

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

TJMC, INC., d/b/a NAPOLI'S,

Plaintiff,

Bench Decision
(Do Not Distribute)

vs.

Index #: 815418/2019

POMRICO A. MAROTTO,

Defendant.

Plaintiff has commenced an action against the Defendant alleging a breach of an employment contract. Plaintiff sought preliminary injunctive relief in an Order to Show Cause, which was denied on November 20, 2019. The Court scheduled the Order to Show Cause returnable on January 10, 2020 to hear argument on whether the Court would grant a permanent injunction (1) enjoining the Defendant from operating, owning, or working for a men's clothing establishment at 6580 Main Street, Williamsville, New York or an alternate location within 75 miles of Plaintiff's place of business, (2) compelling Defendant to return a "clientele" list to the Plaintiff and to destroy any copies in his possession, (3) enjoining the Defendant from soliciting Plaintiff's employees and clientele, (4) directing the Defendant to cease making disparaging remarks about the Plaintiff, its officers and employees, and (5) such other and further relief as the Court may deem just and appropriate.

Subsequent to the hearing of arguments once notice of the preliminary injunction was given, counsel for Plaintiff advised the Court and counsel of case law that supports the granting of a preliminary injunction and requested that the Order to Show Cause be made returnable earlier than January 10, 2020. The Court granted that request and afforded Defendant time to supply opposing papers, which the Court has received.

At issue is an employment contract existing between Plaintiff and Defendant. The parties to this action entered into this agreement on August 14, 2012 which was for a five-year delineated term. The term of the agreement began on September 15, 2012 and expired on September 14, 2017. The agreement, in Article 7, provided for several restrictive covenants that survived the agreement for a period of two (2) years after termination of the agreement, or September 14, 2019, or thereabouts. The agreement specifically provides that the term continues “through and until September 14, 2017 unless otherwise extended by the parties in writing.” The agreement was never extended in writing nor does it appear that the parties engaged in negotiations to extend the agreement. On November 1, 2019, Plaintiff alleges that Defendant abruptly resigned and demanded compensation in accordance with Article 2 of the agreement, which was entitled “compensation.” In bringing this application, Plaintiff alleges that it has been harmed inasmuch as Defendant poses a risk to take trade secrets, clientele and other business from its store to the new

enterprise Defendant intends to open. Plaintiff alleges that Defendant has leased space for a new mens clothing store, that they believe will directly compete with its clothing store, approximately one-half mile from its store. Further, Plaintiff alleges that Defendant will sell mens clothing, which he is prohibited from doing pursuant to the restrictive covenants contained in the employment contract. In doing so, Plaintiff alleges that it “will” (emphasis added) suffer substantial damages and be irreparably harmed by Defendant’s conduct. Plaintiff also contends that it will suffer economic damages, which it notes are not measurable at this time without additional discovery.

CPLR 6301 provides that the court may grant a preliminary injunction “in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.” “The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 N.Y3d 839 (2005). ‘A motion for a preliminary injunction is addressed to the sound discretion of the trial court[,] and the decision of the trial court on such a motion will not be disturbed on appeal, unless there is a showing of an abuse of discretion’ ” Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp., 69 A.D.3d 212 (4th Dept. 2009).

The Court previously denied Plaintiff's request for a preliminary injunction when notice of its intention was first given. After permitting the Defendant an opportunity to oppose, and weighing the Plaintiff's additional arguments, the Court similarly denies Plaintiff's request for a preliminary injunction.

While the facts are perhaps more ambiguous in the authority relied upon by Plaintiff, here, the terms of the agreement are clear and unambiguous. The term of the agreement was fixed, it was never modified or extended in writing, as it contemplated, and the term of the restrictive covenants expired. As such, the plain meaning of the agreement should be enforced without regard to the consideration of the extrinsic evidence Plaintiff seeks for the Court to consider when determining the intent or subsequent practice of the parties. Chimart Assoc. v. Paul, 66 N.Y.2d 570 (1996). Plaintiff's argument, if it were to be accepted, would render meaningless the clear delineation of the agreements term which was negotiated as well as the method for its extension, which was not followed. Helmsley-Spear Inc. v. New York Blood Ctr., 257 A.D.2d 64 (1st Dept. 1999). Here, there is no evidence suggesting that the parties agreed for the agreement to continue in perpetuity or that it was to be renewed automatically. Goldman v. White Plaints Ctr., 11 N.Y.3d 173 (2008). As such, this Court finds that the agreement expired by its own terms and that Defendant's conduct, regardless of how egregious or in poor form it is, does not warrant injunctive relief.

Further, a preliminary injunction is not necessary when monetary damages would suffice. Irreparable injury generally cannot be established where any damages sustained are calculable, because the plaintiff in such a case would have an adequate remedy in the form of monetary damages. D&W Diesel v. McIntosh, 307 A.D.2d 750 (4th Dept. 2003). In D&W Diesel, the Fourth Department, in a similar case, held that "[R]estrictive covenants that tend to prevent an employee from pursuing a similar vocation upon termination or retirement from employment are disfavored by the law * * * [and] will not be enforced unless necessary to protect trade secrets, confidential customer lists or good will, or to prevent special harm to which the former employer might be exposed because of the unique nature of the employee's services." Briskin v. All Seasons Servs., 206 A.D.2d 906 (___ Dep't 1994]; see American Broadcasting Cos. V. Wolf, 52 N.Y.2d 394 (1981). A non-competition agreement is subject to a reasonableness test, and "[t]he modern, prevailing common-law standard of reasonableness * * * applies a three-pronged test. A restraint 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 * * *. A violation of any prong renders the covenant invalid." BDO Seidman v. Hirshberg, 93 N.Y.2d 382 (1999).

Here, the restrictions imposed by the non-competition agreement are "*greater* than is required for the protection of the *legitimate interest* of"

plaintiff, in that Plaintiff's arguments are speculative and have not established that Defendant's talents and resources alone are sufficient to cause irreparable injury. Thus, because Plaintiff failed to demonstrate a likelihood of success on the merits with respect to the enforceability of the agreement, and because any loss of sales occasioned by the allegedly improper conduct of defendant can be calculated after discovery, Plaintiff's remedy is more in the form of monetary damages. Accordingly, injunctive relief is both unnecessary and unwarranted. Main Evaluations v. State of New York, 296 A.D.2d 852 (___ Dept. 2002); Elpac, Ltd. v Keenpac N. Am., 186 A.D.2d 893 (___ Dept. 1992).

As such, the request for injunctive relief is hereby denied. Defendant shall submit an order together with a transcript of this decision.