

SCANNED ON 7/6/2009
SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: CE Ramo

PART 53

Index Number : 106634/2007

FULLMAN, DAVID

vs.

R & G BRENNER INCOME TAX

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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 this motion

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

Motion is decided in accordance with accompanying Memorandum Decision.

FILED

JUL 06 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/25/09

[Signature]
HON. CHARLES E. RAMOS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
DAVID FULLMAN,

Plaintiff,

Index No.
106634/07

-against-

R&G BRENNER INCOME TAX CONSULTANTS,

Defendant.

-----X
Charles Edward Ramos, J.S.

FILED
JUL 06 2009

COUNTY CLERK'S OFFICE

Plaintiff David Fullman moves for partial summary judgment as to his first and second causes of action and to dismiss defendant R&G Brenner Income Tax Consultant's (Brenner) counterclaims. Fullman additionally seeks sanctions and attorney's fees.

Brenner cross-moves for partial summary judgment as to its fourth counterclaim.

Background

Plaintiff Fullman is a tax preparer and financial planner licensed by the National Association of Securities Dealers (NASD). Brenner is a New York corporation that prepares income tax returns for individuals and entities. Brenner has approximately twenty offices, located mainly in and around New York City, including Manhattan, Brooklyn, Queens, and Rockland, Westchester and Nassau Counties, and employs over 120 tax preparers.

Fullman began his career as a tax preparer as an assistant to accountant Joe Gallagher, a senior tax preparer employed at Brenner for over twenty-five years (Gallagher Aff., ¶ 1).

In November 2006, Brenner hired Fullman as an independent contractor to provide tax preparation and financial planning services at Brenner's Manhattan offices. As compensation, Fullman received twenty-five percent of the fees collected for the tax returns he prepared.

As a condition of employment, Fullman was required to execute a "general independent contractor agreement" (Agreement), in addition to an addendum entitled "general restrictive covenant" (Restrictive Covenants), that contain several provisions at issue in this action.¹

Fullman agreed in section 8 of the Agreement that he will not become employed by a tax preparation office within a three mile radius of any Brenner office, or a one mile radius if the office is located within New York City², for a two-year term after termination of the Agreement.

Fullman is described in the Restrictive Covenants as an employee, amongst other titles, "with access to the list of names and contacts with Brenner Clients (Brenner Clients)." The term "Brenner Clients" is later defined as "a person or business whose tax return was prepared in a Brenner Tax Preparation office and/or includes a prospective client who enters into a Brenner Tax Preparation Office for the purpose of Tax Preparation, whether or not a tax return was prepared."

¹ During this time period, Brenner required all of its tax preparers and clerical staff to execute agreements containing identical or similar agreements Restrictive Covenants.

² Fullman was employed at Brenner's Manhattan office.

A document attached to the Restrictive Covenants states that, "Any person who comes to or contacts any R&G Brenner office for tax preparation services or assistance, or any other service offered is automatically considered a Brenner client."

Fullman was also required to acknowledge that Brenner has a proprietary interest in each of its clients, and to agree not to solicit or perform services for Brenner Clients for the entire two year term of the Agreement. In section 2 of the Restrictive Covenants, Fullman expressly acknowledged that each Brenner Client "has a value to Brenner of at least \$2,000."

Fullman provided tax preparation and financial planning services during the 2007 tax season to numerous clients at Brenner's Manhattan office.

In April 2007, the parties' relationship soured, and Fullman was terminated. Both parties largely dispute the circumstances surrounding his termination. Fullman alleges that he was wrongfully terminated without cause, while Brenner alleges that he was terminated with cause, and thus, is not entitled to the remainder of fees otherwise due him, under a provision of the Agreement.

Fullman alleges that prior to his termination, Brenner "locked him out of the office." Additionally, Brenner allegedly failed to inform his financial planning clients how they could reach Fullman on numerous occasions, thereby causing Fullman to lose revenue from these clients and rendering Fullman potentially liable under NASD rules. Further, Brenner allegedly owes Fullman

\$70,000 in fees.

In contrast, Brenner alleges that Fullman engaged in misconduct while employed there, including that he miscoded tax returns in order to obtain compensation from Brenner that he was not entitled to. In addition, Brenner alleges that Fullman wrongfully solicited and serviced Brenner Clients during the 2008 tax season at an office that Fullman opened in Queens while he was still in Brenner's employ.

In May 2007, Fullman commenced this action, seeking to set aside the Restrictive Covenants as unenforceable. In addition, Fullman is seeking past due fees amounting to approximately \$70,000, in addition to damages stemming from Brenner's failure to transmit to Fullman messages from his financial planning clients, and for faulty advice Brenner gave many of these clients.

In its answer, Brenner maintains that Fullman was terminated with cause, and thus, Brenner is not liable to pay the balance of Fullman's fees under section 9 of the Agreement. Additionally, Brenner asserted counterclaims for breach of contract based upon Brenner's alleged solicitation and servicing of Brenner Clients in violation of the Restrictive Covenants, and that he was terminated with cause for wrongfully coding clients in order to obtain more fees from Brenner.

Discussion

Fullman moves for partial summary judgment on its first and second causes of action, seeking to set aside the Restrictive

Covenants as overboard and unenforceable, to recover approximately \$70,000 in outstanding fees due him for services performed, and to dismiss Brenner's counterclaims.

Brenner cross-moves for partial summary judgment on its fourth counterclaim for breach of the Restrictive Covenants, based upon evidence that purportedly establishes that Fullman both solicited and provided tax preparation services to Brenner Clients during the 2008 tax season.

Pre-trial discovery reveals that Fullman admittedly provided tax preparation services to 249 clients who qualify as "Brenner Clients" under the Restrictive Covenants, and that he received approximately \$105,000 in fees from them (Fullman's Rule 19-A Statement, ¶¶ 23-24).

The parties dispute whether any of these clients had a pre-existing relationship with Fullman that originated with him while he was employed with Gallagher and came to Brenner only because of their relationship with Fullman, or were clients that Fullman acquired while employed at Brenner.

Fullman was required to execute the Agreement containing the Restrictive Covenants as a condition of initial employment. The Restrictive Covenants contain a reimbursement clause, that requires Fullman to compensate Brenner \$2,000³ for providing tax and financial planning services to any client or prospective

³ The reimbursement clause states that Fullman must pay either \$2,000 or the fee paid by the client, whichever is higher, for each Brenner Client serviced by Fullman subsequent to termination. Fullman submits that he charged much less than \$2,000 for each client he serviced.

client of Brenner located within one mile of Brenner's Manhattan office for a period of two years following his termination at Brenner.

Non-compete clauses in employment contracts are not favored (*Morris v Schroder Capital Management Intl.*, 7 NY3d 616, 620 [2006]). To be enforceable, a non-compete clause must meet a three-pronged reasonableness test: it must be no greater than is necessary to protect the legitimate interests of the employer, it must not impose undue hardship on the employee, and it must not be injurious to the public (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-92 [1999]).

The Restrictive Covenants are overboard and unenforceable. First, they require Fullman to compensate Brenner for each "Brenner Client" serviced by Fullman following his termination for a period of two years. The definition of Brenner Clients includes current clients of Brenner, irrespective of whether Fullman ever provided services for them while employed there, and also include prospective clients of Brenner who never actually utilized its services. In addition, the provision extends to financial planning clients.

Brenner concedes that the Restrictive Covenants are overly broad insofar as they seek to prevent Fullman from soliciting or performing financial planning services to any of Brenner's current or prospective clients. Brenner is not licensed or qualified to provide financial planning services, and thus, has no legitimate business interest to protect in this regard (see

Good Energy, L.P. v Kosachuk, 49 AD3d 331, 332 [1st Dept 2008]).

Further, the Restrictive Covenants extend to prospective clients of Brenner, even those who never actually utilized Brenner's services or acquired a relationship with Brenner, but include those who merely contact Brenner to inquire about its services, irrespective of whether Fullman ever had contact with these prospective clients while at Brenner's employ or had a pre-existing relationship with them. In this regard, the Restrictive Covenants are overly broad and evidently do not seek to protect a legitimate interest of Brenner (*Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 AD3d 805, 806-07 [3d Dept], lv denied 3 NY3d 612 [2004]; *Good Energy, L.P.*, 49 AD3d at 332 [a restrictive covenant is unreasonable where the restriction includes clients that were not serviced by the former employee during his tenure and those that came to the employer solely because of a pre-existing relationship with the employee]).

Legitimate interests of the employer are typically limited to circumstances where the employee's services are unique or extraordinary, protection against misappropriation of trade secrets, or the protection of client relationships developed by an employee at the employer's expense (*Id.*; *Elite Promotional Mktg., Inc. v Stumacher*, 8 AD3d 525, 530 [2d Dept 2004]).

First, Brenner fails to demonstrate that Fullman provided unique or extraordinary services. Fullman prepares tax returns and provides financial planning advice. Brenner employs over 120 tax return preparers. Although Fullman may be experienced,

Brenner is not seeking to enforce the Restrictive Covenants based upon the unique or extraordinary nature of the services that Fullman performed that might give him an unfair advantage over Brenner (see *Reed, Roberts Assocs. v Strauman*, 40 NY2d 303, rearg denied 40 NY2d 918 [1976]; *Willis of New York, Inc. v DeFelice*, 299 AD2d 240, 241 [1st Dept 2002]; *Empire Farm Credit ACA v Bailey*, 239 AD2d 855, 856 [3d Dept 1997] [former employee who provided financial services and tax preparation, record-keeping and related financial assistance did not provide unique and extraordinary services]).

Brenner does not allege that its customer names and contact information constitute trade secrets (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 391-92 [1972]). Additionally, Brenner fails to demonstrate that Fullman engaged in wrongful means in competing for clients, or otherwise obtained a competitive advantage by using confidential information of Brenner (see *BDO Seidman*, 93 NY2d at 391; see also *Reed, Roberts Assocs., Inc.*, 40 NY2d at 308-09; *Leo Silfen, Inc.*, 29 NY2d at 391-94).

The factual basis for Brenner's assertion that Fullman engaged in unfair competition consists of Brenner's principal's affidavit stating that Fullman wrongfully solicited its clients by, inter alia, sending Christmas cards and other unidentified mailings to Brenner clients after his termination (Brenner's Rule 19-A Statement, ¶ 56; Versichelli Aff., ¶ 6).

Further, Brenner's principal states that a client advised Brenner office personnel that Fullman "gave him a business card

displaying only plaintiff's name, his cellular telephone number and email account," and that he continued to distribute his personal business card after being told not to (Brenner Aff., ¶¶ 38-39).

Brenner's principal also states that another client represented that Fullman pulled the client aside at Brenner's office and stated, "I'm not going to be working here next year, call me when you're ready" (Brenner Aff., ¶ 40). Brenner does not submit any sworn statements from these clients, and does not allege that Fullman actually formed a relationship with any of these clients subsequent to his termination at Brenner.

Brenner additionally concludes in an affidavit that Fullman removed files, records, and lists of client names, and other confidential property of Brenner, and that Fullman inexplicably produced copies of lists of Brenner's client names and their contact information during discovery (Brenner Aff., ¶¶ 41-42).

Brenner states that, in analyzing the list of names of the 249 disputed clients, the "overwhelming majority of individuals that plaintiff admits to providing tax services for in 2008 were prior R&G Brenner clients, some of whom had a relationship with R&G Brenner from as early as 2002" (Brenner Aff., ¶ 46).

Gallagher, Fullman's former employer, submitted an affidavit stating that while Fullman was working for him and prior to his employ at Brenner, Fullman did not have his own client list, and that if he did, "it was no more than a handful" (Gallagher Aff., ¶¶ 4). Finally, Gallagher states that, while Fullman was

employed for him, all of the clients that they serviced were Brenner clients (*Id.*).

However, from the client lists submitted by Brenner in support of its motion, the Court is unable to conclude that Fullman wrongfully solicited Brenner's clients which would have established that Fullman engaged in unfair competition, or that he obtained a competitive advantage over Brenner at Brenner's expense. It is evident that a number of the disputed clients had a pre-existing relationship with Fullman and originated from his employment as an assistant to Gallagher. It is not clear from the record whether any of these clients contacted Fullman of their own accord, contacted Fullman after Brenner sent out a mass mailing to 1,000 of its clients announcing Fullman's departure, from having received a Christmas card from Fullman, or if they were indeed solicited by Fullman while employed at Brenner.

Consequently, Brenner's failure to raise a triable issue of fact that Fullman engaged in wrongful means and solicited clients with whom he acquired relationships with while at Brenner's employ undermines any contention that Fullman engaged in unfair competition and gained a competitive advantage over Brenner at Brenner's expense (*see BDO Seidman*, 93 NY2d at 391).

Moreover, the reimbursement clause of the Restrictive Covenants is unreasonable to the extent that it appears to be grossly disproportionate to probable loss (*compare Crown It Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265-66 [1st Dept 2004]).

The reimbursement clause set forth in the Restrictive Covenants requires Fullman to pay \$2,000 per Brenner Client he provides services to for two years following his termination, which is effectively a liquidated damages provision. Brenner does not dispute that \$2,000 is far greater per client than Fullman actually received for his services. If the clause is enforced as written, Fullman would be required to pay Brenner in excess of \$500,000, although he received no more than \$105,000 in fees for servicing these clients during the 2008 tax season. This amount is plainly and grossly disproportionate, and does not appear to have any reasonable relationship to the probable loss. Further, it would undoubtedly impose great personal hardship upon Fullman.

For these reasons, the Court determines that the restraints set forth in the Restrictive Covenants are greater than is necessary to protect any legitimate interest of Brenner, and thus, are unenforceable (see *BDO Seidman*, 93 NY2d at 392; *Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 AD3d 805, 806-07 [3d Dept]).

Nevertheless, Brenner urges the Court to partially enforce the remainder of the Restrictive Covenants. Brenner seeks partial enforcement to the extent that the restraints are not unreasonable as to duration, geographical scope and do not impose a burden on the public, in order to compensate it for Fullman's provision of tax preparation services to current Brenner clients that he acquired during the course of his employment at Brenner.

However, severance in favor of partial enforcement is inappropriate, in light of the particular circumstances of this action.

A court may modify a non-competition provision in order to partially enforce an otherwise unenforceable employment agreement to the extent necessary to protect an employer's legitimate interest, where the unenforceable portion is not an essential part of the agreed exchange (*BDO Seidman*, 93 NY2d at 394-95).

Thus, where the unenforceable portion is not an essential part of the exchange, courts will conduct a case specific analysis focusing on the conduct of the employer in imposing the terms of the agreement (*Id.*). If the employer demonstrates an absence of overreaching or coercive use of dominant bargaining power or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest consistent with reasonable standards of fair dealing, partial enforcement may be justified (*Id.*).

First, it cannot be said that the unreasonable and overboard restraints identified, namely the restraint that extends to prospective clients, financial planning clients (despite Brenner's admitted non-qualification to provide these services), and the \$2,000 reimbursement clause, were not essential parts of the employment agreement.

Further, Brenner required Fullman to sign the Restrictive Covenants as a condition of initial employment, and it appears that if he had refused to sign it, he would not have been hired.

Fullman was not offered a promotion or a higher level of responsibility, or any other added benefit other than initial employment, as consideration for executing the Restrictive Covenants. For these reasons, the Agreement does not appear to be the product of an agreed exchange but rather, of Brenner's superior bargaining power (accord *Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 807-08; *Ashland Mgt. Inc. v Altair Investments NA, LLC*, 59 AD3d 97, 114-15 [1st Dept 2008] [dissent]; compare *BDO Seidman*, 93 NY2d at 395).

Moreover, Brenner continued to require Fullman, and presumably other tax preparers, to execute the employment agreement containing the Restrictive Covenants even after the issuance of the Court of Appeals' ruling in *BDO Seidman* (93 NY2d 382).

The totality of these factors, and in particular, the intention to extend the restraint to include services for which Brenner is not licensed to perform, point to anti-competitive conduct that cannot be sanctioned.

For these reasons, Brenner's cross-motion as to summary judgment on its fourth counterclaim for breach of the Restrictive Covenants is denied, and Fullman's motion for summary judgment as to its claim for a finding that the Restrictive Covenants are unenforceable and to dismiss those counterclaims that seek to find Fullman in breach of the Agreement, is granted.

As to the second cause of action for fees, Fullman asserts that it is due approximately \$70,000 in fees for tax returns he

prepared.

The Agreement states that Fullman would receive 25% of monies collected by the tax returns actually prepared and signed by Fullman (Agreement, § 4).

Brenner states that Fullman is not entitled to additional compensation because he forfeited any additional compensation by willfully and surreptitiously receiving compensation for tax returns that he did not prepare or sign, by miscoding receipts. Specifically, Brenner states that Fullman miscoded receipts and received approximately \$250,000 in compensation for tax returns that were prepared and signed by Gallagher, Fullman's former employer and a Brenner employee. Gallagher submitted an affidavit, stating that he learned that Fullman miscoded tax returns by logging the returns in Brenner's internal system and entitling him to advance compensation, for tax returns personally prepared and signed by Gallagher (Gallagher Aff., ¶¶ 8-11).

Fullman disputes that he miscoded any returns in Brenner's system, asserting that any coding made by Fullman was done with Gallagher's knowledge and consent, and submits spreadsheets prepared by Fullman that were purportedly submitted to Gallagher for his review and approval for each tax return that Fullman coded.

The Court cannot resolve these disputed facts on a motion for summary judgment, that involves resolving issues and making credibility determinations (*DeJesus v Alba*, AD3d, 2009 NY Slip Op 04704, *6 [1st Dept 2009]). Therefore, Fullman's motion for

summary judgment as to his second cause of action is denied.

Finally, the court denies, in its discretion, Fullman's application for sanctions and attorney's fees (*Kalyanaram v New York Institute of Technology*, _AD3d_, 2009 NY Slip Op 04349, *3 [1st Dept 2009]).

Accordingly, it is

ORDERED that plaintiff's motion is granted, in part, and denied, in part; and it is further

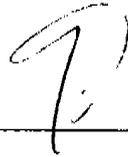
ORDERED that defendant's cross-motion is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 53 on July 13, 2009 at 10:30 AM.

Dated: June 23, 2009

ENTER:



J.S.C.

HON. CHARLES E. RAMOS

FILED

JUL 06 2009

COUNTY CLERK'S OFFICE
NEW YORK