At a Special Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York on the 19th day of August, 2004

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

MANLEY'S MIGHTY-MART, L.L.C.

Plaintiff,

vs.

JAMES REYNOLDS,

Defendant.

DECISION AND ORDER

Index No. 2004-1782
RJI No. 2004-1034-M

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

Plaintiff Manley's Mighty Mart, L.L.C., ("Manley's") in its application to the Court, seeks a preliminary injunction enforcing a covenant against competition contained in an employment agreement between it and the defendant James Reynolds ("Reynolds")

This proceeding was commenced by Order to Show Cause dated August 12, 2004, returnable before this Court on August 19, 2004. On August 16, 2004, defendant's counsel submitted an Order to Show Cause seeking to vacate the temporary restraining order contained in the Court's August 12, 2004 Order to Show Cause . With that he also submitted his affidavit and the affidavit of the defendant. On August 18, 2004, defendant's counsel submitted an Order to Show Cause seeking to have a motion for summary judgment made returnable the next day.[1] The Court declined to sign either Order to Show Cause. Attorneys for both sides presented oral argument on August 19, 2004. At the conclusion of oral argument, this Court informed the parties that it would continue the temporary restraining order pending further submissions by the parties and the Court's written decision. Thereafter, the parties through their attorneys made several additional submissions to the Court. On August 19, 2004, plaintiff's counsel submitted a letter memorandum. On August 23, 2004, defendant's counsel submitted an affidavit from Joseph Salino and a letter memorandum. On August 24, 2004, plaintiff's counsel submitted a letter memorandum and an affidavit from Anthony Manley. Defendant's counsel submitted affidavits from Reynolds and Joseph Salino on August 25, 2004.

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[1] Defendant's counsel also submitted an affidavit in support of that application and in opposition to the plaintiff's motion for a preliminary injunction, together with an answer to the plaintiff's complaint and a memorandum of law.

Manley's is the purchaser of a convenience store, gas station, food facility located at 1103 Danby Road in the Town of Ithaca, New York. That facility was owned and operated by Big Al's Hilltop Quikstop, Inc. ("Big Al's"). In late 2002, an Asset Purchase agreement (Exhibit B of the Order to Show Cause) was signed by Manley's and Big Al's providing for the sale of certain enumerated assets of Big Al's to Manley's. The Asset Purchase Agreement is supplemented by three Addenda "A," "B," and "C," all dated December 2, 2002[2]. Particularly relevant to this proceeding is Addendum "B" which mentions Mr. Reynolds by name and specifically references payments to be made to him and that an employment agreement will be entered into between him and Manley's. That Addenda provides for a portion of the purchase price to be paid to two "key employees" one of them being Jim Reynolds, the defendant herein. The portion of the purchase price payable to Reynolds is Seventy Five Thousand Dollars ($75,000.00). The provision of the Addenda that contemplates an employment agreement between Manley's and Reynolds reads as follows:

> A. JIM REYNOLDS and SARAH VRZAL will each enter into an Employment Contract with the BUYER for a term of five (5) years, which Contract will specifically provide that at each anniversary date of the Contract, provided it is still in force, BUYER will pay to JIM REYNOLDS and SARAH VRZAL twenty percent (20%) of their total special compensation as above set forth.

According to the affidavits submitted in this matter, the actual sale or transfer of those assets occurred or closed on February 28, 2003.

James Reynolds was by all accounts an employee of Big Al's. On February 25, 2003 he signed an employment agreement with Manley's (Exhibit C of the Order to Show Cause) dated February 21, 2003 providing customary terms and conditions such as enumerated duties,

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[2] Addenda "C" indicates in its heading it is dated December 2, 2002. The signature line indicates it is dated February 28, 2003.

compensation and benefits. It is the covenant not to compete contained in that agreement that is at the center of this litigation. That term of the agreement reads as follows:

> 10. NON-COMPETITION AGREEMENT: Employee agrees that in the event this Employment Agreement is terminated by the Employee or by the Employer for cause, the Employee will not carry on directly or indirectly, whether or not for compensation, as proprietor, partner, stockholder, (except that a less than one percent (1%) ownership interest in a public corporation shall be permitted), officer, director, agent, employee, consultant, trustee, affiliate or otherwise, any business which in the good faith determination of the Employer is, or as a result of the engagement or participation of Employee would become, competitive with, or adverse to, the business of the Employer, as well as the normal evolutions thereof consistent with developments in the industry for a period of two (2) years from the date of termination and within (10) mile radius of the City of Ithaca, NY. In the event of the termination of employee, which is not due to deliberate action of employee, employer waives this provision.

The payment provided in Addendum "B" is referenced in the employment agreement as a "bonus." The language of that provision is:

> 5. BONUS: Employer shall pay Employee a minimum bonus for each full year of employment for a maximum of five (5) consecutive years with the first payment due on February 28, 2004, and yearly thereafter in the amount of $15,000.00 per year.

Mr. Reynolds worked for Manley's under that agreement until May 2, 2004 when he submitted a letter dated May 3, 2004 resigning his employment effective May 2, 2004. Shortly thereafter it became known to Manley's that Mr. Reynolds was present and appeared to be working at "Italian Carry Out", a food service establishment located a short distance[3] away from the Big Al's facility where Mr. Reynolds had been employed. According to Manley's, at the time he provided his resignation letter or in a conversation shortly thereafter, he indicated that he was leaving Manley's employment to work with his cousin in the painting business. Mr. Reynold's confirms that

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[3] According to affidavits submitted by Manley's, Italian Carry Out is located 250 yards away from the Big Al's location.

he was, prior to the Temporary Restraining Order, working as a cook at Italian Carry Out earning $250.00 per week.

Manley's seeks a preliminary injunction enforcing the non-compete terms of its agreement with Mr. Reynolds. Mr. Reynolds opposes that request and asserts that the non-compete terms of the agreement are unenforceable.

Preliminary injunctive relief is a drastic remedy that is not routinely granted (*see Marietta Corporation v. Fairhurst*, 301 AD2d 734, 736 [3d Dept 2003]). As the Third Department has recently stated in that case addressing the legal concepts at issue here: "The court must assess whether the moving party has demonstrated that irreparable harm will occur if the injunction is not granted, that such party has a likelihood of success on the merits, and that the balance of the equities tip in its favor" (*see id*).

THE STANDARD TO BE APPLIED

At issue here is the standard to be applied in evaluating the propriety and enforceability of the non-compete terms of the employment agreement. The parties do not contest that there are two standards for evaluating such agreements. One standard, a less stringent one, applies to restrictions on competition by sellers of businesses or business assets. The other is a more restrictive standard that applies to restrictions on competition by employees in an employer-employee situation. The question here is which standard applies. At oral argument of this motion, the Court indicated that the determination of the motion would likely depend on which standard applied. If the more stringent standard applicable to an employer-employee situation applied, the request for a preliminary injunction would likely be denied. If the less stringent standard applicable to sellers of businesses, business assets and goodwill applied, the request might well be granted.

The Court invited both counsel to offer any case law on this question. Defendant's counsel in a supplemental submission to the Court pointed out that *Alexander & Alexander v. Maloff* (105 AD2d 1066 [4th Dept. 1984]) may provide insight even though not directly on point. That case applied the stricter standard applicable to an employment contract between an employer and an employee even though there was a sale and incident agreements which contained non-compete restrictions. However, that result, applying the stricter standard for employer-employee agreements, was reasonable and probably proper in light of the fact that the non-compete obligations incident to the sale had by all accounts expired.[4] Thus, that decision is based on the fact that the only restriction remaining in effect was an employer/employee restriction rather than a seller/purchaser restriction.

Then, which standard does apply? A simple answer would be that Mr. Reynolds was a mere employee of Big Al's and as such the more restrictive standard applies. However, the facts presented here are not quite that simple. It can be said that there are certain indicia in the Addendum to the Asset Purchase Agreement and the employment agreement that are in the nature of provisions that one would typically see in a situation of continued employment of an owner, operator or key employee of a business with the customary restriction on competition by such an individual.

Plaintiff notes that the employment agreement between Manley's and Reynolds is specifically referenced and mandated in the Addendum to the Asset Purchase Agreement. Reynolds received

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[4] The logic of that case would apply here to any agreement between Reynolds and Manley's after the initial term of the contract. In other words, after the initial five (5) year term, the standard to be applied in evaluating the non-compete would be that applicable to agreements solely in the employer/employee context.

Seventy Five Thousand Dollars ($75,000.00) of the purchase price[5]. Under the employment agreement he had an assurance of continued employment and the Seventy Five Thousand Dollar ($75,000.00) bonus payment. The payment of a portion of the purchase price to Mr. Reynolds has at least the appearance of a payment that is typically made to an owner or seller of a business or its assets.

Defendant's counsel asserts that there are no contingencies in the Asset Purchase Agreement for mandatory employment or a non-compete obligation from the defendant. He also points out that Reynolds had no ownership interest in Big Al's, was merely a short-order cook and long-term employee of Big Al's and there are no secret or unique recipes that he might use in future employment.

Defendant seeks to characterize the provision for payment of up to Seventy Five Thousand Dollars ($75,000.00) to Mr. Reynolds as a reward from the prior owner of the facility for his past service. While it is true that the purchase price was reduced by this amount, were the payment simply a reward by a seller to a long and loyal employee, there was nothing to prohibit the seller from directly paying a bonus to Mr. Reynolds in a lump sum or periodic payments. The fact that this was not done, presumably had a purpose.

Defendant points out that where there is doubt about entitlement to the relief sought then an injunction should not be granted. Specifically, plaintiff asserts that a motion for a preliminary

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The Seventy Five Thousand Dollars ($75,000.00) is referred to as a bonus in Reynolds employment agreement payable in installments of Fifteen Thousand Dollars ($15,000.00) over five years. It is a minimum required payment and it is not dependant upon anything other than Reynolds continued employment. The agreement also provided upon Reynolds voluntary resignation, he lost any right to continue receiving the payment.

injunction should be granted "only where the right is plain from the undisputed facts." (Hooks letter dated August 25, 2004).

There are a few cases that have in one way or another wrestled with the issue of what standard should be applied in evaluating a non-compete agreement where the status of the individual subject to the restriction is not entirely clear. Two such cases are *Purchasing Associates, Inc. v. Weitz* (13 NY2d 267 [1963])[6] and *Cliff v. R.R.S., Inc.* (207 Ad2d 17 [3rd Dept. 1994]).

In *Purchasing Associates*, the Court explained that "{W}e must look behind and beyond the label to ascertain the true nature of the transaction" (see id. at 273). In that case, the Court noted that the defendant against whom the non-compete agreement was to be enforced:

> "could not have transferred any . . . customers or good will in the . . . business, as the record itself demonstrates, neither he nor his partnership was in that business and had no customers at the time of the deal. He was merely a salaried employee of {the business}."

The Court went on to state unequivocally that the standard for evaluating the enforceability of employer/employee employment agreements applied.

It could still be argued that even applying *Purchasing Associates* to the facts of this case that, looking behind and beyond the label of this transaction, defendant Reynolds was a de-facto owner[7] and the standard for non-compete agreements incident to the sale of a business should apply.

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Purchasing Associates was cited by the defendant for the point that it is necessary to distinguish between a non-compete covenant given by the seller of a business and one given by an employee with no ownership interest in the business. (Hooks letter dated August 19, 2004 p. 2)

7

One reason for this would be the fact that it appears the transaction was structured such that he received Seventy Five Thousand Dollars of the purchase price for the sale of the Big Al's assets to Manley's.

However, in a situation presenting facts much more near to an asset sale, the Appellate Division of this Department has declined to apply that standard.

In *Cliff v. R.R.S., Inc.*, the Court found that the covenant at issue did not "fall squarely into any of the aforementioned categories." The categories referred to by the Court were 1) an implied covenant with the sale of a business and its goodwill, 2) an express covenant with the sale of a business and its goodwill and 3) a restrictive covenant in the context of an employment agreement. The Court went on to find that the covenant in question in *Cliff v. R.R.S., Inc.* "most closely resembles a contract that arises in an employment situation." The Court noted numerous facts that would indicate that the situation was analogous to an asset purchase or sales transaction. Specifically, the Court stated:

> In this regard we acknowledge, as plaintiff correctly points out, that the covenant here arose in the context of a sales transaction and was tied to the execution of the asset purchase agreement, not the date upon which defendant's employment terminated. Additionally, to the extent that defendant provided his own office equipment and manager, set his own hours and retained income for the eye examinations he performed, it is apparent that the traditional elements of an employer/employee relationship are lacking. In our view, however, both the interest the plaintiff seeks to protect (the goodwill he retained in his Potsdam office) and the activity he seeks to enjoin (direct competition from the defendant and his corporation in the sale of retail eye wear) are analogous to the activities and interests typically at stake in the employer/employee context. Inasmuch as plaintiff has made no showing that enforcement of the covenant is required to protect trade secrets or confidential customer lists. . .(citations omitted) . . ., he has failed to demonstrate his likelihood of success on the merits and, as such, his request for a preliminary injunction should not have been granted. *Cliff v. R.R.S., Inc.* at 20.

This analysis seems applicable here. If the employer/employee standard is to be applied in *Cliff v. R.R.S., Inc.* where there was an admitted ownership arrangement and several indicia of ownership and non-employee status, then defendant Reynolds case may be even more compelling. After all, he admittedly was merely an employee of the Big Al's operation, albeit apparently a

valuable one. However, the record does not reveal any possession of trade secrets or customer lists by Reynolds. This was a key fact in *Cliff v. R.R.S., Inc.* that led to the denial of a preliminary injunction.

The Court is not aware of and counsel have not provided any case law that applies the standard for evaluating non-compete obligations incident to a sale of a business or its assets to an individual who does not have any actual ownership interest in the business or assets being transferred.

Based on this, the standard to be applied here is that governing agreements between an employer and an employee. Measured by that standard the agreement must be reasonable as determined by applying a three-pronged test. Such agreements are reasonable if the restriction on employee competition is 1) no greater than required for the protection of the legitimate interests of the employer, 2) does not impose undue hardship on the employee, and 3) is not injurious to the public. (See *BDO Seidman v. Hirshberg*, 93 NY2d 382, 388 [1999]).

The determination of this motion turns on the first prong of the test[8]–is the restriction no greater than required to protect the legitimate interests of the employer. The legitimate interests that an employer is entitled to protect under the first prong of this test are: misappropriation of trade secrets or confidential customer lists or protection from competition by a former employee whose services are unique. (See *BDO Seidman v. Hirshberg*, 93 NY2d 382, 388 [1999])

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[8] Hardship to the employee would not seem to be an issue in that it was self imposed when Reynolds voluntarily left employment that paid him $60,000.00 a year for employment he now seeks to retain which he claims pays him less than a quarter of that. Nor is injury to the public an issue since the loss of Reynolds cooking, food prep and pizza making skills is not a matter that should cause injury to the public.

On this record, there is no indication that Mr. Reynolds is aware of any trade secrets or confidential customer lists from his tenure with Manley's or Big Al's prior to that[9]. Nor is the record at all clear that Mr. Reynolds' services are unique or extraordinary. While this might be the case if Mr. Reynolds had a unique skill or talent as an Italian short order cook or pizza maker,[10] there is nothing to indicate that such is the case here. In fact, Mr. Reynolds disputes that his talents are in any way unique or extraordinary.[11] But the fact remains that Manley's has not shown that Mr. Reynolds has access to or knowledge of trade secrets or confidential customer information or that his services are unique or extraordinary.

The only cases that have addressed the issue of which standard applies in case where a sale, indicia of ownership and employee status are present, have applied the more stringent standard for evaluating employer/employee agreements. Thus this case, to this Court, is governed by the analysis of *Purchasing Associates* and *Cliff v. R.R.S., Inc.*. Applying that analysis to the facts of this case it leads to the same result–denial of the preliminary injunction.

9

Mr. Reynolds asserts that he is not privy to any particular trade secrets and there are no confidential customer lists. There is no evidence in the record that there is a unique or special formula or recipe for the food, including the pizza that Mr. Reynolds had a role in overseeing and preparing over the years. Mr. Reynolds asserts to the contrary that the methods and ingredients for making Big Al's pizza have changed since Manley's took over the Town of Ithaca site.

10

The Court would upon a proper showing be willing to recognize that the ability to make a pizza or other food items in a particular manner might be unique and extraordinary. But there is no showing here that Mr. Reynolds has any particular talents or unique skills in this regard.

11

There are some concerns in this regard raised by the salary that Manley's agreed to pay him under the employment contract. Together the salary and the "bonus" amounted to a guaranteed income of $60,000.00 for Mr. Reynolds. Not a bad income for someone who asserts he is nothing other than a run of the mill ordinary Italian short order cook. But, on this record, there is insufficient support for the position that Reynolds's talents and skills as an employee are unique or extraordinary.

For the foregoing reasons, the plaintiff's motion for a preliminary injunction is denied. The defendant's application for an Order to Show Cause to vacate of the temporary restraining order is dismissed as moot. The defendant's request that the Court sign its Order to Show Cause for its motion for summary judgment dismissing the complaint is denied without prejudice.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: September 22, 2004
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice

The following papers were filed with the Clerk of the County of Broome:

- Order to Show Cause dated August 12, 2004
  - Affidavit of Anthony V. Manley dated August 10, 2004
- Affidavit of Jack W. Brayton sworn to August 16, 2004
- Affidavit of Jack W. Brayton sworn to August 18, 2004
- Affidavit of Joseph Salino sworn to August 23, 2004
- Affidavit of Anthony V. Manley sworn to August 24, 2004
- Affidavit of James Reynolds sworn to August 25, 2004
- Affidavit of Joseph Salino sworn to August 25, 2004
- Affidavit of Service sworn to August 25, 2004