Landmark FG Realty LLC v Stralberg
2020 NY Slip Op 32369(U)
July 17, 2020
Supreme Court, Kings County
Docket Number: 509998/20
Judge: Leon Ruchelsman

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

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LANDMARK FG REALTY LLC,

Plaintiff, Decision and order

- against - Index No. 509998/20

SHAINDY STRALBERG,

Defendant, July 17, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a preliminary injunction restraining the defendant from engaging in her current employment on the grounds it violates a non compete she signed with plaintiff. The plaintiff has further moved seeking contempt arguing the defendant violated a court order dated June 16, 2020. The defendant has opposed both motions. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, on June 27, 2017 the plaintiff executed a non-disclosure and non-compete agreement with the plaintiff, known as the 'Disclosing Party'. Concerning the non-compete, the agreement prohibits the defendant from engaging in any "phase of any business or enterprise similar to that" of the plaintiff for a period of sixty months "anywhere in the world" where the plaintiff operates (see, Non-Disclosure and Non-Compete Agreement, §5).

Concerning non-disclosure, the agreement prohibits divulging any confidential information or from utilizing the confidential information for herself or others.

The plaintiff has alleged the defendant's employment at a direct competitor violates the non-compete agreement. The court denied a temporary restraining order preventing the defendant from employment with the competitor, however, did grant an injunction to the extent the defendant was prohibited from engaging with any clients or institutions of the plaintiff. The plaintiff alleges the defendant violated that injunction. The defendant has opposed the motions.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the plaintiff has demanded and would be entitled to a judgement restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id). A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction concerning the non disclosure element is the allegation the defendant has disclosed confidential information and plaintiff's trade secrets and therefore breached the agreement in many significant ways. Of course, the defendant denies these underlying facts supporting the injunctive relief and indeed the allegations are heavily and fundamentally disputed. Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "key facts" are in dispute and the basis for the injunction rests upon "speculation and conjecture" the injunction must be denied (Faberge International Inc., v. Di Pino, 109 AD2d 235, 491 NYS2d 345 [1st Dept., 1985]). Thus, the plaintiff asserts that they gave defendant a company laptop so she could work from home during the COVID-19 lockdown. The plaintiff argues that "the company laptop contained the entirety of Plaintiffs' client confidential database that was culled over the years. The Defendant would never have had access to the database otherwise.

This database is key to doing business in the commercial mortgage lending business and the Plaintiffs worked years to maintain said database. A database such as this and the business relationships that stem from the database are the key to a fruitful commercial mortgage lending business" (see, Memorandum of Law in Support of Order to Show Cause, page 5). Thus, the plaintiff alleges the defendant "disseminated and disbursed confidential company information to unauthorized third parties through the use of the company laptop" (id). Again, on page 12 of the Memorandum, the plaintiff asserts that "the company laptop contained the entirety of Plaintiffs' client confidential database that was culled over the years. The Defendant would never have had access to the database otherwise. This database is key to doing business in the commercial mortgage lending business and the Plaintiffs worked years to maintain said database" (id). Again, the plaintiff alleges the defendant divulged such confidential information. However, the defendant denies ever divulging any confidential information at all. Indeed, she disputes the nature of the company laptop as containing secret information at all. While she does acknowledge the laptop was purchased for her by the plaintiff and was given to her to be used at home during the lockdown she asserts the laptop was new and arrived at her home with the factory seal still intact (see, Affidavit of Shaindy Stralberg, ¶8). Moreover, she categorically

disputes that she was ever in possession of confidential information and that she did not disclose any such information. Thus, the entire basis for the injunction is disputed. Consequently, the motion seeking injunctive relief in this regard is denied.

It should be noted that the non-disclosure portion of the agreement is legally valid, thus the defendant remains bound not to disclose any information in the future that is the subject of the non-disclosure agreement.

Concerning the non-compete portion of the agreement, the defendant argues the non-compete is too broad in the time restriction, the geography restriction and in the scope of its terms. Regarding the restrictions, a careful reading of the agreement reveals that it states that for five years after employment with plaintiff she may not "directly or indirectly...anywhere in the world in which Disclosing Party operates...engage in...or be connected in any manner with any phase of any business or enterprise similar to that of the Disclosing Party or any of its affiliates and/or subsidies" (see, Agreement, §5). The restriction further prohibits the defendant from engaging in any business "in competition with the Protected Parties or compete with the Protected Parties in any related business...in which the Protected Parties may be engaged or which it is actively developing or had developed as of the termination

of this agreement" (id). Clearly, the time restriction of five years and the geographical restriction of anywhere in the world where the plaintiff operates applies to the entire clause. Thus, it cannot seriously be argued that the agreement prohibits defendant from working "for her own account" or as an employee "with any phase of any business similar to that of the" plaintiff, anywhere in the world the plaintiff operates, however, the prohibition against working "in competition" with the plaintiff is governed by some other, more limited, geographical area. Indeed, the entire restriction is only one sentence, albeit a long one, and it cannot be parsed to afford different geographical restrictions to different sorts of prohibited employment (see, Plaintiff's Reply Memorandum of Law, pages 8,9). Thus, the agreement essentially prohibited the defendant from working "anywhere in the world" where the plaintiff operates. There can be little argument that such a restriction is too broad and not enforceable (Veramark Technologies Inc., v. Bouk, 10 F.Supp3d 395 [W.D.N.Y. 2014]).

Next, the non-compete prohibited the defendant from engaging in any way in any "phase of any business or enterprise similar to that of the" plaintiff or any of plaintiff's affiliates or subsidies (Agreement §5, supra). The agreement further prohibited the defendant to compete "in any related business" in which the plaintiff is engaged (id). Thus,

essentially, the agreement prohibited the defendant from engaging in the industry at all.

In BDO Seidman v. Hirshberg, 93 NY2d 382, 690 NYS2d 854 [1999], the court held that in order for a restrictive covenant to be enforceable it must satisfy four criteria. Thus, the covenant must be necessary to protect the employer's legitimate interests, it must be reasonable in time and geography, it cannot be unreasonably burdensome to the employee and it cannot be harmful to the general public. Further, the court explained that 'legitimate interests' mean only the protection of trade secrets, the protection of confidential customer information, the protection of an employer's client base and the protection against irreparable harm where an employee's services are unique or extraordinary.

Thus, a restrictive covenant that does not connect the restrictions to the enumerated interests of the company are too broad and unenforceable (Columbia Ribbon & Carbon Manufacturing Co., Inc., v. A-1-A Corporation, 42 NY2d 496, 398 NYS2d 1004 [1977]). In that case the court held a non-compete that prevented a company's employees from working for any firm that sold goods similar to those sold by the company was invalid. The court noted the non-compete did "no more than baldly restrain competition" because it contained no "limitations keyed to uniqueness, trade secrets, confidentiality, or even competitive

unfairness" (id). In GFI Brokers LLC v. Santana, 2008 WL 3166972 [S.D.N.Y. 2008] the court held a non-compete was too broad where it prevented an employee, Santana who had worked for the plaintiff GFI, from "associating with a competitor regardless of the nature of that association" (id). The court noted the non-compete did not "limit itself to situations where Santana would have an opportunity to exploit the 'information and relationships' gained from his work at his previous employer (id). Thus, the court concluded the non-compete "purports to prevent Santana from working for a competitor even in situations where his employment poses no risk-let alone a 'substantial' one-that GFI would lose customers to that new employer. In such a circumstance, Santana's new employer would gain no unfair competitive advantage over GFI, and the prohibition would therefore not be 'necessary' to the protection of GFI's legitimate interests" (id, see, also, Crye Precision LLC v. Duro Textiles LLC, 2016 WL 1629343 [S.D.N.Y. 2016]).

Likewise, the non-compete in this case is not limited or focused upon trade secrets, confidentiality or competitive unfairness but rather encompasses any employment with any competitor for any reason. This agreement is overbroad and is consequently unenforceable as written (Flatiron Health Inc., v. Carson, 2020 WL 1320867 [S.D.N.Y. 2020]).

Alternatively, the plaintiff argues the non-compete

should not be read to prohibit the defendant from working in the commercial mortgage lending industry generally, rather the restriction should only be applied to any mortgage lending company located in Brooklyn. Indeed, paragraph 7 of the Agreement expressly permits the court to fashion appropriate restrictions in the event some portions of the agreement are deemed unenforceable.

It is well settled that a court may partially enforce an overly broad non-compete covenant if the plaintiff sought to protect legitimate business interests (BDO Seidman, supra). Those legitimate interests, however, are minimized by the fact the non-compete was imposed as a condition of employment in efforts to stifle competition (Scott, Strackrow & Co., C.P.A.'s v. Skavina, 9 AD3d 805, 780 NYS2d 675 [3rd Dept., 2004]).

Therefore, the court will enforce the contract to the extent the defendant may not divulge any secrets or proprietary information of the plaintiff she acquired while employed there. Further, the defendant may not solicit or engage with any clients of the plaintiff while employed elsewhere. The plaintiff's request for an injunction is granted only to that extent.

The plaintiff further alleges the defendant violated a stay already imposed in this case by reaching out to financial institutions, namely two banks, that had prior business dealings with plaintiff. It is true the prior order prohibited the

defendant from talking to "institutions or clients of the plaintiff" such restriction cannot possibly bar the defendant from engaging with any bank or any institution in Brooklyn or elsewhere that once did or continues to do business with the plaintiff. Indeed, such an untenable position would foreclose the ability of the defendant to pursue its business in a competitive manner. There can be no prohibition preventing the defendant from seeking new business with various banks just because those banks also engage with the plaintiff.

Of course, the defendant may not contact or solicit business from any client of the plaintiff or any institutions that are similar to clients in the sense they are the result of cultivation of time and effort, may contain trade secrets or confidential customer information. There is no legitimate interest barring defendant or any other competitor, whether they once worked for plaintiff or not, from soliciting public banks for new deals not in way connected to plaintiff's business or client base at all.

Consequently, the motion seeking contempt is hereby denied.

So ordered.

ENTER:

DATED: July 17, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC