Aristotle Psychological and Biofeedback Services, PLLC v Tenenbaum
2019 NY Slip Op 32159(U)
May 17, 2019
Supreme Court, Queens County
Docket Number: 712638/2018
Judge: Pam Jackman Brown

NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

Short Form Order
Present: Hon. Pam Jackman Brown, JSC

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ARISTOTLE PSYCHOLOGICAL AND BIOFEEDBACK SERVICES, PLLC

Plaintiff,

-against-

LYNN CURCURO TENENBAUM, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the persons and parties intended whose acts and omissions contributed to the damages sustained by the Plaintiff described in the Complaint,

Defendants.

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Index No.: 712638/2018

Motion Date: 12/10/19

Cal. No.: 2

Mot. Seq. No.: 001

Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 2 to 12 read on this motion by Plaintiff for an Order restraining and enjoining the Defendant Lynn Curcuro Tenenbaum from contacting and soliciting any of Aristotle's patients and from continuing to render psychological services from an office located in the same city block as Plaintiff's facility, in violation of both her employment with Plaintiff and the covenant of good and fair dealing and further restrain and enjoin the defendant from engaging in a competitive enterprise in close geographic proximity to Plaintiff and from disclosing and/or using sensitive and confidential patient information and converting it to her own use and from retaining and not returning testing materials and books belonging to Plaintiff.

	PAPERS E-FILE NUMBERED	
	Papers	Exhibits
Order to Show Cause with Temporary Restraining Order - Exhibit(s), Affidavit(s), and Affirmation(s) Annexed	2-12	A-B
Proposed Answer - Exhibit(s) Annexed		

Upon the papers listed above, this motion is hereby decided in accordance with this Decision/Order.

Plaintiff commenced this action by summons and verified complaint on August 15, 2018 seeking to recover damages for Defendant Lynn Curcuro Tenenbaum's (hereinafter "Defendant") alleged breach of an employment agreement, breach of the covenant of good faith and fair dealing, tortious interference with business relations, conversion and for an accounting.

Plaintiff is a mental health services facility that offers various treatments to patients within the County of Queens, New York. According to an affidavit, sworn to on August 14, 2018 by Evan Tziazas, Plaintiff and Defendant entered into an employment agreement, dated May 26, 2010 and an Addendum, dated June 14, 2012. In support, of its application, Plaintiff submitted the purported employment agreement entered into between Plaintiff and Defendant.[1] It is undisputed that Defendant worked with Plaintiff, treating patients at Plaintiff's facility as a New York State licensed psychologist, beginning from approximately May 26, 2010 to on or about May 18, 2018. Thereafter, Defendant allegedly ceased working without providing Plaintiff with proper notice in accordance with the employment agreement, dated May 26, 2010 and Addendum, dated June 14, 2012, and began treating patients at a nearby office within the County of Queens, New York.

Now, upon Order to Show Cause, Plaintiff is seeking an Order, in effect, pursuant to CPLR § 6301, for a preliminary injunction, restraining and enjoining Defendant from: (1) contracting and soliciting any of Plaintiff's patients; (2) continuing to render psychological services from an office located nearby Plaintiff's facility; (3) engaging in competitive enterprise in close geographic proximity to Plaintiff; (4) disclosing and/or using sensitive and confidential patient information and converting it to her own use; and (5) retaining and not returning Plaintiff's testing materials and books.

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."

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[1] The Court notes that Defendant purportedly executed the agreement as an independent contractor. For present purposes, the Court observes that no distinction need be drawn between the independent contractor and the at-will employee. While important differences between the independent contractor and the salaried employee surely exist, they are not material to the instant issue before this Court.

In order to be entitled to a preliminary injunction, the moving party must demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of the equities favors the movant's position (*see Barone v Frie*, 99 AD2d 129, 132 [2d Dept 1984]). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts (*see Related Properties, Inc. v Town Bd. Of Town Village of Harrison*, 22 Add3 587 [2d Dept 2005]). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief (*see Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 Ad3d 612 [2d Dept 2008] quoting *Milbrandt & Co. v Griffin*, 1 Ad3d 327, 328 [2d Dept 2003]).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages *(see White Bay Enterprises v Newsday*, 258 AD2d 520 [2d Dept 1999]).

To establish a cause of action for breach of contract, a plaintiff must demonstrate: (1) the existence of a contract between the plaintiff and defendant; (2) consideration; (3) performance by the plaintiff; (4) breach by the defendant; and (5) damages resulting from the breach (*see Furia v Furia*, 116 Ad2d 694 [2d Dept 1986]).

Powerful considerations of public policy militate against sanctioning the loss of a person's livelihood (*see Post v Merrill Lynch*, 38 NY2d 84, 86 [1979]), citing *Purchasing Assoc. v Weitz*, 13 NY2d 267, 272 [1963]). This policy is so potent that covenants tending to restrain anyone from engaging in any lawful vocation are almost uniformly disfavored, and are sustained only to the extent that they are reasonably necessary to protect the legitimate interests of the employer, and are not unduly harsh or burdensome to the one restrained (*Id.* at 87). Restrictive covenants contained in employment contracts are disfavored by the courts and are to be enforced only if reasonably limited temporally and geographically, and to the extent necessary to protect the employer's use of trade secrets or confidential customer information (*see Gilman & Ciovia, Inc. v Randello*, 55 AD3d 871, 872 [2d Dept 2008]). Where an otherwise valid restrictive covenant does not contain a geographic limitation, the court may, if warranted by equity, interpret the clause in conformity with the intent of the parties" (*see Deborah Hope Doelker, Inc. v Kestly*, 87 Ad2d 763 [1d Dept 1982]). "The enforceablity of covenants restricting health care

professionals from competing with a former employer or associate have been recognized" (*see Hapworth Med. Services, P.C. v Kress*, 218 AD2d 575, 575 [1d Dept 1995]).

Plaintiff has shown that it will likely succeed in demonstrating that Defendant is indirectly providing psychotherapist services in violation of Section 13 of the Employment Contract, dated May 26, 2010 which dictates that Defendant "shall not control, consult to or be employed by any business similar to that conducted by [Plaintiff], either by soliciting any of its accounts or by operating within [Plaintiff's] general trading area." Plaintiff has also established that it will likely succeed in demonstrating that Section 13 of the Employment Contract is reasonablely limited temporally and not unduly burdensome. Although the agreement is silent as to the scope of the geographic restriction, the absence of a geographic restriction alone does not automatically invalidate the restrictive covenant. Here, in light of the parties' agreement, the Court finds that the County of Queens is a reasonable geographic restriction. The Court finds that Plaintiff demonstrated that it faces irreparable harm in the absence of an injunction *(see Merrill Lynch, Pierce, Fenner & Smith v Bradley*, 756 F2d 1048 [4th Cir. 1985])(the possibility of permanent loss of customers to a competitor may constitute noncompensable irreparable injury). Further, the balancing of the equities tips in favor of Plaintiff. If the injunction is imposed, Defendant can continue her practice outside of the County of Queens and with her own network of patients. On the other hand, absent injunctive relief, Plaintiff faces losing its patients that it has developed through its own efforts. Therefore, in the interests of equity, the Court finds that under these circumstances, Defendant's solicitation of Plaintiff's patients warrants an injunction within the County of Queens. Accordingly, the branch of Plaintiff's application seeking a preliminary injunction is granted to the foregoing extent.

To establish a claim of tortious interference with contract, plaintiff must show the existence of a valid contract with a third party defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages *(see White Plains Coat & Apron v Cintas Corp.*, 8 NY3d 422, 426 [2007]). It is well settled that, absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party, for any reason or even for no reason (*see DeSimone v Supertek, Inc.*, 308 AD2d 501 [2d Dept 2003]). Here, Plaintiff has failed to meet its *prima facie* burden. Accordingly, the branch of the Plaintiff's application seeking a preliminary injunction on the basis of Defendant's alleged tortious interference is denied.

To establish a claim for conversion, a plaintiff must show that he had an immediate superior right of possession to the property and the exercise by defendants of unauthorized dominion over the property in question to the exclusion of plaintiff's rights

(*see Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 Ad2d 384, 385 [1d Dept 1992]). Here, Plaintiff has failed to meet its *prima facie* burden. Accordingly, the branch of the Plaintiff's application seeking a preliminary injunction enjoining Defendant from not returning materials allegedly owned by Plaintiff on the basis of Defendant's alleged conversion of same is denied.

The motion is granted in part and denied in part.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 17, 2019
Jamaica, NY

HON. PAM JACKMAN BROWN, JSC