SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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QUICKSILVER CAPITAL LLC,

Plaintiffs, Decision and order

- against - Index No. 512843/18

MS # 2

TAYLOR HALEY,

Defendants, February 11, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §221 seeking to reargue a decision and order dated November 19, 2018 seeking to dismiss the complaint. The plaintiff has opposed the motion. Papers were submitted by both parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in the prior order this lawsuit concerns claims filed by the plaintiff against the defendant a former employee. As noted, on July 5, 2017 the defendant accepted employment at an entity called Max Advance LLC working as an underwriter evaluating prospective customers seeking cash advances. The defendant signed a non-solicitation and confidentiality agreement that stated that the defendant, during employment and for three years thereafter may not "compete directly or indirectly with the business of the Company in the United States of America and in any other jurisdiction in which the Company conducts its business" (see, Agreement, §7(c)). The defendant accepted alternate employment in May 2018 with another company in

violation of the above noted provision. This lawsuit was filed and the court denied the defendant's motion seeking to dismiss on the grounds the parties should first engage in discovery to determine if the restrictions imposed upon the plaintiff were reasonable in light of the plaintiff's specific job and functions. The defendant has now moved seeking to reargue that determination.

Conclusions of Law

A motion to reargue which is not based upon new proof or evidence may be granted upon the showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision (Delcrete Corp. v. Kling, 67 AD2d 1099, 415 NYS2d 148 [4th Dept., 1979]). Thus, the party must demonstrate that the judge must have overlooked some point of law or fact and consequently made a decision in error. Its purpose is designed to afford an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied a controlling principle of law. Thus, where a party fails to demonstrate that the Court misapprehended any of the relevant facts or misapplied any controlling principle of law, a motion to reargue must be denied Matter of Mattie M. v. Administration for Children's Services, 48 AD3d 392, 851 NYS2d 236 [2d Dept., 2008], McNamara v. Rockland County Patrolmen's

Benevolent Association, Inc., 302 AD2d 435, 754 NYS2d 900 [2d Dept., 2003]).

The defendant argues that requiring employees to engage in discovery to determine whether a non compete in enforceable would force low-level employees to engage in costly and unnecessary discovery whenever such employees seek employment elsewhere (see, Defendant's Memorandum of Law, pages 1-3). However, that fear is unfounded since non-compete clauses are only enforceable regarding trade secrets, client lists, unique or extraordinary services or good will belonging to the employer (BDO Seidman v. Hirschberg, 93 NY2d 382, 690 NYS2d 854 [1999]). Employers who cannot even establish any basis to enforce a non-compete against a low level employee that does not even facially satisfy any of the above criteria should not be able to obtain discovery and unnecessarily prolong a fruitless endeavor. To the extent low level employees are asked to sign such non-compete agreements and the effects of those agreements, there are efforts currently being explored to address any improprieties (see, generally, *The Necessity for Employer Liability in Unenforceable Non-Compete Agreements*, 86 University of Missouri-Kansas City Law School Law Review 995 by Rachel Argenbright Rioux [2018]).

However, in this case, as noted, the allegations consist of far more than low-level, ordinary activities for which a non-compete has no place. Rather, the plaintiff has alleged the

defendant was involved with client information and proprietary information that was intentionally afforded to her that goes beyond the mere "casual memory" of the employee (Leo Silfen Inc., v. Cream, 29 NY2d 387, 328 NYS2d 423 [1972]). Further, the decision merely required to engage in discovery and if upon the conclusion of all discovery the defendant can present evidence the non-compete is not applicable then the court will evaluate the evidence at the appropriate time. The defendant has not presented any evidence that the parties should not even have the opportunity to engage in discovery.

Therefore, based on the foregoing, the motion seeking to reargue the prior order is denied.

So ordered.

ENTER:

DATED: February 11, 2019
Brooklyn NY

Hon. Leon Ruchelsman
JSC