SHORT FORM ORDER

INDEX No. 05-6261
CAL. No. 06-02248-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-13-06
ADJ. DATE 1-22-07
Mot. Seq. # 003 - MG

MORRIS SENDOR, GREAT RESTAURANTS OF LONG ISLAND, INC., GREAT RESTAURANTS OF NEW YORK CITY, EAST SIDE EDITION INC., GREAT RESTAURANTS OF NEW YORK CITY, WEST SIDE EDITION INC., Plaintiffs, - against - MATTHEW CHERVIN, CARY ROSNER and BEN HIRSCH, Defendants.	ANTHONY A. CAPETOLA, ESQ. Attorney for Plaintiffs Two Hillside Avenue, Building C Williston Park, New York 11596-2335 BARTON BARTON & PLOTKIN, LLP Attorneys for Defendant Rosner 420 Lexington Avenue New York, New York 10170 ALBERT KOSTRINSKY, ESQ. Attorney for Defendant Chervin 150 Great Neck Road, Suite 305 Great Neck, New York 11021

Upon the following papers numbered 1 to 19 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 9 - 14 ; Replying Affidavits and supporting papers 15 - 19 ; Other defendant's memorandum of law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion seeking partial summary judgment dismissing plaintiffs' first, third, fifth and seventh causes of action is granted.

In this action plaintiffs consist of Morris Sendor and a number of corporations owned and managed by him, including the Great Restaurants of Long Island Inc., Great Restaurants of New York City, East Side Edition Inc., and Great Restaurants of New York City, West Side Edition Inc. Plaintiffs' businesses comprise a number of high-end restaurant advertising and promotional magazines which earn their revenue by receiving advertising fees and through the sales and distribution of the magazines within the Long Island and New York City regions. Among other things, plaintiffs allege that three of their former employees, Matthew Chervin, Cary Rosner and Ben Hirsch, breached confidentiality and non-compete clauses within their employment contracts by participating in the establishment of a competing magazine. In addition to damages related to alleged fraud, theft and misappropriation, plaintiffs are jointly seeking a judgment granting them issuance of a preliminary injunction and an award of actual and punitive damages related to the alleged breach. Plaintiff Sendor also seeks damages related to "emotional distress."

Defendant Cary Rosner ("Rosner") now moves for partial summary judgment dismissing the first, third, fifth and seventh causes of action in the plaintiffs' complaint. Specifically, Rosner contends that plaintiffs' first cause of action alleging breach of contract and the wrongful utilization of plaintiffs' confidential information should be dismissed as unenforceable because plaintiffs' restrictive covenant and confidentiality clause are unreasonably restrictive and ambiguous. Rosner contends that the third cause of action alleging fraud, theft and misappropriation should also be dismissed because plaintiffs failed to allege the elements necessary to maintain such an action. Rosner further asserts that the fifth cause of action alleging the infliction of emotional distress is without merit because plaintiffs have failed to state a prima facie cause of action for either negligent or intentional infliction of emotional distress. Lastly, defendant Rosner argues that plaintiffs' seventh cause of action seeking litigation expenses must also be dismissed because plaintiffs' claims for litigation expenses are contingent upon an unenforceable non compete clause. In support of his motion defendant Rosner submits, inter alia, a copy of the Confidentiality and Non Compete agreement he signed on May 26, 2004 and an excerpt from the deposition testimony of plaintiff Sendor.

In their reply plaintiffs argue that defendant Rosner's motion should be denied because the papers submitted in support of his motion failed to include copies of the pleadings in accordance with the requirements of CPLR 3212. Plaintiffs also contend that the excerpts of plaintiff Sendor's deposition testimony submitted by the defendant is without probative value since Rosner also failed to follow the requirements of CPLR 3116 which require that the deposed party be given the opportunity to review and correct his deposition testimony before it may be submitted for use as evidence. Plaintiffs further assert that the court should apply the standards applicable to ordinary commercial contracts rather than those applicable to typical employer/employee restrictive covenants because Rosner was an independent business person rather than a salaried employee. Lastly, plaintiffs urge that even if the agreement is considered unreasonable, the court should sever the unreasonable sections and enforce those sections which are found to be reasonably suited to protect plaintiffs' legitimate interests.

The relevant clauses of the employment agreement between plaintiffs and defendant Rosner provide as follows:

> 1. Confidentiality–The undersigned acknowledges that the Company shall be divulging Confidential information both verbally and in writing of the Company's business and operations. All such information will be kept confidential by the undersigned after receiving information verbally or in writing and shall not be disclosed to anyone by the undersigned in any manner whatsoever, in whole or in part, or through another party, other than in the course of this business relationship. Such confidential information shall include, but shall not be limited to, methods of sale and contract signing techniques, names of advertisers, methods of production, distribution, advertising sales, accounting data pertaining to past or present income, profits, costs, expenses or projected future income, profits, costs, expenses or other information concerning projections and any other information related to the Company and its business....the undersigned shall maintain this confidentiality for a period of 7½ years.
>
> 2. Non Compete–The undersigned agrees that they shall not use any of the Confidential Information divulged by the Company to start a business that is similar

> in nature to the Company's business, individually or jointly. The undersigned shall not engage in competitive any activity, in any manner whatsoever, directly or indirectly, or cause any other party to be engaged in competitive activities, directly or indirectly, relating to the products or business of the Company. This Non Compete agreement shall be effective in Florida, The New York metropolitan area, and throughout the United States and the World. The undersigned shall maintain the terms of this Non Compete agreement for a period of 15 years.

Initially, the Court notes that while a movant's failure to include a complete copy of the pleadings is ordinarily grounds for denial of a summary judgment motion (***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2005]; ***Green v Wood***, 6 AD3d 976, 775 NYS2d 192 [2004]), such a procedural defect may be overlooked if the record is sufficiently complete and the opposing part has not been prejudiced (***Welch v Hauck***, 18 AD3d 1096, 795 NYS2d 789 [2005]; ***Hamawi Deli, Inc. v Psaras***, 2006 NY Slip Op 52411U; *see also,* CPLR 2001). Thus, notwithstanding defendant's failure to include copies of the pleadings originally served by plaintiffs, to the extent defendant Rosner included copies of the pleadings within his reply, the record is sufficiently complete, and the Court may decide the motion on its merits (*see,* ***Welch v Hauck***, *supra*; ***Hamawi Deli, Inc. v Psaras***, *supra*). Moreover, contrary to plaintiffs' assertion an unsigned but certified deposition transcript of a party, can be used by the opposing party as an admission in support of a summary judgment motion (***Morchik v Trinity Sch.***, 257 AD2d 534, 684 NYS2d 534 [1999]; ***Newell Co. v Rice***, 236 AD2d 843, 653 NYS2d 1004 [1997]; *see also,* ***Jacobs v Herrera***, 4 Misc3d 1018A, 798 NYS2d 345 [2004]; CPLR 3116[b]). Notwithstanding defendant's failure to include the page bearing the officer's certification within the excerpts submitted with his moving papers, defendant included a certified copy of plaintiff Sendor's entire deposition transcript within his reply.

Contrary to plaintiffs' assertion the standard of review applicable to the restrictive covenant signed by defendant Rosner are those applicable to typical employer/employee restrictive covenants. Unlike those restrictive covenants made as a part of ordinary commercial contracts such as licensing agreements, the covenant in question was signed after Rosner accepted employment as a commissioned sales person from Matthew Chervin, who was then, the acting president of Great Restaurants of New York City (*see*, ***Mathias v Jacobs,*** 167 F Supp 606, [US Dist, SD NY 2001]; ***DAR & Assocs., Inc. v Uniforce Servs., Inc.***, 37 F Supp 192 [US Dist Ct, ED NY 1999]). Thus, the covenant is subject to more exacting scrutiny since public policy favors economic competition and individual liberty and seeks to shield employees from the superior bargaining position of employers (*see*, ***Mathias v Jacobs,*** *supra*; ***DAR & Assocs., Inc. v Uniforce Servs., Inc.***, *supra*). Such covenants will be enforced only if reasonably limited temporally and geographically, and then only to the extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of trade secrets or confidential customer information, or if the employee's services are unique or extraordinary (***Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.***, 42 NY2d 496, 398 NYS2d 1004 [1977]; *see also,* ***Savannah Bank N.A. v Savings Bank of Fingerlakes,*** 261 AD2d 917, 691 NYS2d 227 [1999]). Here, defendant has demonstrated that plaintiffs' restrictive covenant, which forbids competition for 7½ years within New York's metropolitan area, Florida, United States and the world is unreasonably restrictive and not geographically or temporarily limited to protect plaintiffs' legitimate business interest. Plaintiffs' geographical restrictions are virtually limitless and the 7½-year temporal restriction is unreasonably burdensome (*see*, ***Reed, Roberts Assocs. v Strauman***, 40 NY2d 303, 386 NYS2d 677 [1971]; *see also*, ***Garfinkle v Pfizer, Inc.***, 162 AD2d 197, 556 NYS2d 322 [1990]; ***Lynch v Bailey***, 300 NY 615, 90 NE2d 484 [1949]).

With regard to the alleged use of confidential information by a former employee, a restrictive covenant will not be enforced unless a plaintiff can demonstrate that the information was not readily available through other non confidential sources (***Leo Silfen, Inc. v Cream***, 29 NY2d 387, 328 NYS2d 423 [1972]). Moreover, the solicitation of a plaintiff's clients by a former employee is not actionable unless the confidential information or customer list could be considered a trade secret or there was wrongful conduct by the employee, such as physical taking or copying the employer's files or confidential information (***Amana Express Int'l. v Pier-Air Int'l. Ltd.***, 211 AD2d 606, 621 NYS2d 108[1995]; *see also,* ***JAD Corp of America v Lewis***, 305 AD2d 545, 759 NYS2d 388 [2003]). Former employees are also entitled to utilize their recollection of information concerning the particular business needs and habits of customers, and such recollected information is not construed as confidential for purposes of enforcing restrictive employment covenants (*see*, ***Buhler v Michael P. Maloney Consulting Inc.***, 299 AD2d 190, 749 NYS2d 867 [2002]; ***Investor Access Corp. v Doremus & Co.***, 186 AD2d 401, 588 NYS2d 842 [1992]). Here, plaintiff Sendor's deposition testimony indicates that much of the alleged confidential information used by Rosner was readily available through public sources such as the Zagats, New York Times and other local publications, including plaintiffs' own magazines, and could have been discovered without "extraordinary efforts"(***Empire Farm Credit v Bailey***, 239 AD2d 855, 856, 657 NYS2d 211, 212 [1997]). Furthermore, there is no evidence that the alleged confidential information–clients and potential client lists; advertising budgets and methods of distribution and marketing–was physically taken, copied or memorized. Indeed, during his examination many of plaintiff Sendor's concerns involved allegations of copyright infringement and unfair competition rather than the misuse of confidential information. Plaintiff Sendor's allegations were also based upon conjecture and speculation since he had no personal knowledge of how Rosner acquired the alleged information or whether he actually used it to solicit his customers. Accordingly, defendant Rosner is granted partial summary judgment with respect to plaintiffs' first cause of action seeking enforcement of their non compete and confidentiality contract.

Plaintiffs' third cause of action alleging fraud, theft and misappropriation should also be dismissed as plaintiffs failed to allege the necessary elements with the specificity required by CPLR 3016 (*see*, ***Foley v D'Agostino***, 21 AD2d 60, 248 NYS2d 121 [1964]; ***Stern v Consumer Equities Assoc.***, 160 AD2d 993, 554 NYS2d 714 [1990]; *see also,* CPLR 3211[c]). Similarly, plaintiffs' fifth cause of action alleging negligent or intentional infliction of emotional distress is without merit since defendant Rosner demonstrated that his actions neither rose to the level of extreme and outrageous conduct (***Howell v New York Post Co., Inc.***, 81 NY2d 115, 596 NYS2d 350 [1993]), nor unreasonably endangered the plaintiff or caused him to fear for his safety (***E.B. v Liberation Publications, Inc.***, 7 AD3d 566, 777 NYS2d 133 [2004]). In opposition plaintiffs failed to demonstrate the existence of an issue of fact warranting denial of defendant's motion to dismiss plaintiffs' fifth cause of action (*see*, ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). With regard to plaintiffs' seventh cause of action seeking litigation expenses, to the extent the Court finds plaintiffs' restrictive covenant and confidentiality contract unenforceable, the portion of the contract seeking litigation expenses is equally unenforceable and should likewise be dismissed.

Accordingly, defendant's motion seeking partial summary judgment dismissing plaintiffs' first, third, fifth and seventh causes of action is granted.

MAY 2 1 2007

Dated:_____

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**