SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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GERALD A. NIZNICK, *et al.*,

Plaintiffs,

-against-

SYBRON CANADA HOLDINGS, INC. *et al.*,

Defendants.

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DECISION AND ORDER
Index No.: 650726/2018

Mot. Seq. No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, the following facts are taken from the Complaint as supplemented by the findings of fact, conclusions of law and judgment entered after trial on the merits in a litigation between these parties, captioned *Sybron Canada Holdings, Inc. v Niznick*, 650908/2014 2017 NY Misc LEXIS 761 [Sup Ct, NY County, March 3, 2017] ("Prior Litigation").

Plaintiff Dr. Gerald Niznick ("Niznick") is an inventor and entrepreneur in the dental implant industry. In 2010, Niznick sold a 75% interest in the dental implant manufacturing and sales business of plaintiff companies Implant Direct International ("IDI"), Implant Direct Manufacturing, LLC (IDM), and Mikana Manufacturing Company, Inc. ("Mikana", and together, the "Niznick Companies" or "Implant Direct") to Danaher Corporation ("Danaher") the parent of defendant Sybron Canada Holdings, Inc. (Sybron). Starting on January 1, 2011, pursuant to the terms of the sale, the business of Implant Direct was performed by joint venture companies, defendants Implant Direct Sybron International, LLC, Implant Direct Sybron Manufacturing, LLC, and Implant Direct Sybron Administration, LLC (the "Joint Venture Companies" or "JVCs",

and, together with Sybron, "defendants"). The JVCs were then owned 75% by Sybron and 25% by the Niznick Companies.

Each of the JVCs had an operating agreement, which was signed by all of the parties, and each agreement contained a non-competition covenant. Pursuant to the non-compete, plaintiffs were prohibited from developing, manufacturing, distributing, or marketing dental implants, or preparing to do so, or from hiring away JVC employees (complaint, ¶ 14, citing ISDI Operating Agreement, attached as Exhibit A to Complaint, § 10.02[a] [the "OA"] [NYSCEF Doc. No. 12 or "Docket No.__"]).[1] The non-compete was to be in effect while, and for five years after, Niznick or his entities directly or indirectly own units of membership in the JVCs (*see id.*). Further, the non-compete period was to be tolled during any period for which plaintiffs are found by a court to be in violation of the non-compete.

On January 29, 2014, Sybron exercised its contractual option to buy plaintiffs' interest in the JVCs pursuant to the Cause Call Options (or "CCO") and the Employment Call Option (or ECO). Plaintiffs contested the validity of the options, and the above referenced lawsuit ensued (*Sybron Canada Holdings, Inc., et al., v Gerald A. Niznick, et al.* Index No. 650908/2014, before Justice Ostrager of this court). After a two-week bench trial, the court rendered a 28 page opinion in favor of Sybron, dated March 3, 2017 (*see* Prior Lit. Doc. No. 881). The court held that Sybron was entitled to exercise the ECO, that its exercise on January 29, was timely (*id.*, p. 18), and that exercise of the ECO effective January 29, 2014, terminated Dr. Niznick's ownership interest in the JVCs as of that date (*see* Judgment, Prior Lit. Doc. No. 926). The court also found that Niznick "materially breached" his fiduciary duties to Sybron and that Danaher had "cause" for purposes of

[1] "Docket No. ___" refers to documents in the docket of this case. "Prior Lit. Doc. No. ___" refers to documents in the docket in the Prior Litigation whose index number is 650908/2014.

its exercise of the CCO (*id.*, p 25). The Niznick Companies were required to disgorge any income they received from the JVCs after that date.

On March 23, 2017, the parties entered into a Purchase and Sale Agreement, Docket No. 41 ("PSA") pursuant to which Sybron purchased the Niznick Companies' entire ownership interest in the JVCs. The Purchase was "deemed to be effective as if the transfer of the Seller Units occurred on January 29, 2014 (*id.*, § 1 [d]). On August 25, 2017, the parties executed an Amendment to the PSA, by which the parties agreed to abandon their appeals in the Prior Litigation, to release certain claims, and for Sybron to pay Niznick an additional $3.3 million (Docket No. 18). The Amendment to the PSA also included a "non-waiver of parties' positions" provision which states that "Sellers and Niznick contend that, as a result of [Justice Ostrager's] determination in the Judgment that their 'ownership interest in the JVCs' terminated as of January 29, 2014, the last day of the five-year non-competition period in Section 10.02 (a) of the Operating Agreements will be January 28, 2019. The execution of this Amendment shall not be construed as a waiver of this contention . . .". The same provision also recites that "the parties agree that the provisions in Section 10.02 (a) of the Operating Agreements are currently in full force and effect . . . [T]he execution of this Amendment shall not be construed as a waiver of any rights or arguments that the Parties may assert, now or in the future, with respect to the duration or any other aspect of the provisions in Section 10.02 (a) of the Operating Agreements, and nothing contained herein is intended to alter or diminish the position of the Parties with respect to those provisions"(*id.*).

Niznick then commenced this litigation seizing on the "as of" date used by Justice Ostrager to calculate damages in the prior litigation to now assert a single cause of action for a declaratory

judgment as to the date the non-competition period began to run, and whether (if it began on January 29, 2014, as plaintiffs contend) the period was tolled by Niznick's receipt and alleged use of JVC information during the Prior Litigation.

II. ARGUMENTS

Initially, Sybron sought to dismiss the complaint for lack of a presently justiciable controversy (CPLR 3001 and 3211[a][2]) and for failure to state a cause of action (CPLR 3211[a][7]) but withdrew the former argument at the time of oral argument because Sybron now suspects that Niznick is currently in violation of the non-competition provision of the Operating Agreements as he is preparing to compete against Sybron.

A. Defendants' Arguments

Citing section 10.02 (a) of the Operating Agreements, Sybron asserts that the five year non-competition period continues to run for five years after Niznick no longer owns Membership Units in the JVCs. The section provides:

> for so long as . . . [Neznick] or any of his Affiliates or Permitted Transferees directly or indirectly owns any Membership Units and continuing until the earlier of (A) five (5) years after such time as none of ID, Niznick, and their Affiliates and Permitted Transferees directly or indirectly owns any Membership Units or (B) Niznick's death.

(Operating Agreement § 10.02 (a), Docket No. 12). Because Neznick actually held the Membership Units until March 23, 2017, his obligation not to compete or prepare to compete applied through that date and continued to apply for five years thereafter (*see* Docket No. 10 p. 14). Sybron explains that the purpose of the restriction was to prevent Niznick from receiving confidential information about the business of the JVCs during what the parties agreed was the five-year life cycle of the company's products (*see id.*).

That Niznick held Membership Units, and had access to the JVCs proprietary information up until March 23, 2017, is a historical fact (*see id.*, at 15). Backdating the start of the non-competition period in the manner plaintiffs seek would deprive defendants of the benefit of their bargain (*see id.*). The backdating ordered by Justice Ostrager allowed use of the earlier date for calculating the exercise price of the buyout and avoided rewarding Niznick for a prolonged and unsuccessful litigation (*see id.* at 16). To use the backdated date for calculation of the non-compete period, would reward Niznick for engaging in protracted litigation by giving him a shorter non-compete period, and allowing him to compete with more recent access to the JVCs' proprietary information (*see id.*).

B. Plaintiffs' Opposition

Plaintiffs rely on the determination in the Prior Litigation that Niznick's ownership interest terminated as of January 29, 2014, (Document No. 48, p. 2). According to plaintiffs, the non-compete clause does not say the five-year period starts when Niznick stops getting confidential information (*id.*). Rather, it starts when Niznick no longer owns an interest in the JVCs. The Operating Agreements do not specify concern regarding access to confidential information as the purpose of the non-compete period (*see id.* at 2-3). Plaintiffs also argue that the information received by Niznick, mostly preliminary financial statements, was not highly confidential (*see id.* at 3). In addition to financials, Niznick received redacted board minutes between 2014 and 2016. He contends that there is nothing in them which would help him compete with the defendants (*see id.*). In any event, much of that information was subsequently made public in court filings, and is now in the public record (*see id.* at 9-10).

Plaintiffs contend this dispute is not about interpreting the parties' agreement, but about when Niznick's ownership interest terminated (*see id.* at 18). Niznick relies on the decision of Justice Ostrager in the Prior Litigation, which Plaintiffs contend found Niznick's ownership interest ended on January 29, 2014 (*see id.*). Niznick also relies on the parties' agreement in the PSA, which states "the purchase and sale of [Niznick's interest] shall be deemed to be effective as if the transfer . . . occurred on January 29, 2014" (*see id.* at 18-19, quoting PSA, Docket No. 41, § 1 [d]). Such a term is enforceable (Opp at 19, citing *Colello v Colello*, 9 AD3d 855, 857 [4th Dept 2004] ["It is fundamental that where parties to an agreement expressly provide that a written contract be entered into 'as of' an earlier date than that on which it was executed, the agreement is effective retroactively 'as of' the earlier date and the parties are bound thereby accordingly"]). While Niznick claimed he was an owner past that point, and obtained company information as a result, he litigated that issue and lost (*see* Opp at 19).

C. Defendants' Arguments in Reply

In their reply, defendants point out that this is the fifth suit Niznick has filed against Sybron or its affiliates, and that the prior four have ended in dismissal or loss after trial for him (*see* Reply at 1). Niznick represented that he owned a membership interest in the JVCs as late as March 23, 2017 (*see* PSA, § 2 (b) ["IDI *is* the owner of 25 Membership Units in IDSI] [*emphasis added*]), so the earliest date on which he can compete should be March 23, 2022, unless he prepares to compete or actually competes during that period, in which case the period should be tolled (*see* Reply at 1). As far as Niznick relies on the decision of Justice Ostrager and on the PSA, those documents do not address the non-compete provision, and merely attempt to put the parties in the financial position in which they should have been, had Niznick's misconduct not occurred (*see id.* at 2). The idea that those documents would effectively shrink the noncompete agreement (as, before they

existed, his noncompete period would have run later, and was shortened by the dating back of the transfer of interest), is absurd (*see id.* at 3). Niznick exercised his rights as an interest holder long after that date. Defendants, in the original agreement, negotiated for five years of non-competition, and would, under this theory, receive less than two years (*see id.* at 3-4). The outcome Niznick proposes is incompatible with the original agreement and with actual events, but is based on a legal fiction (*see id.* at 6).

III. DISCUSSION

A. Standard for Motion to Dismiss

Defendants move to dismiss based on CPLR 3211(a)(2), lack of a justiciable controversy, and CPLR 3211(a)(7), failure to state a claim (Memo at 9-10). At oral argument on this motion, defendants agreed that the case is justiciable. Accordingly, that issue is moot.

While defendants pose the latter portion of the motion as one brought pursuant to CPLR 3211 (a) (7), defendants premise their arguments on the agreements and the decision of Justice Ostrager in the Prior Litigation. Accordingly, this is properly categorized as a motion to dismiss based on documentary evidence under CPLR 3211 (a) (1).

To succeed on a motion to dismiss under CPLR 3211 (a) (1), the documentary evidence that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts

as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term' and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85).

Here, the documentary evidence is the operating agreements between the parties (attached as Exhibits 1-3 to the Podoll aff, NYSCEF Docs. No. 12-14). In opposition, plaintiff refers to the prior judgment of Justice Ostrager (not attached but e-filed in the Prior Litigation). His findings of fact and conclusions of law being res judicata, are also relevant.

B. The Operating Agreements and the Prior Litigation

In November 2010, Danaher Corporation, the parent of defendant, Sybron, paid Niznick $225 million in exchange for a 75% majority and controlling interest in Niznick's company, Implant Direct (Ostrager Op., 2017 NY Misc LEXIS 761 *3). As a part of the transaction, Danaher also purchased options to acquire the remaining 25% under certain conditions.

The Operating Agreements refer to the 5-year non-competition and non-solicitation provisions of the sale as "a material part of the consideration for the purchase . . . of [Implant Direct]" (Docket No. 12, § 10.02 [a]). Under the terms of the non-competition clause, Niznick promised that "he shall not . . . for so long as. . . he . . . owns any Membership Units and continuing until the earlier of (A) five years after such time as none of . . . Niznick . . . owns any Membership Units . . . engage in . . . [competition with Danaher]." Further, in § 10.02 (b), captioned "Reasonable Restraint", which the parties acknowledged as "a material inducement" for Danaher entering into the sale, the parties explained that "the product life cycles in the company are five (5) years or longer and that the [restrictive] covenants . . . impose a reasonable restraint . . ." (*id.*).

Although Niznick does not dispute that the Operating Agreements provide for a five-year non-competition period commencing upon the sale of his units in the companies, he minimizes the parties' agreement that the non-competition clause is "a material part of the consideration" and would have this court re-write the parties agreement to drastically shorten the non-competition period. This the court will not do.

In the PSA, dated March 23, 2017, involving sale of Niznick's remaining units in the JVCs as a result of the judgment in the Prior Litigation, Niznick represents that he (through his companies) "*is* the owner of 25 Membership Units" (Docket No. 41, § 2 [b]) (*emphasis added*). In the Amendment to the PSA, dated August 25, 2017, the parties acknowledge that § 10.02 (a) of the Operating Agreements (which contain the non-competition clause) "are *currently* in full force and effect" (Docket No. 18 § 5) despite Niznick contention that "the last day of the five-year non-competition period in Section 10.02 (a) of the Operating Agreement will be January 28, 2019".

It is undisputed that the closing of the purchase and sale on Niznicks remaining interest was "deemed to be effective as if the transfer" of his units had occurred on January 29, 2014 (Docket No. 41, § 1 [d]). That "deemed" date speaks to the date Justice Ostrager determined that Sybron was entitled to exercise the ECO and CCO and provided a basis for calculating damage in the case before him (*see* Index No. 650908/2014, Docket Nos. 881and 926). The OA states unambiguously that the non-competition period "shall" continue for at least "five (5) years after such time as none of . . . [Niznick] . . . owns any Member Units" (Docket No. 12, § 10.02 [a]). Niznick was the actual "owner 25 Membership Units" as of March 23, 2017 as the PSA states (Docket No. 411 § 2[b]). Nowhere in Justice Ostrager's opinion is there any indication of an intention to alter any of these facts and the "deemed" termination date cited by plaintiffs cannot alter this reality. While the courts of this state will not hesitate to enforce contractual agreements entered into "as of an earlier date than that which it was executed, . . . [thereby making] the agreement . . . effective retroactively", *Colello v Colello*, 9 AD 3d 855, 857 (4th Dept 2004) (cited in plaintiffs brief at p. 19), no such agreement of the parties is present here. To the contrary, as late as August 25, 2017, the parties agreed that "the provisions of Section 10.02 (a) of the Operating Agreement [containing the non-competition clause] are currently in full force and effect" (Docket No. 18). The motion shall be granted.

Accordingly, it is hereby

ORDERED that the motion of defendants to dismiss the sole cause of action is GRANTED and the case is hereby DISMISSED in its entirety and the Clerk of the Court is directed to enter judgment against plaintiffs Gerald A. Niznick, Implant Direct International, Inc., Implant Direct Manufacturing, LLC, Mikana Manufacturing Company and in favor of defendant Sybron Canada

Holdings, Inc., Implant Direct Sybron International, LLC, Implant Direct Sybron Manufacturing, and LLC, Implant Direct Sybron Administration, LLC, dismissing the case and taxing costs against said plaintiffs upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: June 28, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.