SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

ALDO VERRELLI,

Plaintiff,

INDEX No.11046/07

MOTION DATE: July 17, 2007
Motion Sequence # 001

-against-

RALPH DEPINTO, PARK AVENUE SECURITIES LLC and GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Defendants.

The following papers read on this motion:

Order to Show Cause..... X
Affirmation in Support..... X
Reply Affirmation X
Memorandum of Law..... XX

This motion, by plaintiff, brought on by order to show cause, for an order enjoining defendants Ralph DePinto, Park Avenue Securities LLC and Guardian Life Insurance Company of America from soliciting, directly or indirectly, any of the accounts or clients of plaintiff, from soliciting any client or account that has terminated its relationship with plaintiff, from divulging any information learned as a result of DePinto's relationship with plaintiff, from using in any manner the confidential data obtained from plaintiff and returning to plaintiff proprietary and confidential business

records is **granted** and is conditioned upon the posting of a $25,000 (Twenty-five thousand dollar) undertaking.

The plaintiff alleges that he entered into an "employment" agreement with defendant Ralph DePinto. The "Prototype: Field Underwriter Partnership Agreement" (the Agreement) states that Verrelli and DePinto "are both engaged in the practice of insurance and securities sales" and both "desire to form a partnership to "assist one another in obtaining and maintaining insurance and securities related business and servicing same. . ." The Agreement appears to be a form agreement. Verrelli asserts that notwithstanding the language of the Agreement, DePinto was not his partner but an employee. He states that all clients of the business are his, gathered from his years in the insurance business, that DePinto made no capital contribution, that DePinto did not share in losses, and that he did not exercise management privileges or have control over the business. Verrelli avers that the Agreement was used only to establish DePinto's commission share, and was not a partnership contract. DePinto does not offer an affidavit to controvert Verrelli's claim of an employer/employee relation.

DePinto was employed by Verrelli for almost four years, and was terminated. He left Verrelli's employ on June 30, 2006. After leaving Verrelli, DePinto became a partner of defendants Park Avenue and Guardian, direct competitors of Plaintiff.

It is more than apparent that Verrelli and DePinto were not partners, as Verrelli's affidavit attests. Although DePinto's counsel relies upon the written agreement to argue that a partnership existed and therefore an injunction does not lie, as noted DePinto does not offer an affidavit asserting a partnership relation, and thus Plaintiff's fully supported contention that he was an employee is uncontroverted.

Moreover, the Agreement itself is not complete, and contains blanks which are not filled in except for the names of the parties, the date it is effective, the commission rate, and a "30" day termination provision. Indeed the partnership name is blank. The entire Agreement document inappropriately addresses a partnership relation rather than an employment agreement. Article Ten, which is the "Non-Compete" provision, is also blank and does not have a duration limitation filled in although a space is provided for one. It too is applicable to "partners", and defendant DePinto is not a partner by any account of the facts.

In sum, the Agreement as written is a partnership agreement containing

partnership terms, all of which are not applicable to the employment relation between Verrelli and DePinto. Thus it is not possible to determine from the face of the document which of the Agreement's provisions are applicable to the employment relation and which of its provisions are not, including the non-compete provision. Thus the court cannot construe the non-compete provision of the Agreement as a matter of law, as the entire Agreement is rendered ambiguous in its application by the parties' improper use of partnership forms. In order to be entitled to a preliminary injunction, plaintiff must "show a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in [its] favor" (**Aetna Ins. Co. v Capasso**, 75 NY2d 860, 862, 1990). The plaintiff may not rely upon the non-compete provision in the Agreement to establish a likelihood of success on the merits (**Aetna Ins. Co. v Capasso, supra**). The plaintiff may prevail on this application only if he can establish that he is entitled to a preliminary injunction, notwithstanding the infirmities of the Agreement, i.e., under common law theory.

To be protected as a trade secret, a customer list must cover customers who are not openly engaged in business in advertised locations or whose availability as customers is not readily ascertainable (see, **Town & Country House & Home Serv., v. Newbery**, 3 NY2d 554, 1958). The foregoing trade secret description appears to apply to a customer list for an insurance agency, as the clients are not readily ascertainable, for example, advertised, as such, under a trade listing in a telephone directory.

Yet, it has been held that the names of insurance customers are not a trade secret subject to protection (**Reidman Agency v. Musnicki**, 79 AD2d 1094, 4th Dept., 1981). Nevertheless, an insurance customer list may be considered to contain "confidential customer information" if contains information involving "customer coverage, premium amounts, cash values, and loans against existing policies" (**John Hancock Mut. Life Ins. Co. v. Austin**, 916 F.Supp. 158, 164, N.D.N.Y. 1996). Moreover, a physical taking of insurance customer lists could "give rise to a claim for breach of fiduciary duty" (**John Hancock Mut. Life Ins. Co. v. Austin, supra**). Here the customer lists contained confidential coverage information such as premiums, coverage, expiration dates, cash values and loans, and plaintiff has offered evidence that the customer list vanished at the same time DePinto left.

The absence of an enforceable non-compete contract provision is not fatal to Plaintiff's application, as a former employee "may not solicit . . . customers who are not openly engaged in business in advertised locations or whose availability as patrons cannot

readily be ascertained but 'whose trade and patronage have been secured by years of business effort and advertising, and the expenditure of time and money, constituting a part of the good-will of a business which enterprise and foresight have built up" (**Town & Country House & Home Service, Inc. v. Newbery**, **supra**, 558). Indeed, it is well established "that an employee, who has had entrusted to him confidential information pertaining to the . . . clientele of his employer's business which he would not have obtained were it not for his status as a trusted employee and which affords him an advantage over other competitors to whom the information is not available, may not subsequently use that information to further his own ends * * * This restriction arises because of the confidential nature of the employment relationship and is not dependent upon the presence in the employment agreement of a provision limiting activities after cessation of employment" (**Harry R. Defler Corp. v. Kleeman**, 19 AD2d 396, 4th Dept., 1963, *affd* 19 NY2d 694, 1967).

While contractual restrictive covenants are "subject to an overriding limitation of time and geographic reasonableness" (**ABC Mobile Brakes, Division of D. A. Mote v. Leyland**, 84 AD2d 914, 4th Dept., 1981), the limitation has no application under the common law restriction (see, **Town & Country Serv. v. Newbery**, **supra**; **People's Coat, Apron & Towel Supply Co. v. Light**, 171 App Div 671, *affd* 224 NY 727, 1918; **Witkop & Holmes Co. v. Boyce**, 61 Misc 126, *affd.* 131 App Div 922, 4th Dept., 1909; **Defler Corp. v. Kleeman**, **supra**).

As stated above, plaintiff has offered the affidavits of two employees who aver that the confidential customer list containing the names of insureds as well as detailed information regarding their policies disappeared from plaintiff's office around the time that defendant Ralph DePinto was terminated. Although DePinto has denied taking the list, such denial does not present an impediment to the grant of a preliminary injunction (see, **Allan Dampf, P.C. v. Bloom**, 127 AD2d 719, 2nd Dept., 1987). The plaintiff has also offered the affidavits of clients who state that DePinto has solicited their business. Moreover, several former clients have left plaintiff to fill their insurance needs with DePinto.

The foregoing establishes the necessary grounds for an injunction. The plaintiff has shown a likelihood of success on the merits, and irreparable injury if DePinto is permitted to continue soliciting his clients in the future, and a balance of the equities in his favor. Accordingly, a preliminary injunction is **granted** conditioned upon the posting of the required undertaking.

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A Preliminary Conference has been scheduled for October 18, 2007 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated SEP 13 2007

J.S.C.

ENTERED

SEP 17 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE