR III controlling member. Further, there is insufficient evidence that plaintiffs believed that Storper had co-founded Armory Merchant as an entity independent of Seaport Global. In addition, as discussed above, the marketing materials constitute merely some evidence that a breach occurred, and triable issues exist regarding whether Storper, through Armory Merchant, competed with plaintiffs, in breach of the noncompetition provisions.

Accordingly, it is

ORDERED that the motion is denied in all respects; and it is further

ORDERED that counsel are direct to appear for a status conference in Room 242, at 60 Centre Street, on February 7, 2018 at 10:30 AM.

Dated: January 8, 2018

ENTER:

HON. ANDREA MASLEY J.S.C.