STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

SUZANNA AMALFI, SUSANNE FALVO DICESARE and SOOZ SALON, LTD.,

Plaintiff,

v.

KEITH H. HELMICKI and THE KEITH SALON, LLC,

Defendant.

DECISION AND ORDER

Index #2007/05476

Plaintiffs move for summary judgment declaring that (1) they are entitled to bi-weekly payments from defendants in a sum equaling 20% with the gross revenues generated in defendants' hair salon, which is situate within 25 miles of plaintiffs' place of business, for two years; (2) that defendants have breached the terms of the Independent Contractor Agreement, dated September 17, 1998, by failing to make such payments; and (3) that plaintiffs are entitled to recovery of attorney's fees by reason of their breach of the Independent Contractor Agreement. Defendants cross-move for partial summary judgment dismissing the first cause of action alleging a breach of the ICA, the second cause of action alleging conversion and misappropriation of plaintiffs' confidential information, and the third cause of action alleging a breach of the ICA in connection with Helmicki's alleged direct solicitation of plaintiffs' customers to do business with his current business, The Keith Salon, LLC.

In December 1995, Helmicki sold his business, Keith Salon, Ltd., to the plaintiffs, which included the real property and improvements located at 2036 Monroe Avenue in the City of Rochester, the name Keith Salon, the good will thereof and the telephone numbers used in conjunction with the operation of the salon. Plaintiffs executed a purchase and sale agreement which contained the purchase price to be paid, i.e., by delivery of a partial lump sum payment upon closing, with the balance due under a note and mortgage to be paid over the course of seven years. Article 5 of the purchase and sale agreement contained a non-competition clause which conditioned the purchase and sale on execution of a separate non-competition agreement. The purchase and sale agreement contained a recital, in Section 5.01(d) that the non-competition agreement to be executed was to be delivered in "consideration . . . [of] part of the purchase price set forth in Article 2 hereof." The non-competition agreement was executed on June 3, 1996, the closing date of the purchase and sale agreement, and obligated Helmicki not to "directly or indirectly own, invest, manage, operate, control or be employed or retained by or participate in or in any way be connected with a hair salon business located within twenty five (25) miles of the business premises," for a period of 10 years after execution of the non-competition agreement. The consideration for the non-competition agreement was stated in Section 3 thereof to be $19,000 of the

purchase price.

In 1998, Helmicki contacted plaintiffs for the purpose of relocating back to Rochester and working at plaintiffs' hair salon at 2036 Monroe Avenue. The parties entered into two agreements, one called an Amendment Agreement, and the second of which was entitled an Independent Contractor Agreement (ICA). The Amendment Agreement recited that Helmicki "wishe[d] to modify the terms and conditions of the Non-Competition Restriction so as to permit Keith H. Helmicki to become employed, as an independent contractor at the business premises at 2036 Monroe Avenue." The agreement also recited that Helmicki was "willing to agree to a reduction in the Purchase Price of the Purchased Assets and a corresponding reduction in the Unpaid Principal Balance of the Note and Mortgage."

The Amendment Agreement reduced the balance due on the purchase price, and amended the 1996 non-competition agreement to permit "Helmicki, individually, . . . [to] operate as a hair stylist only within the business premises . . . of 2036 Monroe Avenue, . . . , provided, however, that he only so operates as an independent contractor in strict compliance with the terms and conditions of . . ." the contemporaneously executed Independent Contractor Agreement. The Amendment Agreement further provided that, if Helmicki breached the terms of or terminated the Independent Contractor Agreement, "Helmicki shall immediately

cease and desist from operating as a hair stylist within the Non-competition Area" described in the non-competition agreement executed in 1996. Other than these two changes, the Amendment Agreement left the December 1995 Purchase and Sale Agreement and the 1996 Non-Competition Agreement, together with the Note and Mortgage executed in connection with the sale of the business "in full force and effect and unmodified."

The Independent Contractor Agreement also recited the non-competition provision of the 1996 Non-Competition Agreement, and recited that the ICA and Amendment Agreement "modified [the 1995 and 1996 agreements] to permit Contractor to operate as a hairstylist only within the premises of Owner." (emphasis supplied). The ICA otherwise described Helmicki's privilege to work as a hairstylist at 2036 Monroe Avenue as a "license" and confined him to "normal and customary business hours" prescribed by plaintiffs "from time to time," and it further provided that the license/privilege to work as a hairstylist at the premises could not be transferred or assigned nor could Helmicki "have any employees or assistants" working within the premises without the prior written consent of the plaintiffs. Plaintiffs agreed to provide Helmicki with "one or more chairs for use by . . . [Helmicki]'s patrons" and to provide him with certain supplies. The agreement provided that plaintiffs would "be entitled to obtain 40% of the gross charges and fees made and collected by .

. . [Helmicki] in his business on the premises."

The ICA also recited that the "license contained herein shall be considered an agreement 'at will,' terminable on thirty (30) days advance written notice by either party to the other," except that "either party may immediately terminate this agreement without prior notice in the event of a breach or default on the part of either party." Hemicki further "agree[d] that, for the remaining term of the said Non-Competition Agreement, or two (2) years following the termination of this Independent Contractor Agreement, whichever shall last occur, he shall not directly or indirectly, own, invest, manage, operate, control or be employed or retained by or participate in or in any way be connected with a hair salon business located with twenty-five (25) miles of the Owner's premises." The ICA also contained a non-solicitation covenant prohibiting Helmicki, during the same two year period, from soliciting or accepting business or patronage from plaintiffs' customers "who were such customers at the time of the termination of this license and agreement, or solicit for employment or employ any of Owner's employees." This non-competition provision was stated to run "for the remaining term of the said Non-Competition Agreement, or two (2) years following the termination of this Independent Contractor Agreement, whichever shall last occur." Given the "at will" term of the ICA, terminable upon thirty (30) days written notice or

immediately upon breach of the ICA, the parties in unambiguous terms created a new Non-Competition Agreement tied solely to the ICA itself in the event the ICA extended beyond the original 10 year term of the 1996 Non-Competition Agreement, providing for a two year covenant following termination of the ICA.[1]

The ICA also contained a provision which provided that, in the event Helmicki operated a hair salon business within twenty-five (25) miles of 2036 Monroe Avenue within two years following termination of the ICA, Helmicki shall pay, or cause to be paid, to Owner on no less than a bi-weekly basis, a sum equal to 20% of the gross revenue generated in any such hair salon business" located within the twenty-five (25) mile territory. Finally, the ICA contained an attorney's fee provision, which provided for payment by Helmicki of attorney's fees, in the event of his breach of the ICA.

It is undisputed that Helmicki organized and formed a new company, the Keith Salon, LLC on February 9, 2007, that he shortly thereafter began operating a hair salon business by that

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[1] In other words, the parties contemplated that, in the event the ICA terminated before the original 10 year covenant term expired, the ICA's restrictive covenant would only last until the expiration of the original 10 year term beginning in June 1996. Once that 10 year period lapsed during the life of the ICA, as it did here in June 2006, the two year ICA covenant became an independent obligation tied to the life of the ICA itself as provided in its termination provisions, which on this record appears to be April 1, 2007, by agreement of the parties. See Amalfi Reply Affidavit.

name at 1462 Monroe Avenue, which is located approximately one mile away from plaintiffs' business. Plaintiffs sent Helmicki a letter calling attention to the aforementioned provisions of the original Purchase and Sale Agreement, the original Non-Competition Agreement, the Amendment Agreement, and the ICA. The parties evidently agreed on an April 1, 2007, separation date, Almalfi reply affidavit at ¶2, but they disagreed about whether he could serve in his new business customers included in the good will transferred to plaintiffs as part of the December 1995 Purchase and Sale Agreement. Helmicki insisted upon serving his personal clients developed since returning to plaintiffs' business in 1998, as well as those that he previously served in 1995 and which were part of the good will sold to plaintiffs in December of that year.

Thus, plaintiffs establish as a matter of law that, as of early 2007, the ICA was not terminated, either on notice or by reason of breach by either party, that it was still extant, that Helmicki opened a competing business in violation of its terms within one mile of plaintiffs' business, and that it has refused payment under the 20% gross revenue provision, thus warranting a finding that Helmicki has breached the ICA. Contrary to the parties' apparent assumption, the court did not previously find that, by allowing Helmicki to service clients sold as part of the good will of the salon in December 1995, they "returned" those

clients to Helmicki. Under the terms of the Amendment Agreement and the ICA, Helmicki was allowed to service those clients, or at least was not prohibited from doing so, but only while servicing them at plaintiffs' place of business and upon compliance with the financial remuneration provisions of the ICA. The ICA's non-competition and non-solicitation provisions, by their unambiguous terms, were not triggered until termination of the ICA, which occurred no later than April 1, 2007. It was, accordingly, quite beside the point to, in the Decision and Order on the motion for preliminary injunction, which was never incorporated into an order listing the customers in question, as directed at the end of the decision and order, to speak of plaintiffs' acquiescence in Helmicki's servicing of clients included in the salon's 1995 good will sold to them in terms of waiver or estoppel. Although it was important on that motion to identify the categories of customers now served by Helmicki in his new business, some of which he also served in 1995 when he sold his salon, for purposes of fashioning an appropriate non-solicitation provision in the order to be entered on the motion for preliminary injunction, identification of those customers is not necessary to establish liability under Section 9 of the ICA, which depends solely upon the existence of competition within twenty-five (25) miles of plaintiffs' business and proof of non-payment of the 20% gross revenue fee.

Finally, I agree that the ICA and Amendment Agreement was ancillary to the purchase and sale agreement of December 1995, and that therefore assessment of the reasonableness the non-compete and non-solicitation covenant contained in the ICA must be assessed not by the BDO Seidman reasonableness analysis applied to employment contracts, but rather by the more lax reasonableness standards applicable to a transfer of good will in connection with an asset and business purchase agreement. Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d 267, 271-72 (1963); Asteco, Inc. v. Smith, 172 A.D.2d 1066 (4th Dept. 1991). See also, Townline Repairs, Inc. v. Anderson, 90 A.D.2d 517, 517-18 (2d Dept. 1982). First, with respect to the non-solicitation covenant in the ICA, by its terms it applies only to customers Helmicki served in 1995-96 when he sold the business, and thus it is co-extensive with his common law obligations subsequently not to invade the good will of the business he sold. Mohawk Maintenance Co., Inc. v. Kessler, 52 N.Y.2d 275, 284 (1981). The implied covenant given as a part of the sale of the business and good will operates quite independently of the written covenants executed in 1995, 1996, and 1998, id. 52 N.Y.2d at 284-86, and is not subject to the BDO Seidman reasonableness analysis urged upon the court by defendants. Id. 52 N.Y.2d at 284. The implied covenant is perpetual and not, id. 52 N.Y.2d at 284-85, 286-87; Spindel v. Chamberlain, 193 A.D.2d 1060 (4th Dept. 1993), and "is

not subject to a test of 'reasonableness.'" Kraft Agency, Inc. v. Delmonico, 110 A.D.2d 177, 181 (4th Dept. 1985). It was modified by agreement in 1998, but the license given to serve customers of the business he sold in 1995-96 only privileged Helmicki to do so during the life of the ICA (if as here it extended beyond the original 10 year covenant in the 1996 agreement), and only privileged Helmicki's service of these customers within plaintiffs' business premises and under the financial remuneration provisions (in favor of plaintiffs) provided in the ICA. There is nothing unreasonable about plaintiffs' effort to retain the benefits their 1995-96 purchase of good will once Helmicki sought to free himself of the ICA's preconditions to servicing clients generally, and including Helmicki's 1995-96 customers post-1998 in particular, especially because plaintiffs would have a common law right to enforcement of the non-solicitation of good will obligation in perpetuity, and only sought in the ICA to limit Helmicki's right to serve those customers outside of the confines of the ICA for two years after termination thereof. Kraft Agency, Inc. v. Delmonico, 110 A.D.2d at 183-84, 185.

Second, the non-competition provision in section 9 of the ICA is reasonable when judged by the standards of reasonableness of non-competition covenants executed in connection with, or ancillary to, the sale of a business. Asteco, Inc. v. Smith, 172

A.D.2d 1066 (4th Dept. 1991). See also, Townline Repairs, Inc. v. Anderson, 90 A.D.2d 517, 517-18 (2d Dept. 1982). "In determining whether the terms of such a restraint are reasonably necessary to protect [the plaintiff's] interests, the * * * court should consider, among other things, such factors as the size and location of the market areas to be served by the parties and the length of time needed to provide [the plaintiff] with a reasonable period in which to secure his ownership in the good will of the agency." Kraft Agency v. Delmonico, supra, 110 A.D.2d at 185. Although the court has found a case in which a summary determination of unreasonableness in the sale of business context was upheld, Slomin's Inc. v. Gray, 176 A.D.2d 934, 935 (2d Dept. 1991), each of the Fourth Department cases cited above required a reasonableness determination after trial or hearing. The restrictions in those cases, however, were quite broad and involved far longer terms or duration. Here, there is a simple two year provision in a hairstyling business serving the Rochester metropolitan area, and Helmicki set up his business virtually next door on Monroe avenue. The underlying facts presented in admissible form (see below) are not in dispute. Helmicki provides a different characterization of the agreements in question, but I find that his reading of them is not plausible and that the agreements unambigiously provide as set forth above. Chimart Associates v. Paul, 66 N.Y.2d 570, 573 (1986); Sullivan

v. Troser Management, Inc., 34 A.D.3d 1233 (4th Dept. 2006). Plaintiff thus establishes as a matter of law the reasonableness of the non-competition portion of the covenant, and plaintiff fails to raise an issue of fact, thus warranting summary relief.

For the reasons stated in my prior decision, Helmicki's contention that his status changed "when Plaintiffs made me an employee of Sooz Salon" is based only on submissions attending the motion for a preliminary injunction, which are inadmissible parole evidence at best. As stated in the prior decision, the decision to change Helmicki's terms of compensation to what is more akin to an employment relationship than to an independent contractor arrangement is not, by itself, and the change in the terms of payment is all that was alleged on the prior motion (nothing is offered on this motion), "unequivocally referable" to a putative oral agreement to waive or terminate the ICA altogether or the restrictive covenant contained in the ICA in particular. Gen. Oblig. Law §15-301. Ford Motor Credit Co. v. Sawdey, 286 A.D.2d 972 (4th Dept. 2001). See also, American Credit Services, Inc. v. R.V. & Marine Corp., 248 A.D.2d 1007 (4th Dept. 1998). Nor was the change in the terms of payment incompatible with the other aspects of the ICA as written such that estoppel principles are invoked. Ford Motor Credit, supra.

In this respect, there is some variance here with the approach to the problem in the court's prior decision, which

(unnecessarily) found the covenant reasonable insofar as it applied to Helmicki's current customers not personally developed by him since his return in 1998. BDO Seidman, supra. That aspect of the BDO Seidman reasonableness analysis in an employment context directed to whether the employee developed customers while at his or her former firm by the use of his own resources and not those of the employer has never been applied in the sale of business context to this court's knowledge, and thus a finding of competition in violation of the ICA triggering the 20% payment provision is warranted on summary judgment.

It is important also that the provision of the ICA in question here does not ultimately restrict competition and deprive Helmicki of earning a living. Rather, it permits him to compete, but upon payment of the 20% gross revenue fee. Plaintiffs liken a provision like this to those considered in the employee choice doctrine cases, Morris v. Schroeder Capital Management Internaional, 7 N.Y.3d 616 (2006), Lenel Systems International, Inc. v. Smith, 10 Misc.3d 890 (Sup. Ct. Monroe Co. 2005), aff'd., 34 A.D.3d 1284 (4th Dept. 2006), but I find that the provision in question, being a modification of the terms of a business purchase, including purchase of the business' good will, stands on its own as a permissible modification of the 1995 purchase and sale agreement that requires a lessened reasonableness analysis than BDO Seidman requires in the

employment context. Indeed, the fact that competition was not, ultimately, restricted, and the fact that the parties freely came to the financial terms that they did in 1998, strongly supports a summary finding of reasonableness in this case. For that reason, Genesis II Hair Replacement Studios Ltd. v. Vallar, 251 A.D.2d 1082 (4th Dept. 1998), which concerned an employment contract, is inapposite.

Plaintiffs' motion for partial summary judgment is granted in its entirety. Submit an order containing the relevant declarations. The cross-motion is granted in part dismissing the Second Cause of Action inasmuch as it is undisputed that plaintiffs gave Helmicki the subject customer lists, and otherwise it is denied.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: September 14, 2007
Rochester, New York