STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: June 13, 2017)

BLUEZ4 CORP., D/B/A BLUE SKY SPAWORKS	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. KC 2016-1087**
	:	
REBECCA MACARI AND ASTRA SALON, LLC	:	
Defendants.	:	

DECISION

STERN, J. Plaintiff BlueZ4 Corp., d/b/a Blue Sky Spaworks (BlueZ4), petitioned this Court for a preliminary injunction against Rebecca Macari (Ms. Macari) and Astra Salon, LLC (Astra) (collectively, Defendants), based on a non-competition agreement that Ms. Macari signed as an employee of Blue Sky Spaworks & Gallery, Inc. (Blue Sky Spaworks), from which BlueZ4 purchased its salon and spa business, along with certain of its assets. Defendants oppose BlueZ4's request, arguing that that agreement is inapplicable to them on two grounds: it was (1) not assigned to BlueZ4 by Blue Sky Spaworks; and (2) not transferred and conveyed to BlueZ4 under the Asset Purchase Agreement between BlueZ4 and Blue Sky Spaworks.

I

Facts and Travel

First, this Court will comb through the pertinent facts of this case. Blue Sky Spaworks owned a salon and spa located at 80 Lambert Lind Highway, Suite 12, in Warwick, Rhode Island. In an affidavit, Ms. Macari attests, in pertinent part, that she worked at Blue Sky Spaworks since 1997, and that Blue Sky Spaworks designated her as a "Master Hairstylist."

(Macari Aff. at ¶¶ 3, 7.) She attests further that in addition to working as a hairstylist, she "was appointed with managerial responsibilities, which meant [she] was responsible to train new employees or less experienced employees, make sure the hairdressing/stylist area was always neat and clean, deal with customer complaints, and order products when products needed to be replaced." Id. at ¶ 12. Ms. Macari's affidavit further reveals not only that "[a]s a 'manager,' [she] had no ability to control, discipline, hire or fire any employee[,]" id. at ¶ 15, but also that she "never had access to the computer system of Blue Sky Spaworks . . . or [BlueZ4] and [has] no information from the computer systems." Id. at ¶ 11. Also according to her affidavit, Ms. Macari "had experience as a hairdresser and stylist before being employed at Blue Sky Spaworks . . . and had an established following of customers before beginning [her] employment there." Id. at ¶ 8.

It is undisputed that on April 17, 2004, Ms. Macari signed Blue Sky Spaworks' "Employee Non-Compete Clause" (the Non-Compete) as a condition of her continued employment. The Non-Compete, a one-page document, is at the heart of this dispute and provides, in pertinent part, as follows:

> "1. Employee [Ms. Macari] shall not compete directly or indirectly, with Blue Sky Spaworks for a period of one (1) year after the termination of her/his employment within three (3) miles of Blue Sky Spaworks during the term of this Agreement. Employee also agrees that during the one (1) year period following termination of her/his employment, Employee:
>
> "A. Will not solicit Blue Sky Spaworks related business from any salon/spa client
> "B. Will not take client names/addresses/phone numbers from Blue Sky Spaworks computer system
> "C. Will not influence or encourage any other Blue Sky Spaworks employee to terminate her/his relationship with Blue Sky Spaworks, and
> "D. Will not hire any person then employed by Blue Sky Spaworks[.]"

On September 26, 2014, while Ms. Macari was Blue Sky Spaworks' employee, Blue Sky Spaworks and BlueZ4 entered into an Asset Purchase Agreement, under which BlueZ4 purchased Blue Sky Spaworks' salon and spa business, along with certain of its assets.[1] In that Asset Purchase Agreement, the parties designated October 24, 2014 as the closing date for the sale of the business. Ms. Macari attests in her affidavit that in October 2014, her "employment was summarily terminated without prior notice or cause" (Macari Aff. at ¶ 3); that "[n]o one explained the type of sale or its impact upon the employees" id. at ¶ 4; that after the sale, she learned "only that Theodore Schroeder was the new owner" id.; and that she "had to fill in an application for employment as a new hiree, after being told of the new ownership of the spa." Id. at ¶ 5. She further attests that "neither [the] Non-Compete Clause nor any other non-competition provisions was a condition of [her] employment." Id. at ¶ 6. Ms. Macari thus began working for BlueZ4 in October 2014, and her designation as a Master Hairstylist remained unchanged. In early June 2016, however, Ms. Macari informed BlueZ4's owner, Mr. Theodore Schroeder, of her decision to leave employment at BlueZ4.

On June 7, 2016, Astra, located within a three-mile radius of BlueZ4, hired Ms. Macari as a hairstylist. At some point thereafter, Ms. Macari posted about her new employment on her Facebook page. BlueZ4 learned of Ms. Macari's new employment and, by letter dated June 28, 2016, notified Ms. Macari (and, in a separate letter, Astra) that Ms. Macari was in breach of the Non-Compete. In response, Ms. Macari and Astra both informed BlueZ4 of their intent not to comply with the terms of the Non-Compete.

On October 31, 2016, BlueZ4 filed a verified complaint seeking (1) a declaratory judgment from this Court, determining that the Non-Compete is enforceable as to BlueZ4 and

[1] Specifically, the assets that were sold as part of the sale of Blue Sky Spaworks' business are listed in Exhibit A to the Asset Purchase Agreement, entitled "Assets and Assumed Liabilities."

that Ms. Macari and Astra are in breach of that agreement; (2) an order enjoining Ms. Macari's employment with Astra or any other competitor for at least one year; (3) an order enjoining Astra from employing Ms. Macari and from providing services to any of BlueZ4's customers; and (4) damages, including all of Astra's profits relating to BlueZ4's customers.

On December 13, 2016, this Court held a hearing on BlueZ4's motion for preliminary injunction. This Court subsequently directed the parties to each submit a post-hearing memorandum of law addressing three issues: (1) the assignability of a non-compete agreement without an assignment clause; (2) whether the Non-Compete transferred as part of the Asset Purchase Agreement; and (3) the date on which the one-year period in the Non-Compete began running, in light of OfficeMax, Inc. v. Levesque, 658 F.3d 94 (1st Cir. 2011).

II

Standard of Review

Rule 65 of the Rhode Island Superior Court Rules of Civil Procedure provides the Court the ability to grant preliminary injunctive relief. Super. R. Civ. P. 65. The standard for granting a preliminary injunction has been established by our Supreme Court. Specifically, the hearing justice must consider

> "whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." Vasquez v. Sportsman's Inn, Inc., 57 A.3d 313, 318 (R.I. 2012) (citing Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (R.I. 1999)).

"A decision to grant or deny . . . injunctive relief is addressed to the sound discretion of the trial justice . . . ." Hagenberg v. Avedisian, 879 A.2d 436, 441 (R.I. 2005).

"In determining the reasonable likelihood of success on the merits, [the Court] do[es] not require the moving party to establish 'a certainty of success[;]' rather, '[the Court] require[s] only that [the moving party] make out a prima facie case.'" DiDonato v. Kennedy, 822 A.2d 179, 181 (R.I. 2003) (quoting Fund for Cmty. Progress v. United Way of Se. New England, 695 A.2d 517, 521 (R.I. 1997)). The moving party's burden is to show "a reasonable probability of ultimately succeeding on a final hearing." Town of Smithfield v. Fanning, 602 A.2d 939, 943 (R.I. 1992). However, "[t]he sine qua non of this four-part inquiry [for a preliminary injunction] is likelihood of success on the merits: if the moving party cannot demonstrate that he [or she] is likely to succeed in his quest, the remaining factors become matters of idle curiosity." New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002).

III

Analysis

To decide whether it should enjoin Ms. Macari from working at Astra and, at the same time, enjoin Astra from employing Ms. Macari, this Court must first determine whether BlueZ4 is likely to succeed in its declaratory judgment action seeking to enforce the Non-Compete.

A

Overview of Non-Competition Agreements in Rhode Island

In Rhode Island, it is well settled that covenants not to compete are disfavored and subject to strict judicial scrutiny. Cranston Print Works Co. v. Pothier, 848 A.2d 213, 219 (R.I. 2004) (citing Durapin, Inc. v. Am. Prods., Inc., 559 A.2d 1051, 1053 (R.I. 1989); see also Koppers Prods. Co. v. Readio, 60 R.I. 207, 197 A. 441, 444–45 (1938) (stating that "noncompetitive employment contracts are carefully scrutinized by the court and only enforced when reasonable and when the restriction does not extend beyond what is apparently necessary

for the protection of those in whose favor they are made"). Our Supreme Court has held that a covenant not to compete is nonetheless enforceable if "(1) the provision is ancillary to an otherwise valid transaction or relationship, such as an employment contract . . . , (2) the provision is supported by adequate consideration, and (3) there exists a legitimate interest that the provision is designed to protect." Durapin, 559 A.2d at 1053 (citations omitted). As to the third factor, "protecting a business's confidential information and goodwill—such as the special relationship its sales force has developed with customers—may qualify as a legitimate interest." Astro-Med, Inc. v. Nihon Kohden Am., Inc., 591 F.3d 1, 17 (1st Cir. 2009) (citations omitted). At the same time, however, our Supreme Court has cautioned that "the desire to be free from competition, by itself, is not a protectable interest." Durapin, 559 A.2d at 1057.

Once a plaintiff establishes the above three factors, the Court must determine the enforceability of such a covenant. Id. at 1053. That determination hinges on a reasonableness test, which depends on "the particular circumstances surrounding the agreement." Id. (citations omitted). Important to a court's analysis regarding reasonableness are the temporal and geographical limitations that a non-competition agreement imposes on an employee. Cranston Print Works Co., 848 A.2d at 220; see also Mento v. Lanni, 106 R.I. 683, 687, 262 A.2d 839, 841 (1970) ("The contract is to be determined by its subject matter and the conditions under which it was made; by considerations of extensiveness or localism, of protection to interests sold and paid for, of mere deprivation of public rights for private gain, of proper advantage on one side, or useless oppression on the other.") (citations omitted); Restatement (Second) Contracts § 188 (1981) (providing that a covenant not to compete is unreasonable if "(a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is

outweighed by the hardship to the promisor and the likely injury to the public") (cited with approval in Cranston Print Works Co., 848 A.2d at 219 n.2).[2]

B

Assignability of Non-Competition Agreements

The parties have not cited to, and this Court is unaware of, any case law in this state addressing whether a non-compete employment agreement is assignable without any assignment clause. This Court thus notes other jurisdictions' approach to this issue.

In some states, non-compete employment agreements that lack an assignability clause have been found unenforceable on the theory that such provisions exist within employment contracts that involve personal services. See e.g., Reynolds and Reynolds Co. v. Hardee, 932 F. Supp. 149, 155 (E.D.Va. 1996), aff'd 133 F.3d 916 (4th Cir. 1997) (finding that a non-competition agreement within a personal services contract cannot be assigned to, nor enforced by, a third party without the parties' consent); Ave. Z Wet Wash Laundry Co. v. Yarmush, 129 Misc. 427, 221 N.Y.S. 506 (N.Y. Sup. Ct. 1927) (declining to enforce a non-compete after determining that the employment contract at issue was for personal services, that performance thereunder cannot be delegated, and that the contract cannot be assigned—even though the employee continued to work for the new owner for some period).

[2] This Court is mindful that in an employer/employee relationship—unlike in a relationship between parties to a sale of a business—an employee (a) likely has less bargaining power against an employer; (b) does not have the luxury of being able to temporarily support himself or herself from the proceeds of a business sale; and (c) is usually not paid a premium for agreeing not to compete. See Alexander & Alexander, Inc. v. Danahy, 21 Mass. App. Ct. 488, 496, 488 N.E.2d 22, 28 (1986). Thus, it follows that non-competes arising in the employment context "must be scrutinized carefully to see that they go no further than necessary to protect an employer's legitimate interests, such as trade secrets or confidential customer information." Id. In light of that distinction and the facts of this case, this Court's Decision is limited to the assignability of non-competition agreements in employment contracts, as opposed to non-competition provisions in an agreement for a sale of, or an interest in, a business.

In other states, non-compete employment agreements that lack an assignability clause have been found unenforceable on the theory that such provisions are personal in nature. See e.g., Traffic Control Servs., Inc. v. United Rentals Nw., Inc., 120 Nev. 168, 174, 87 P.3d 1054, 1058 (2004) ("We agree with those jurisdictions holding that noncompetition covenants are personal in nature and, therefore, unassignable as a matter of law, absent the employee's express consent.") (collecting cases). Further, some states hold that non-competition agreements cannot be assigned without the employee's permission or knowledge. See e.g., SDL Enters. Inc. v. DeReamer, 683 N.E.2d 1347, 1350 (Ind. Ct. App. 1997) (finding that covenants not to compete between a former employee and former owner could not be assigned to a subsequent purchaser because neither the former employee nor the owner had consented to such assignment); Alldredge v. Twenty-Five Thirty-Two Broadway Corp., 509 S.W.2d 744, 749 (Mo. Ct. App. 1974) (holding that the employment agreement was not assigned to the purchaser of the assets because the sales contract had no assignment provision and the employment contract contained no language indicating consent or mentioning successors and assigns).

In Hess v. Gebhard & Co., 808 A.2d 912 (Pa. 2002), the Pennsylvania Supreme Court addressed, in part, the issue presented here (i.e., the assignability of a non-compete in a situation where there is a sale of assets and no assignability clause). In that case, the plaintiff's signed non-compete agreement did not contain an assignability clause. Id. at 914. At some point thereafter, the plaintiff's employer sold all the assets associated with a portion of the business at which the plaintiff worked, including the plaintiff's employment agreement and his non-compete. Id. at 915. When the acquiring employer threatened to enforce the plaintiff's non-compete, the plaintiff brought suit against it. On appeal, the Pennsylvania Supreme Court was asked to determine whether a restrictive covenant not to compete—without an assignability

clause—is assignable by the former employer to a purchaser of the assets of the employer's business. Id. at 919. The Hess court ultimately concluded that "a restrictive covenant not to compete, contained in an employment agreement, is not assignable to the purchasing business entity, in the absence of a specific assignability provision, where the covenant is included in a sale of assets." Id. at 922. With respect to the personal nature of restrictive covenants, the court noted that

> "[t]he fact that an individual may have confidence in the character and personality of one employer does not mean that the employee would be willing to suffer a restraint on his employment for the benefit of a stranger to the original undertaking." Id.

On the other hand, there are jurisdictions that do not favor restrictions on the assignability of non-competition agreements. See e.g., Reynolds & Reynolds Co. v. Tart, 955 F. Supp. 547, 552 (W.D.N.C. 1997) (allowing assignment of non-compete clauses); Jackson v. Moskovitz Agency, Inc., 672 S.W.2d 400 (Tenn. 1984) (reiterating the general principle that a covenant not to compete is a property right which is assignable and transferable in the absence of a provision to the contrary); Symphony Diagnostic Servs. No. 1 Inc. v. Greenbaum, 828 F.3d 643, 646, 647 (8th Cir. 2016) (predicting that "the Missouri Supreme Court would permit assignment of covenants not to compete without contemporaneous consent" because, in part, "the crucial difference between a personal services contract and a non-compete agreement [is that] the former requires affirmative actions by the employee, whereas the latter requires only that they refrain from certain actions") (citations omitted) (emphasis in original).

Moreover, other jurisdictions that favor the assignability of non-compete agreements without an assignability provision specifically consider non-compete clauses equal to any other independently assignable contractual rights. See e.g., Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990) (finding that personal service contracts are not assignable and noting

that "[a]lthough an employee's duty to perform under an employment contract generally is not delegable . . . the right to enforce a covenant not to compete generally is assignable in connection with the sale of a business") (citations omitted); J.H. Renarde, Inc. v. Sims, 312 N.J. Super. 195, 201-02, 711 A.2d 410, 414 (N.J. Super. Ct. Ch. Div. 1998) (finding that restrictive covenants in an employment contract are assignable as an incident of the business because "the purchaser and the employee expect, without new negotiations between them, that the purchaser will honor the employment contract and that the employees, who choose to remain, will honor the promises made to the former employer").

This Court finds persuasive the reasoning not only of those states concluding that non-compete provisions in employment contracts are unassignable personal services contracts, but also of those treating non-compete provisions in employment contracts as personal in nature. See Hess, 808 A.2d at 922 (determining that whether a non-competition agreement is assignable is a two-step process: first, whether the non-competition agreement at issue contains an assignability provision; and second, whether that agreement was properly transferred as part of the asset purchase agreement). This Court's finding comports with our Supreme Court's disfavoring of noncompetitive employment contracts and subjecting the same to strict judicial scrutiny, see Cranston Print Works Co., 848 A.2d at 219 (citation omitted); Koppers, 60 R.I. 207, 197 A. at 444–45, and by our Supreme Court's position that contracts that are personal in nature are unassignable. See Swarts v. Narragansett Elec. Lighting Co., 26 R.I. 388, 59 A.77, 78 (1904); see also T & T Mfg. Co. v. A. T. Cross Co., 449 F. Supp. 813, 826 (D.R.I. 1978), aff'd, 587 F.2d 533 (1st Cir. 1978).

In addition, because a non-compete is extinguishable upon the death of the party involved—see e.g., Kipe v. U.S. Banknote Corp., 55 Misc. 2d 245, 246, 284 N.Y.S.2d 745, 746

(Sup. Ct. 1967), aff'd, 28 A.D.2d 1209, 285 N.Y.S.2d 262 (1967) (acknowledging that "it is well-settled that an employment agreement carries with it the implied condition that the employee shall be able to perform and, therefore, his death extinguishes the obligation")—a non-compete is personal to its holder and may not be assigned unless the parties were to agree otherwise. Cf. Vogel v. Melish, 203 N.E.2d 411, 413 (Ill. 1964) (noting in a case about a stockholder's agreement that "where a contract requires the continued existence of a particular person or thing for its performance, there is always an implied condition that death or destruction of that person or thing excuses further performance"). This Court accordingly concludes that absent specific language providing for its assignment, a non-compete provision in the employment context is not assignable.

Here, because the parties do not contest that Ms. Macari's Non-Compete provision—which she signed as Blue Sky Spaworks' employee—did not include an assignability clause, it follows that that provision was not assigned to BlueZ4 after it purchased Blue Sky Spaworks' assets. Traffic Control Servs., 120 Nev. at 174, 87 P.3d at 1058 ("[T]he drafter of the covenant[] was in the best position to negotiate for an assignment clause. However, for whatever reason, it chose not to do so."). Finding that non-competition provisions are personal in nature and, thus, unassignable without the employee's consent, absent assignability language in the Non-Compete, Ms. Macari did not agree to a non-competition agreement with BlueZ4. The Non-Compete thus fails to meet the first of the aforementioned two-step process as to assignability. Even assuming, arguendo, that the Non-Compete is assignable, BlueZ4's prayer for relief fails because, as discussed below, this Court finds that Ms. Macari's Non-Compete provision did not transfer as part of the Asset Purchase Agreement.

C

Transfer of the Non-Compete as Part of the Asset Purchase Agreement

As indicated above, the Asset Purchase Agreement does not mention or refer to a transfer or purchase of any non-compete agreement signed by Blue Sky Spaworks' then-employees.[3] In fact, a review of the Asset Purchase Agreement reveals that BlueZ4 purchased only those of Blue Sky Spaworks' assets that are listed in "Exhibit A" of that agreement, which exhibit is entitled "Assets and Assumed Liabilities." Notably, nowhere in Exhibit A of the Asset Purchase Agreement do the parties reference any employment agreement, the Non-Compete clause, or Blue Sky Spaworks' goodwill.

Moreover, BlueZ4's argument in their post-hearing memorandum—that "[t]he purchase price [of the business] encompasses more than what is itemized in Exhibit A"—founders in light of Section 10 of the Asset Purchase Agreement, in which the parties allocated the different values that make up the total purchase price of Blue Sky Spaworks. In that section, the parties likewise do not reference any non-compete agreements, any employment contracts, or Blue Sky Spaworks' goodwill. Rather, a plain reading of that section indicates that there are four "categories" of assets that comprise the value of the business' total purchase price: equipment, office equipment, inventory, and leasehold improvements. None of these categories relates in any way to Blue Sky Spaworks' goodwill, any employment contract, or Ms. Macari's Non-Compete provision. Thus, BlueZ4's contention that the Asset Purchase Agreement conveyed Ms. Macari's Non-Compete provision from Blue Sky Spaworks to BlueZ4 is unavailing. Cf. Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC, 2010 WL 338219, at *12 (Del. Ch. Jan. 29, 2010) (holding "that absent specific language prohibiting assignment, noncompete

[3] Rather, the Asset Purchase Agreement refers solely to a non-competition covenant between BlueZ4 and Blue Sky Spaworks "and its principals." Asset Purchase Agreement at 2, ¶ 9.

covenants, even though part of a personal service contract, remain enforceable by an assignee when transferred to the assignee as part of a sale or transfer of business assets regardless of whether the employment contract contains a clause expressly authorizing such assignability, so long as the assignee engages in the same business as the assignor") (emphasis added).

Further, to the extent that BlueZ4 relies on recitals in the Asset Purchase Agreement,[4] BlueZ4 overlooks that "[a]s a general rule, [r]ecitals in a contract, such as whereas clauses, are merely explanations of the circumstances surrounding the execution of the contract, and are not binding obligations unless referred to in the operative provisions of the contract." Tomey Realty Co. v. Bozzuto's, Inc., 168 Conn. App. 637, 653 n.10, 147 A.3d 166, 176 (2016) (internal quotation marks omitted).[5] For these reasons, the Non-Compete would thus fail to meet the second of the aforementioned two-step process as to assignability.

[4] Specifically, in its post-hearing memorandum to this Court, BlueZ4 relies on the following two recitals for the proposition that "the Asset Purchase Agreement was sufficient to convey the Non-Competition Agreement from Blue Sky Spaworks & Gallery, Inc. to BlueZ4 Corp":

> "WHEREAS, Seller owns equipment, inventory, contract rights, and miscellaneous assets used in connection with the operations of its business; and
>
> "WHEREAS, Buyer desires to acquire substantially all of the assets used or useful, or intended to be used in the operation of Sellers [sic] business and Seller desires to sell such assets to Buyer." Asset Purchase Agreement at 1.

[5] This Court pauses at this time to note the following. First, nothing in this Court's Decision should be interpreted as preventing an employee from challenging the terms or scope of his or her non-compete agreement. Moreover, this Court is mindful that there may be other avenues—e.g., by common law or statute—through which an aggrieved employer may seek recourse to protect his, her or its business interest against a current or former employee. See e.g., G.L. 1956 §§ 6-41-1 et seq. (codifying Rhode Island's Uniform Trade Secrets Act and providing relief for the misappropriation of a trade secret); Abbey Medical/Abbey Rents, Inc. v. Mignacca, 471 A.2d 189, 193 (R.I. 1984) (finding that misuse of an employer's confidential information by a current or former employee constituted unfair competition); Qosina Corp. v. C & N Packaging, Inc., 96 A.D.3d 1032, 948 N.Y.S.2d 308 (N.Y. App. Div. 2012) (concluding that an employer adequately alleged a cause of action against an employee for breach of the duty of loyalty because that

D

The Application of OfficeMax, Inc. v. Levesque

At oral argument, and with respect to the date on which the one-year non-competition period in the Non-Compete began to run, this Court raised the application of OfficeMax, in which the United States Court of Appeals for the First Circuit recently decided a case regarding the triggering date of a non-compete clause. In OfficeMax, the defendant-employees signed a non-compete agreement, which, in pertinent part, provided that (1) the defendant-employees would not compete with their employer for a period of twelve months after termination of employment with that employer; and that (2) the agreement is "freely assignable . . . to" another company, which ultimately acquired the employer's business. Id. at 95-96. The defendant-employees remained working at the acquiring company, which ultimately merged with OfficeMax. Id. at 96. At some point, the defendant-employees began employment at OfficeMax's competitor, and OfficeMax sought to enforce the defendant-employees' non-compete agreements, with which enforcement the lower court agreed. Id. at 96, 97.

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employer alleged that the employee failed to disclose his actual relationship with a competitor and acted for and on behalf of the competitor in a manner that was contrary to the employer's interests); Sec. Acceptance Corp. v. Brown, 171 Neb. 701, 107 N.W.2d 540 (1961) (noting that regardless of restrictive covenants, the common law prohibits disclosure of trade secrets or other confidential information that the employee has acquired in the course of employment if used to the detriment of the former employer). Additionally, this Court is also mindful that courts have applied a different analysis to the enforceability of non-compete agreements in a factual scenario involving a merger, which is not the case here. See e.g., Collier HMA Physician Mgmt., LLC v. Menichello, 2017 WL 2364675, at *6 (Fla. Dist. Ct. App. May 31, 2017) (noting that Florida courts "must rely on the 'form of the commercial transaction' under review in determining the enforceability of a restrictive covenant after the completion of a stock purchase, asset purchase, or corporate merger"); Netscout Sys., Inc. v. Hohenstein, 2017 WL 1654852, at *2 (Mass. Super. Feb. 23, 2017) (holding that a company that merges with another company is entitled to enforce employment agreements, including non-competition obligations, that are transferred with that merger); UARCO Inc. v. Lam, 18 F. Supp. 2d 1116, 1122 (D. Haw. 1998) (holding that following a merger, successor corporation may enforce non-compete agreements because they passed "by operation of law").

On appeal, the First Circuit determined that the one-year non-compete period began to run upon the acquiring company's purchase of the company with which the defendant-employees signed a non-compete. Id. at 97. The court found that the plain language of the non-compete "refers solely to employment with [that employer], rather than termination of employment with [that employer] or any of its successors or assigns." Id. at 98. As to the assignability provision in the non-compete—which, in part, provided that the acquiring company could solicit new non-compete agreements of "substantially the same form" after its purchase of the business—the court stated in part that "[t]hough assignment of the agreements to [the acquiring company] may have substituted the party that could enforce the agreements, it could not have changed the triggering date of the noncompetition clause." Id. at 99.

This Court finds that based on the unambiguous terms of the Non-Compete, Ms. Macari's non-compete period began on October 24, 2014. See generally City of East Providence v. United Steelworkers of Am., Local 15509, 925 A.2d 246, 251–52 (R.I. 2007) (cautioning that "[w]hen reviewing contracts, it is clear that [a court] 'should not . . . stretch its imagination in order to read ambiguity into a [contract] where none is present'") (citations omitted). That date marked not only the closing date for the sale of the business, but also the date on which Ms. Macari's employment with Blue Sky Spaworks ended. Just as the non-compete agreement in OfficeMax provided that the defendant-employees could not compete with their employer "[f]or a period of 12 months after termination of [their] employment with [that employer]," OfficeMax, 658 F.3d at 95 (emphasis in original), the Non-Compete here provides only that Ms. Macari "shall not compete directly or indirectly, with Blue Sky Spaworks for a period of one (1) year after the termination of [her] employment within three (3) miles of Blue Sky Spaworks during the term of this Agreement." (Non-Compete at 1.) Notably, and like the non-compete provision

in OfficeMax, which restricted the defendant-employees from competing specifically and only with their employer and not that employer's successors or assigns, the Non-Compete here refers only to the termination of Ms. Macari's employment with Blue Sky Spaworks, rather than the termination of her employment with Blue Sky Spaworks or any of its successors or assigns. 658 F.3d at 98.

Further, that the Non-Compete lacks an assignability provision does not affect the October 24, 2014 triggering date of Ms. Macari's non-compete period, which began when she was no longer Blue Sky Spaworks' employee. Pursuant to OfficeMax, and given that the plain terms of the Non-Compete prohibit Ms. Macari from competing only with Blue Sky Spaworks, "[a]s a legal matter, assignment of the [Non-Compete] could not have altered [Ms. Macari's] substantive duties under the agreement['s] terms." 658 F.3d at 98 (citation omitted). Even assuming, however, that the Non-Compete was assignable and that it transferred as part of the Asset Purchase Agreement, this Court finds that based on the Non-Compete's unambiguous language, the Non-Compete would not have prohibited Ms. Macari from competing with BlueZ4, but rather, only with Blue Sky Spaworks. Ms. Macari's one-year non-compete period began to run on October 24, 2014, the date on which Blue Sky Spaworks and BlueZ4 closed on the sale of the business, and, accordingly, ended Ms. Macari's employment with Blue Sky Spaworks.[6]

[6] BlueZ4 argues in its post-hearing memorandum that Ms. Macari's employment was not terminated upon the transfer of the business to BlueZ4 because the Non-Compete was an employment agreement that was transferred to BlueZ4 under the terms of Paragraph 5 of the Asset Purchase Agreement. Paragraph 5 provides as follows:

> "As of or prior to the closing date, [Blue Sky Spaworks] will terminate all of its employees, except Selling Shareholder, not having employee agreements transferable to [BlueZ4] and will pay each employee all wages, commissions, and accrued vacation pay

BlueZ4 contends that unlike in OfficeMax, in which the court "placed special emphasis on Paragraph 6 of the Employment Agreement[—]stat[ing] that the new employer might solicit and require employees to sign new Non-Competition Agreements in substantially the same form"—there is "no requirement [here] that [Ms. Macari] execute a new Non-Compete Agreement." (BlueZ4's Post-hearing Mem. at 3.) BlueZ4, however, attempts to split hairs and draw a distinction without a difference. That is, although it is true that the court referred to Paragraph 6 in explaining its decision, it did so only to explain that its interpretation of the non-compete—i.e., that the triggering event for the running of the non-compete period was the defendant-employees' termination of employment with the employer with which they signed a non-compete—"is consistent with the agreements read as a whole." OfficeMax, 658 F.3d at 98. Here, this Court is satisfied that its interpretation of Ms. Macari's Non-Compete is consistent with the Asset Purchase Agreement read as a whole, insomuch as there is no mention in that Asset Purchase Agreement that the Non-Compete is transferable or assignable.

IV

Conclusion

For the foregoing reasons, this Court finds (1) that the Non-Compete is unassignable; (2) that, in any event, the Non-Compete did not transfer as part of the Asset Purchase Agreement; and (3) that the one-year non-compete period began to run on October 24, 2014. Because BlueZ4 is unable to establish a reasonable likelihood of success on the merits of its claim, this Court will not address the remaining factors for injunctive relief. New Comm Wireless Servs.,

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> earned up to the time of termination, including overtime pay." Asset Purchase Agreement at 2.

Because, as explained herein, this Court finds that the Non-Compete was not transferable—and did not transfer—to BlueZ4, BlueZ4's argument is unavailing.

Inc., 287 F.3d at 9. BlueZ4's request for injunctive relief is accordingly denied. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**BlueZ4 Corp., d/b/a Blue Sky Spaworks v. Rebecca Macari, et al.**
CASE NO:	**KC-2016-1087**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**June 13, 2017**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Edward Grourke, Esq.**
For Defendant:	**Dante J. Giammarco, Esq.**