STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

LAZER INCORPORATED,

Plaintiff, DECISION AND ORDER

v. Index # 2004-13445

ROSEMARIE KESSELRING,

Defendant.

This matter is before the court following a motion for summary judgment filed by plaintiff and a cross-motion for summary judgment filed by defendant. Oral argument was held on July 6, 2005, and the court ruled at that time that plaintiff's motion for summary judgment was denied. Further, it was held that the portion of defendant's cross-motion which was for dismissal of plaintiff's cause of action grounded in unjust enrichment was granted. The court reserved decision on the remainder of defendant's cross-motion, and that will be addressed at this time.

Facts and Procedural Background

According to its own description as contained in the complaint, plaintiff is a corporation which, "has provided businesses with various digital services used in the production of marketing and packaging materials, including imaging, design and mechanical layout, electronic prepress, and catalog and packaging development." (Complaint, paragraph 3). Defendant was

an employee of plaintiff who left its employ in July 2004, and began working for Jay Advertising ("Jay") immediately thereafter. According to the affidavit of Greg Smith, the President of Jay, Jay is a advertising and marketing company which conducts advertising, planning, research, promotions, media and public relations. These descriptions of the two companies have not been contested by either of the parties.

Defendant was required to execute an Employment Agreement on May 31, 2000. It contained, *inter alia,* restrictive covenants. One, found in paragraph 5.4, was a covenant not to compete. It consisted of general language in which defendant, for the period of one year following termination of employment with plaintiff, agreed, not to compete with plaintiff, nor solicit any customers of plaintiff, and not to work for a competitor. A second restrictive covenant was found in an entirely different paragraph. Paragraph 5.6 provided that, during the one year post-employment period, defendant "shall not hire any employee of the [Plaintiff] or solicit any employee of the [Plaintiff] to leave the employment of the [Plaintiff] for any reason." When defendant's initial term of employment was nearing an end, plaintiff sent defendant a letter in which plaintiff indicated that it wished to retain defendant as an employee, and made several amendments to the May 31, 2000, agreement. Among those revisions, plaintiff wrote that paragraph 5.8 was deleted in its

entirety. Neither party contests that defendant was employed under the terms of the May 31, 2001 amendments to the May 31, 2000 Agreement.

Plaintiff filed suit against defendant alleging damages as the result of defendant's alleged solicitation of one of plaintiff's employees, Marianne Warfle. Plaintiff has asserted that defendant actively participated in the hiring of Warfle by Jay to such an extent that defendant violated her restrictive covenant not to solicit plaintiff's employees. Defendant, in response, has contended that she did nothing affirmative to seek out Warfle, that Warfle merely responded to a blind ad for an open position which turned out to be with Jay, and upon learning that Warfle had applied for the open position, informed both her and Jay that she could not actively assist in the potential hiring process of Warfle in deference to the restrictive covenant which she had executed with plaintiff. The parties' submissions on these motions focus primarily on this factual dispute. But defendant's cross motion may be resolved in her favor without a trial of that discrete factual issue.

Discussion and Analysis

The non-recruitment provision at issue appears in Article 5 of the agreement entitled "Covenants by Employee." The first three paragraphs of Article 5 concern confidential information. ¶5.4 is a covenant not to compete. Paragraph 5.5 is a non-

solicitation of customers provision. Paragraph 5.6, the one at issue here, is a non-recruitment provision which reads, in its entirety, “During the non-competition period, the employee shall not hire any employee of the company or solicit any employee of the company to leave the employment of the company for any purpose.” As I indicated at oral argument, two issues immediately present themselves by defendant’s cross motion. First, can the non-recruitment provision be read as a stand-alone covenant, without regard to and not tied to the non-competition provisions? Second, if it can be read as a stand-alone provision, is it enforceable in this state? Both the structure of Article 5 of the agreement and the first clause of ¶5.6 compel a reading of the ¶5.6 covenant as erecting a non-recruitment duty only in conjunction with the non disclosure of propriety information provisions(¶5.1, ¶5.2, and ¶5.3) and the non-competition provisions (¶5.4, ¶5.5 and, as I find here, ¶5.6). The first clause of ¶5.6 (“During the non-competition period”) makes the tie-in explicit, thus signaling the intention of the parties to make the non-recruitment duty applicable only in a case in which a competitor is involved or the protection of confidential or proprietary information is at stake.

Even assuming, however, that the non-recruitment provision may be read as a standalone provision, having application to non-competitors in a case in which the former employer fails to

establish that protection of confidential information is at stake, such a provision would be held unenforceable in New York. The Court of Appeals has not considered whether a covenant not to recruit is enforceable in this state. The federal courts cite Veraldi v. American Analytical Laboratories, Inc., 271 A.D.2d 599 (2d Dept. 2000), however, as authority for the proposition that "New York recognizes the enforceability of covenants not to solicit employees." Global Telesystems, Inc. v. KPNQWEST, N.V., 151 F.Supp.2d 478, 482 (S.D.N.Y. 2001). See also, Automated Concepts Incorporated v. Weaver, unpublished, No. 99 C 7599 (N.D. Ill. August 9, 2000)(2000 WL 1134541).

Veraldi is indeed the only New York case I have been able to find treating a covenant not to solicit employees. The case involved a counter claim asserting that the former employee solicited the employer's customers and employees, both of which was covered by restrictive covenants. The court upheld the trial court's refusal to dismiss the counterclaims, observing that "the restrictive covenant does not violate public policy and, therefore, is enforceable." Veraldi, 271 A.D.2d at 600. In support of this conclusion the court cited Slomin's Inc. v. Gray, 176 A.D.2d 934, 935 (2d Dept. 1991), which was a sale of business case not involving a covenant prohibiting solicitation of former co-employees. See id. 176 A.D.2d at 935. The court's cryptic statement that the covenant "does not violate public policy" did

not reveal whether the covenant was tested under the concept of reasonableness applicable to restraints on competition (as a species of restraints on trade), A.L.I., Restatement (Second) of Contracts §188 (1981); BDO Seidman & Hirshberg, 93 N.Y.2d 382, 388-89 (1999)(three prong test), or the rule of reason test applicable to covenants in restraint of trade generally. A.L.I., Restatement (Second) of Contracts §187, or some other test.

I assume that, because the particular kind or type of restraint that is involved here is a post employment restraint on the conduct of an employee, the covenant should be analyzed according to the three pronged reasonableness formula of BDO Seidman and §188 of the Restatement (Second) of Contracts. See generally, Blake, Employee Agreements Not To Compete, 73 Harv. L. Rec. 625, 646 (1960)(tracing "the divorce of the law of employee restraints from its rather unnatural marriage with the doctrines governing restraints of other types"). The New York cases, although invariably dealing with post employment covenants not to compete, speak of the "overriding requirement of reasonableness" as applying to "negative covenants" or "restrictive covenants" directed at employee conduct generally, with "the formula of reasonableness . . . vary[ing] with the context and type of restriction imposed." Reed, Roberts Associates, Inc. v. Strauman, 40 N.Y.2d 303, 307-08 (1976). But an agreement of the kind found here, restricting as it does a former employee's

freedom to solicit his former co-employees, necessarily also affects "the general competitive mold of society," American Broadcasting Companies, Inc. v. Wolf, 52 N.Y.2d 394, 404 (1981), and is in derogation of the concept, invoked in the cases on this subject, that "our economy is premised on the competition engendered by the uninhibited flow of services, talent and ideas." Read, Roberts Associates, Inc. v. Strauman, 40 N.Y.2d at 307. Accordingly, a covenant not to solicit former co-employees is a species, albeit a limited one, of a covenant not to compete in the broad sense and is governed by the three part test of reasonableness articulated in BDO Seidman and §188 of the Restatement (Second) of Contracts.

To be sure, such a covenant does not affect in the same way the "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood," Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d at 272. That factor, however, does not take such a covenant out of the class of anti-competitive employee covenants subject to reasonableness scrutiny generally applicable to non-compete agreements, because as stated above it is only "the formulation of reasonableness [that] may vary with the context and type of restriction imposed." Reed Roberts, Associates, Inc. v. Strauman, 40 N.Y.2d at 307. This is confirmed by the citation in BDO Seidman, 93 N.Y.2d at 389, of Technical Aid Corp. v. Allen, 134 N.H. 1, 591 A.2d 262 (1991),

which upheld on its facts a covenant not to solicit the former employer's employees. Id. 134 N.H. at 13-14, 591 A.2d at 269. The court agreed at "[s]uch a prohibition certainly may have some impact on . . . [the former employee]'s employment," id. 134 N.H. at 15, 591 A.2d at 270, and therefore it is appropriate to analyze ¶5.6 under the three-pronged test of reasonableness of BDO Seidman, or some variant thereof.[1]

Generally, a restrictive covenant in an employment agreement "is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." BDO Seidman, 93 N.Y. at 388-89. "A

[1] There is authority to the contrary elsewhere. Smith Barney Harris Upham & Co., Inc. v. Robinson, 12 F.3d 515, 519 (5th Cir. 1994)("narrowly tailored covenant not to solicit employees of the employer is not among the kinds of agreement covered by the [Louisiana] statute"); Boasley v. Hub City Texas, L.P., unpublished 2003 WL 22254692, at n.3 (Ct. App. Tex. Sept. 29, 2003)("'nonrecruitment covenants . . . do not necessarily restrict a former employee's ability to compete with his or her former employer and, like nondisclosure covenants, should not significantly restrain trade'" (quoting Totino v. Alexander & Assocs., Inc., unpublished 1998 WL 552818, text at 28-30)(Ct. App. Tex. Aug. 20, 1998)). Compare YCA, LLC v. Berg, unpublished 2004 WL 1093385 at *17-*18 (N.D. Ill. May 7, 2004), with, Unisource Worldwide, Inc. v. Carrara, 244 F.Supp. 2d 977, 983 (C.D. Ill. 2003), for varying approaches to Illinois Law. The problem with these cases, however, is that they completely remove the matter from any reasonableness analysis while the approach taken in the text above factors the more benign nature of the restrictive covenant into the common law reasonableness analysis. For the reasons stated above, I believe the Court of Appeals cases on restrictive employment covenants require this, as Veraldi seemed to recognize.

violation of any prong renders the covenant invalid." Id., 93 N.Y.2d at 389. As stated above, however, the reasonableness test "may vary" depending upon the type of restriction involved and the circumstances. The precise formulation of the reasonableness test for a covenant of this nature should be left to the Court of Appeals, as the exclusive policy making arm of the state judiciary. But it has been held that the reasonableness inquiry may be avoided altogether when the court finds that application of a particular restrictive covenant will not serve any legitimate employer interest. American Institute of Chemical Supervisors v. Reber-Friel Co., 682 F.2d 382, 387 (2d Cir. 1982)("we need not reach the questions of reasonableness of the scope of the covenant because legitimate interests of the employer are not implicated"). True, this is a federal case, but the clear message of BDO Seidman was the same: enforcement of a covenant restricting employee competition will be upheld only to the extent it serves a legitimate interest of the employer to avoid unfair competition. BDO Seidman, 93 N.Y.2d at 391-93 (drawing a sharp distinction between the concept of unfair competition and the illegitimate purpose of avoiding competition in a general sense).[2]

[2] This is just another way of saying that a failure to meet the first prong of the tripartite common law standard (restraint must be "no greater than is required for the protection of the legitimate interest of the employer," BDO Seidman, 93 N.Y.2d at 388-89 [emphasis in original]) obviates the need to consider the

Here, defendant establishes as a matter of law that enforcement of the nonrecruit provision of the agreement will not serve any legitimate employer interest in the circumstances, and plaintiff fails to raise an issue of fact on the matter. It is not alleged that the employer allegedly recruited possesses any confidential or proprietary information of the plaintiff, nor is it alleged that she was in any position to acquire trade secrets. Plaintiff does not present any admissible evidence that she was a particularly valuable or unique employee, or provided services to plaintiff which cannot easily be replaced. Ken J. Pezrow Corporation v. Seifert, 197 A.D.2d 856 (4th Dept. 1993); ABC Mobile Brakes, Division of D.A.Mote, Inc., v. Leyland, 84 A.D. 2d 914 (4th Dept. 1981). Most important, plaintiff fails to raise an issue of fact that Jay Advertising and it are competitors in any sense of the word other than that any two employers would like the services of a good employee. To the extent that interest is affected by the alleged recruitment here, it is not one of those interests which permit enforcement of a restrictive covenant in this state. See LaBriola v. Pullard Group, Inc., 152 Wash.2d 828, 847, 110 P.3d 791, 800 (2004)(holding unenforceable a restraint "designed to stabilize a company's current workforce"); Schmorahl, Treloar & Co., P.C. v. McHugh, 28 S.W. 3d 345, 350 (Mo. Ct. App. E.D. 2000)("rationale for protecting trade

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other two prongs of the test.

secrets and customer contacts does not extend to protecting an employer's interest in keeping at-will employees from leaving their employment"). Cf., National Employment Service Corporation v. Olsten Staffing Service, Inc., 145 N.H. 158, 161, 761 A.2d 401, 405 (2000)("although there may be valid reasons to restrictive covenants, the mere cost associated with recruiting and hiring employees is not a legitimate interest protectable by a restrictive covenant in an employment contract"). Cf., Lockheed Martin Corp. v. Aatlas Commerce, Inc., 283 A.D.2d 801, 803 (3d Dept. 2001); Headquarters Brick-Nissan, Inc. v. Michael Oldsmobile, 149 A.D.2d 302 303-04 (1st Dept. 1989)("nor is the mere inducement of an at will employee to join a competitor actionable, unless dishonest means are employed, or the solicitation is part of a scheme designed to produce damage"). Accordingly, defendant establishes as a matter of law that, in these circumstances involving no competition, and no confidential or proprietary information at stake, no legitimate interest of the employer is served by the covenant, and plaintiff raises no issue of fact warranting a trial.

Conclusion

Defendant's cross-motion for summary judgment is granted. Guiffrida v. Citibank Corporation, 100 N.Y.2d 72 (2003); Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986).

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: July 21, 2005
Rochester, New York