SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Andrea Masley Justice PART 48

NATHANIEL LESKA,
Plaintiff,

- v -

GRANT INTERNATIONAL CO, INC. et. al,
Defendants.

INDEX NO. 654164/2018
MOTION DATE
MOTION SEQ. NO. 01
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for PRELIMINARY INJUNCTION

NUMBERED	PAPERS
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that plaintiff's motion for a preliminary injunction is granted.

Plaintiff, Nathaniel Leska, 27 years of age, seeks to enjoin his former employer defendant, Grant International Co. Inc., d/b/a Grant Supplies, from commencing any legal actions attempting to enforce the March 30, 2017 "CONFIDENTIALITY, COMPETITION, AND CONDUCT AGREEMENT" (the Agreement) and prohibiting defendant from communicating with any potential employers of plaintiff during the pendency of this action.

Plaintiff filed this action on August 21, 2018 seeking a declaratory judgment that the Agreement is not enforceable and for tortious interference with contract. The Agreement prohibits an employee from competing with defendant for one year after termination. It also provides that the employee is not to solicit defendant's customers, employees, contractors or vendors. The employee agrees to protect defendant's information including vendor and customer lists, profit margins and pricing. There is no geographic restriction. While there is a mandatory arbitration provision, defendant is authorized to seek injunctive relief in federal or state court. The employee acknowledges that a breach constitutes irreparable harm.

For thirty years, defendant has been in the business of selling electrical and plumbing supples, employing over 150 people. Upon graduation from college in 2013, plaintiff began his employment with defendant as a sales person, providing contractors with pricing information for electrical equipment. He worked with fifteen other Electrical Sales Associates. He signed the Agreement in March 2017. On May 31, 2018, plaintiff was offered employment by nonparty Graybar Electrical Supply Company (Graybar) to work as an Electrical Sales Associate with salary of $100,000, an increase of $10,000

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

over his salary with defendant. He resigned from defendant on June 15, 2018 and accepted employment with Graybar.

On July 17, 2018, defendant sent a cease and desist letter to Graybar. On August 9, 2018, defendant filed an action in the Southern District of New York (SDNY), alleging violation of the Defend Trade Secrets Act, 18 USC §1836; breach of contract; breach of the employee duty of loyalty; tortious interference; unfair competition; misappropriation; and conversion. Defendant sought equitable relief and compensatory and punitive damages. The SDNY court issued a TRO scheduled to be heard on August 20, 2018. On August 9, 2018, Graybar terminated plaintiff because of the SDNY action. On August 16, 2019, defendant withdrew the SDNY action.

For injunctive relief under CPLR 6301, the movant must establish likelihood of success on the merits of the action; the danger of irreparable harm in the absence of a preliminary injunction; and a balance of equities in favor of the moving party. Under New York law, restrictive covenants are strictly construed. (*Columbia Ribbon & Carbon Mfg. Co v A-1-A Corp.*, 42 NY2d 496, 499 [1977].) Employees will be enjoined when a restrictive covenant is reasonable in scope, duration and geographical area. (*Reed, Roberts Assocs., Inc. v Strauman*, 40 NY2d 303, 307 [1976].)

> "While powerful public policy considerations militate against enforcement of restrictive covenants, at the same time, the employer is entitled to protection from unfair or illegal conduct that causes economic injury. The rules governing enforcement of anticompetitive covenants and the availability of equitable relief after termination of employment are designed to foster these interests of the employer without impairing the employee's ability to earn a living or the general competitive mold of society. Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on an employee's employment mobility where a mutuality of obligation is bargained for by the parties. Indeed, the modern trend in the case law seems to be in favor of according such covenants full effect when they are not unduly burdensome."

(*Maltby v Harlow Meyer Savage, Inc.*, 166 Misc 2d 481, 485 [Sup Ct, NY County 1995] [internal quotation marks and citations omitted].)

Plaintiff has established the probability of success on the merits at this preliminary stage. A restrictive employment covenant is reasonable if it is (1) no greater in time or area than is necessary to protect the legitimate business interest of the employer; (2) does not impose undue hardship on the employee; and (3) does not injure the public. (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999].) Here, the Agreement has no geographical restriction making it over broad and unreasonable. (*See Good Energy, L.P. v Kosachuk*, 49 AD3d 331, 332 [1st Dept 2008]; *Garfinkle v Pfizer, Inc.*, 162 AD2d 197 [1st Dept 1990].) Moreover, the court is hard pressed to find at this preliminary stage that this 27-year-old salesman possesses unique skills. (*Reed, Roberts Assoc v Strauman*, 40 NY2d at 308.) Plaintiff is challenging the noncompete

provision. Accordingly, defendant's citation of cases concerning the reasonableness of confidentiality agreements is misplaced.

Further, the consideration for the Agreement may be insufficient. While future employment is certainly accepted in New York as consideration for employment agreements, here the future employment was just over a year. (*Zellner v Stephen D. Conrad, M.D., P.C.*, 183 AD2d 250, 256 [2d Dept 1992]). Continued employment constitutes sufficient consideration for a noncompete where discharge was the alternative, or where the employee remained with the employer for a substantial time after the covenant was signed. (*See Addison Hosp. Grp LLC v Kaciupski*, 2018 NY Slip Op 50853 [U], *5 n 3 [Sup Ct, NY County 2018] [adopting *Zellner* and noting with regard to a 12-month noncompete that "[a] restrictive covenant will be upheld without consideration where an at-will-employee remained with the employer for a substantial amount of time after the covenant was signed"].)

In his August 21, 2018 affidavit, plaintiff claims that, in March 2017, defendants distributed the Confidentiality, Competition and Conduct Agreement to dozens of employees, including sales and non-sales, and that he was not given the opportunity to review the Agreement with counsel. Defendant offered the affidavit of Anna Lee, defendant's corporate secretary, to counter plaintiff, saying that Human Resources Manager, Thomas Kim, "spent over an hour with Leska in our conference room, explaining the Agreement and answering Leska's questions... Leska did not object to signing it, nor did he ask to review it with an attorney prior to signing it." Lee fails to state the source of her information. Defendant failed to submit an affidavit from Kim. Since resolution of the consideration issue could resolve the matter, the court offered to continue the TRO and schedule an expedited hearing to resolve the fact issue. (*See* CPLR 603 ["In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others"].) The court was informed on September 13, 2018 that defendant no longer employs Kim, who is located in Maryland and cannot be compelled to testify. The court interprets defendant's email as a rejection of the expedited fact hearing.

Plaintiff has established irreparable harm in that without this injunction defendant promises to use the Agreement to procure plaintiff's employment termination. Such aggressive enforcement of a noncompete that may not be enforceable will have a chilling effect on plaintiff, defendant's employees, and the public. (*Reed, Roberts Assocs., Inc. v Strauman*, 40 NY2d at 307 [employees are not "virtual hostages to their employers"].) Plaintiff is entitled to earn a living. (*Purchasing Assocs, Inc. v Weitz*, 13 NY2d 267, 272 [1963].) For the same reasons, the equities favor plaintiff, a recent college graduate in the naissance of his career.

As to plaintiff's requested relief – to stop defendant from filing actions in other venues -- the court grants plaintiff's request to limit defendant to the forum selection provisions in the Agreement: arbitration and federal or state court for injunctive relief. Having filed the SDNY action, and withdrawing it before the court could address the

ultimate issue of whether the Agreement is valid, defendant has waived its right under the Agreement to select another forum for injunctive relief. Accordingly, defendant is limited by the Agreement to enforce it in this action or in arbitration. The court rejects defendant's claim that this order is unconstitutional. Defendant drafted the Agreement and designated forums. Plaintiff is now without employment since defendant was successful in getting an ex parte TRO and having him terminated. While plaintiff asserts that defendant's bad faith abuse of the courts justifies this relief, that issue is not something that can be resolved by the court today. However, plaintiff, a 27-year-old sale person, is entitled to expeditious resolution of the contract issues without having to litigate the same contract in different forums. Otherwise, enforcing the Agreement, as defendant proposes, would impose undue hardship on plaintiff.

As to defendant's request for an undertaking, defendant is welcome to submit a letter within 10 days of this order explaining how it will be harmed if this injunction is improvidently issued and later reversed. Defendant shall propose a calculation and plaintiff may respond within 10 days.

Accordingly, it is

ORDERED, that the expedited hearing is cancelled; and it is further

ORDERED that plaintiff's motion for a preliminary injunction is granted and defendant is directed to not interfere with plaintiff's job search and shall not communicate with anyone, including potential employers, about the Agreement until further order of the court or determination of whether the Agreement is valid; and it is further

ORDERED, that plaintiff shall inform defendant within 48 hours by email to defendant's counsel of any job offers if plaintiff is considering acceptance of such an offer; and it is further

ORDERED, that except for initiating arbitration, as set forth in the Agreement, defendant shall seek relief in this court concerning this Agreement and Leska's employment; and it is further

ORDERED that the parties are to appear for a conference on October 31, 2018 at 11:30 a.m. at 60 Centre Street, Room 242.

Dated: 9/18/18

HON. ANDREA MASLEY J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**