SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the matter of the Application of
RevitaLife Therapy, LLC,

Petitioner(s),

Index No.
652068/2018

- against -

Decision and
Order

For an Order Pursuant to Section 7502(c) and 6301 of the Civil Practice Law and Rules for a Temporary Restraining Order and Preliminary Injunction in Aid of Arbitration,

Motion Sequence
#1

-against-

Alyssa Petersel,
Respondent.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner, RevitaLife Therapy, LLC ("RevitaLife") is a provider of psychotherapy services in New York City. Respondent Alyssa Petersel ("Petersel") worked as a therapist for RevitaLife from August 2017 until March 25, 2018 when her engagement with RevitaLife was terminated. RevitaLife seeks a preliminary injunction enjoining Petersel for the pendency of an arbitration from violating the restrictive covenants contained in the parties' agreement. The underlying Petition brings causes of action for breach of contract, tortious interference with business relations, and fraud.

Factual Allegations

RevitaLife "provides psychotherapy services to individuals and families in the New York City area." (Verified Petition ["Ver. Petition"] ¶6). Robby Ward

and Davia Ward are co-owners of RevitaLife. (Robby Ward Affidavit ["Ward Aff."], ¶1). RevitaLife "matches clients from referral sources to therapists that RevitaLife hires on a contract basis." (Ward Aff. ¶2). RevitaLife's business "relies on the network of patients/clients it has created, based on geographic region and specific needs of said patients/clients." (Ver. Petition ¶5). RevitaLife presently operates offices at the following locations: (1) 6 East 39th, Suite 701, New York, NY 10016; (2) 300 Cadman Plaza West, 1 Pierrepont Plaza, 12th Floor, Brooklyn, NY 11201; and (3) One Liberty Plaza, 165 Broadway, 23rd Floor, New York, NY 10006. (Ver. Petition ¶7; Ward Aff. ¶¶4, 6).

Petersel is "a certified mental health counsel in the State of New York." (Petersel Affidavit ["Petersel Aff."] ¶2). Petersel "studied for [her] Masters in Social Work at New York University, and received her Masters in Social Work in 2017." (Petersel Aff. ¶5). Petersel "became licensed on June 9, 2017." (Petersel Aff. ¶4).

On August 14, 2017, RevitaLife and Petersel entered into an Employment Agreement. (Ward Aff. ¶8). The Employment Agreement sets forth the terms of Petersel's engagement with RevitaLife including the restrictive covenants which are issue in this case. (Ward Aff. ¶¶7, 12).

At the time the Employment Agreement was executed in August 2017, RevitaLife had offices in the 10016 and 11201 zip codes. (Petersel Aff. ¶ 6). Petersel exclusively provided services on behalf of RevitaLife in the 11201 zip code. (Petersel Aff. ¶16). On March 12, 2018, Robby Ward sent an email to RevitaLife's therapists, including Petersel, to advise them that RevitaLife had signed contracts for additional space in the financial district at One Liberty Plaza (Robby Ward testimony; 32:16-33:21; Exhibit F). One Liberty Plaza is located within the 10006 zipcode. (*Id.*). The email informs the recipients that the new office "will open on the 1st of May." (*Id.*).

Petersel claims that prior to entering into the Employment Agreement, she met with Davia Ward and told her about My Wellbeing, Inc. ("My Wellbeing"), a company that Petersel had founded in May 2017. (Petersel Aff. ¶¶9, 11). Petersel describes My Wellbeing as "a matchmaking service designed to help match therapy patients and therapy providers in New York." (Petersel Aff. ¶8). Petersel claims that Davia Ward "assured [her] that there would be no conflict," and in reliance on the statement, she executed the Employment Agreement on August 14, 2017. (Petersel Aff. ¶15). Petersel claims she also disclosed her involvement in My Wellbeing in an e-mail to Davia Ward and Robby Ward on August 14, 2017.

(Petersel Aff. ¶11). In that email, Petersel forwarded certain requested information, including a bio which states, *inter alia*, "Since obtaining my Master's, I co-founded My Wellbeing to connect therapy-seekers with therapists fit to their needs in New York City." (Petersel Aff. ¶11; August 14, 2017 email). Davia Ward testified that she did not notice Petersel's reference to My Wellbeing in her bio which was included in Petersel's August 14, 2017 email to her, and that she did not know about My Wellbeing until March 25, 2018. (Davia Ward testimony; 12:3-24). Robby Ward testified that he first learned of My Wellbeing on March 25, 2018. (Robby Ward testimony; 34:16-24).

On March 25, 2018, RevitaLife terminated Petersel's employment after Davia Ward and Robby Ward learned about My Wellbeing. (Petersel Aff. ¶21; Ward Aff. ¶15). On April 24, 2018, RevitaLife sent Petersel a letter, which stated that Petersel must immediately cease and desist operating My Wellbeing within the 11201 zip code. (Ward Aff. ¶27; Ver. Petition Ex. C).

Procedural History

RevitaLife filed an Order to Show Cause seeking an Order, pursuant to CPLR 7502(c), for a temporary restraining order pending the hearing on the Order to Show Cause, and for a preliminary injunction. RevitaLife seeks to enjoin Petersel during the pendency of an arbitration from: (a) providing therapist services in the zip codes of 10006, 10016 and 11201 ("Restricted Zip Codes"); (b) operating My Wellbeing in those zip codes; (c) soliciting or attempting to solicit RevitaLife's contract therapists, referral sources, and clients for the benefit of Petersel and/or My Wellbeing; (d) using RevitaLife's proprietary and confidential information; and (3) using any portion of any video that contains RevitaLife's facilities and/or offices. In support the Order to Show Cause, RevitaLife submitted the affidavit of Robby Ward.

On April 27, 2018, after being heard on the record, the parties agreed to a temporary restraining order, pending the hearing on the Order to Show Cause. Petersel agreed not to provide one on one therapist services in the Restricted Zip Codes and not to solicit RevitaLife's contract therapists and referral sources for her own benefit. On May 18, 2018, Petersel filed her Answer and an affidavit in opposition to the Order to Show Cause.

A hearing was held on May 22, 2018.[1] At the hearing, Davia Ward, Robby Ward, and Petersel testified. At the conclusion of the hearing, the Court found all witnesses to be credible. (May 22, 2018 hearing; 65:10-11). After the hearing concluded, the parties had settlement discussions. On June 12, 2018, counsel for the parties informed the Court that a settlement could not be reached. The Court directed the parties to submit a copy of the transcript from the May 22, 2018 hearing and stated that a decision would be rendered upon receipt of the transcript.

ANALYSIS

Preliminary Injunction Standard

CPLR § 7502(c) permits this Court to "entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced..., but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."

CPLR § 6301, in relevant part, provides, "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual."

In order to be entitled to a preliminary injunction, the moving party must demonstrate (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position. *See* CPLR § 6301; *Barone v. Frie*, 99 A.D.2d 129, 132 [2d Dept. 1984]; *see generally Doe v. Axelrod*, 73 N.Y.2d 748 [1988]. The determination as to whether to issue a preliminary injunction "is a matter ordinarily committed to the sound discretion of the lower courts." *Doe,* 73 N.Y.2d at 750.

A. Likelihood of success on the merits

"[T]o establish a likelihood of success on the merits, 'a prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner's

[1] At the hearing on May 22, 2018, RevitaLife's counsel advised the court that an arbitration had been filed.

claims should be left to a full hearing on the merits.' A likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive." *Barbes Restaurant Inc. v ASRR Suzer 218, LLC,* 140 A.D. 3d 430, 431 [1st Dept 2016].

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." *Flomenbaum v. New York Univ.*, 71 A.D. 3d 80, 91 [1st Dept 2009]. Generally, "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms [and extrinsic evidence] is generally inadmissible to add to or vary the writing." *W.W.W. Assoc. v. Grancontieri*, 77 N.Y. 2d 157, 162 [1990].

A restrictive covenant is enforceable where it is "on its face, reasonably limited, both temporally and geographically, and not unduly burdensome." *Am. Para Prof'l Sys., Inc. v. Examination Mgmt. Services, Inc.*, 214 A.D.2d 413, 414 [1st Dept 1995]. *See also D.S. Courier Servs., Inc., v. Seebarran*, 40 A.D. 3d 271 [1st Dept 2007]. "[T]he enforceability of covenants restricting health care professionals from competing with a former employer or associate have been recognized." *Hapworth Med. Services, P.C. v. Kress*, 218 A.D.2d 575, 575 [1st Dept 1995]).

New York has adopted the prevailing standard of reasonableness in determining the validity of agreements not to compete. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388 [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. *BDO Seidman*, 93 N.Y.2d at 388-89. Generally, an employer's legitimate business interests are limited to "the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." *Id.* at 389. The application of the test of reasonableness of restrictive covenants focuses on the particular facts and circumstances giving context to the agreement. *Id.* at 390 (citing *Karpinski v. Ingrasci*, 28 N.Y.2d 45 [1971]).

RevitaLife argues that it is likely to succeed on its claim that Petersel breached the restrictive covenants contained in the Employment Agreement. RevitaLife alleges that it has suffered damages in lost business, reputation, and

good will. RevitaLife contends that the restrictive covenants are reasonable since they apply only to three zip codes in New York City where RevitaLife carries out business and its actual contractors and clients.

In opposition, Petersel argues that RevitaLife cannot show a likelihood that it will prevail on its claim because RevitaLife breached the Agreement first when it failed to follow normal payroll practices. Petersel also argues that the restrictive covenants are unenforceable because they are unreasonably broad in scope, time and conduct that is restricted. Petersel also argues that her involvement with My Wellbeing is outside the scope of the restrictive covenants. Petersel further argues that RevitaLife also cannot show a likelihood that it will prevail on its tortious interference claim or fraud claim, both of which fail to state a claim.

1. Non-Competition Provision – Section 7.1

Section 7.1(a) prohibits Petersel for a two year period after termination from "directly or indirectly enter[ing] into or attempt[ing] to enter into the 'Restricted Business' … within the same zip code of any office maintained by [RevitaLife]" for a period of two years after termination of employment. (Section 7.1[a]). "Restricted Business" is defined as "the professional practice of psychology/clinical social work or psychotherapy …". (Section 7.1[a]). "Indirectly" is defined as including "acting as a paid or unpaid director, officer, agent, representative, contractor of, or consultant to any enterprise, or acting as a proprietor of an enterprise, or holding any direct or indirect participation in any enterprise as an owner, partner, limited partner, joint venturer, shareholder, or creditor." (Section 7.1[a]).

Section 7.1(b) prohibits Petersel for a period of two years after termination from "serv[ing] directly or indirectly as psychotherapist for any patient who had come to him/her by reason of his/her employment with Employer unless, in the clinical judgement of the Employer, it is clinically advisable to do so." (Section 7.1[b]).

Under Section 7.1(c), Petersel "acknowledges" that the restrictions contained in Section 7.1(a) and (b) "are reasonable as to extent and duration, that they are fully enforceable, and waives any objection thereto and covenants to

institute no suit or proceeding, or otherwise advance any position or contention, to the contrary." (Section 7.1[c]).

RevitaLife claims that Petersel is indirectly providing psychotherapist services through My Wellbeing, and therefore is in breach of Sections 7.1(a) and (b). RevitaLife submits a print-out of the "About Us" section on My Wellbeing's website. This section describes My Wellbeing as "a community of therapists and mental health advocates" that "will connect you the right therapist, from our diverse therapist connections, based on your needs." Another portion of the print-out states, "Book a free 15-minute phone consultation with our Founder and CEO, Alyssa, also a trained social worker."

Petersel contends that My Wellbeing is "a matchmaking service designed to help match therapy patients and therapy providers in New York" and is not involved in the "professional practice of psychology/clinical work or psychotherapy." (Petersel Aff. ¶9). Petersel contends that My Wellbeing is therefore not a "[r]estricted business" and outside the scope of Section 7.1(a). Additionally, Petersel claims that before she entered into the Employment Agreement, she disclosed her involvement with My Wellbeing to RevitaLife and relied upon RevitaLife's representation that there would be no conflict between the two businesses when she executed the Employment Agreement. (Petersel Aff. ¶15).

RevitaLife has shown that it will likely succeed in demonstrating that Petersel is indirectly providing psychotherapist services through her operation of My Wellbeing and that Section 7.1 is "on its face, reasonably limited, both temporally and geographically, and not unduly burdensome." *Am. Para Prof'l Sys., Inc. v. Examination Mgmt. Services, Inc.*, 214 A.D.2d 413, 414 [1st Dept 1995]. Section 7.1(a) restricts Petersel's operation of My Wellbeing only "within the same zip code of any office maintained by" RevitaLife. This is where RevitaLife has established the relationships that it seeks to protect. Section 7.1(a) and (b) are also limited to a two year period from termination. The restrictions do not impose undue hardship on Petersel, who can operate My Wellbeing outside of the restricted zip codes. Furthermore, the restrictions are not injurious to the public because Petersel may continue to service RevitaLife's clients if "it is clinically advisable to do so." *BDO Seidman*, 93 N.Y.2d at 388-89.

As to what zip codes are specifically restricted, at the time the Employment Agreement was executed in August 2017, RevitaLife had offices in the 10016 and 11201 zip codes. (Petersel Aff. ¶ 6). Petersel is therefore restricted from operating My Wellbeing in the 10016 and 11201 zip codes, the zip codes where RevitaLife maintained an office at the time of Petersel's employment. Since RevitaLife terminated Petersel's employment on March 25, 2018 and did not open its third office in the financial district until May 1, 2018, Petersel is not restricted from operating her business in the 10006 zip code.

2. Non-Solicitation Provisions – Section 7.2

Section 7.2(a) prohibits Petersel for two years after termination from inducing, attempting to persuade, or soliciting any contractor of RevitaLife "to terminate such relationship with the Employer [RevitaLife] in order to enter into any relationship with the Contractor [Petersel], any business in which the Contractor [Petersel] is a participant in any capacity whatsoever, or any other business in competition with the Employer's [RevitaLife] business."

Section 7.2(b) prohibits Petersel for two years after termination from "directly or indirectly … solicit[ing] (including by announcement), treat[ing] or deal[ing] with any of the referral sources (as defined herein) of the Employer [RevitaLife] unless written authorization by the Employer [RevitaLife] has been given to Contractor."

Under Section 7.2(c), Petersel "acknowledges" that Sections 7.2(a) and (b) "are reasonable as to extent and duration, that they are fully enforceable, and waives any objection thereto and covenants to institute no suit or proceeding, or otherwise advance any position or contention, to the contrary."

RevitaLife has provided a screen shot from a Facebook therapist group page community page that shows Petersel soliciting therapists for her company. (Exhibit G). Davia Ward testified that every person in this Facebook group is important to RevitaLife's business as referrals. (*Id.*). RevitaLife has also provided a copy of an email that Petersel sent to Park Avenue Psychotherapy on March 25, 2018, concerning My Wellbeing. Davia Ward testified that Park Avenue Psychology is another psychotherapy practice that she "do[es] practice management for" and is also a referral source to RevitaLife. (Davia Ward testimony; 11:2-15). Davia Ward

testified that after she saw Petersel's email to Park Avenue Psychology, she "was actually quite shocked" and "then looked up My Wellbeing and saw a website with Miss Petersel's picture along with other therapists that were referral sources for RevitaLife." (*Id.* at 11:22-25).

Additionally, Robby Ward states that on March 25, 2018, RevitaLife learned that Petersel had entered into a contract with Cobb Psychotherapy, one of RevitaLife's competitors and referral sources, to refer them clients, in breach of the Employment Agreement. (Ward Aff. ¶15; Robby Ward testimony 32:4-11).

As with the restrictions set forth in Section 7.1, RevitaLife has demonstrated a likelihood of success on the merits that the non-solicitation provision contained in the Employment Agreement is reasonable and should be enforced.

3. Confidentiality Provision – Section 8

Under Section 8 of the Employment Agreement, Petersel "acknowledges that he/she will be exposed to, and may assist in developing, information that is or will be confidential and proprietary" which includes "patient lists, customer lists, plans, …, software, and all concepts and ideas, materials or information related to the business, products, sales or services." Petersel "agrees that such information is the sole and exclusive property of" RevitaLife. Petersel also agrees upon termination of her employment to "surrender to the Employer [RevitaLife] all information, written or otherwise, in connection with the Employer's [RevitaLife's] professional practice and business, as well as any and all other property of the Employer [RevitaLife]."

RevitaLife has demonstrated a likelihood of success on the merits that Section 8 is reasonable and should be enforced. Davia Ward testified that an injunction is necessary to protect RevitaLife "patients' information and [RevitaLife's] software that [Davia] developed and adapted specifically to RevitaLife" which Petersel had access to when she worked at RevitaLife. (Davia Ward testimony; 16:4-13).

4. Subject Video

RevitaLife alleges that Petersel committed a fraud to obtain the use of its facilities so that Petersel could create a video advertisement for My Wellbeing.

In his affidavit, Robby Ward states that on November 2, 2017, Petersel requested to use RevitaLife facilities to record a video. (Ward Aff. ¶13). Robby Ward alleges that Petersel "affirmatively told RevitaLife, with knowledge of falsity, that the video was going to be used for educational purposes." (Ward Aff. ¶14). He further alleges that Petersel "made this request based on those representations to induce RevitaLife into providing an office to film the video," and "RevitaLife justifiably relied on Ms. Petersel's representation and allowed her to use their facilities for the purpose of creating the video." (Ward Aff. ¶14).

In her affidavit, Petersel states that on November 20, 2017, she filmed a video which was "about the meaning of therapy." (Petersel Aff. ¶19) She states, "Some portions of that video were filmed in RevitaLife's offices, with RevitaLife's permission, but no portion of the video in anyway identifies RevitaLife or its business. See email dated November 2, 2017 giving permission to film annexed hereto." (Petersel Aff. ¶20).

Petersel testified, "And for the record, I offered to take down the video, and I am still more than happy to. I don't think – the video is not intended to be malicious or competitive. It is an educational video about what is therapy from a therapist's prospective (sic)." (Petersel testimony; 50:2-6).

Irreparable Harm

In addition to demonstrating a likelihood of success on the merits, RevitaLife has demonstrated irreparable harm.

"A quantifiable remedy precludes a finding of irreparable harm." *U.S. Re Companies, Inc. v Scheerer*, 41 A.D.3d 152, 155 [1st Dept 2007]. Accordingly, "[d]amages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable." *SportsChannel America Associates v National Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]. However, the loss of goodwill is not "readily quantifiable." *FTI Consulting, Inc. v Pricewaterhouse*

Coopers LLP, 8 A.D. 3d 145, 146 [1st Dept 2004]. The term "goodwill" is "broadly defined as 'the advantage of benefit, which is acquired by an establishment . . . in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position . . . or reputation for skill or affluence . . .'" *Moore v Johnson*, 108 A.D.3d 1125, 1126 [1st Dept 2013]. "The use and disclosure of an employer's confidential information and the possibility of loss of customers through such usage can constitute irreparable harm, and the loss of goodwill can constitute irreparable harm which cannot be compensated by money damages." *Unisource Worldwide, Inc. v. Valenti*, 196 F. Supp. 2d 269, 280 [E.D.N.Y. 2002].

Davia Ward testified that RevitaLife needs an injunction against Petersel in order "to protect the relationships with patients with clients, with other therapy practice (sic) that we built and developed" and its "reputation ... that [they] worked really hard to develop to become a practice that is honest, has integrity and has the patients at heart." (Davia Ward testimony; 15:15-24). Davia Ward testified that an injunction is also necessary to protect "[t]he patients' information and [their] software that [she] developed and adapted specifically to RevitaLife" which Petersel had access to when she worked at RevitaLife. (*Id.* at 16:4-13).

RevitaLife has demonstrated that it faces irreparable harm in the absence of an injunction. RevitaLife's most important business assets are its reputation in the communities where it services clients and its network of contractors, referral sources, and clients it has spent time and money developing. These assets are at risk if Petersel is able to solicit them for her own benefit.

Balancing of the Equites

In balancing the equities, the court must weigh the harm that each side would face in the absence or in the face of injunctive relief. (*Edgeworth Food Corp. v Stephenson*, 53 AD2d 588, 588 [1st Dept 1976]). Here, the balancing of the equities tips in RevitaLife's favor. If the injunction is imposed, Petersel can continue her practice outside of the two restricted Zip Codes and with her own network of contractors and clients. On the other hand, absent injunctive relief, RevitaLife faces losing the goodwill that it has developed through its own efforts and capital expenditure. Furthermore, "considering that the restriction was freely

bargained for as part of a negotiated contract, it cannot be said that the equities favor" the party that agreed to the restriction." *Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 234 A.D.2d 200, 203 [1st Dept 1996].

Wherefore it is hereby

ORDERED that respondent Alyssa Petersel is preliminarily enjoined for the pendency of the Arbitration up to 2 years from her termination on March 25, 2018 from providing therapist services in the restricted Zip Codes of 10016 and 11201; and it is further

ORDERED that respondent Alyssa Petersel is preliminarily enjoined for the pendency of the Arbitration up to 2 years from her termination on March 25, 2018 from operating My Wellbeing, Inc., in the restricted Zip Codes of 10016 and 11201; and it is further

ORDERED that respondent Alyssa Petersel is preliminarily enjoined for the pendency of the Arbitration up to 2 years from her termination on March 25, 2018 from (a) soliciting or attempting to solicit, directly or indirectly, RevitaLife's contract therapists for the purpose of providing services on behalf of, or for the benefit of, Respondent and/or My Wellbeing, Inc.; (b) soliciting or attempting to solicit, directly or indirectly RevitaLife's referral sources for the purpose of referring services on behalf, or for the benefit of, Respondent and/or My Wellbeing, Inc.; (c) soliciting or attempting to solicit, directly or indirectly RevitaLife's clients for the purpose of becoming Respondent's and/or My Wellbeing, Inc.'s clients; and it is further

ORDERED that respondent Alyssa Petersel is preliminarily enjoined for the pendency of the Arbitration from using and/or disclosing RevitaLife's Proprietary or Confidential Information; and it is further

ORDERED that respondent Alyssa Petersel is preliminarily enjoined for the pendency of the Arbitration from using any portion of any video that contains, in whole or in part, RevitaLife's facilities and/or offices.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JULY 20, 2018

Eileen A. Rakower, J.S.C.