

Karb v Building Blocks Comprehensive Servs., Inc.
2010 NY Slip Op 33362(U)
October 12, 2010
Canandaigua City Ct
Docket Number: SC-001114-10/CA
Judge: Stephen D. Aronson
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 Leah Karb

Claimant(s)

-against-

Building Blocks Comprehensive Services, Inc.

Defendant(s)

DECISION

Present: Hon. Stephen D. Aronson

Appearances: Claimant: Pro se

Defendant: Kelly Bateman, President

In this small claims case, the claimant, Leah Karb ("speech pathologist" or "pathologist"), seeks \$1247.50 from her prior employer, Building Blocks Comprehensive Services, Inc. ("Building Blocks"), for services rendered. Building Blocks filed a counterclaim seeking \$5000 based on a claim that the pathologist breached an employment contract. A hearing was held on September 23, 2010, and decision was reserved.

The credible proof showed that the pathologist provided services for Building Blocks starting in or about February, 2009, pursuant to a written agreement ("agreement"). The credible evidence shows that the pathologist rendered services as a per diem speech pathologist through Building Blocks from May 4, 2010-June 24, 2010 as specified on a summary letter dated July 20, 2010. It is undisputed that Building Blocks has not paid the pathologist for these services. Building Blocks claims that it has not paid the pathologist because the pathologist has breached their agreement. Building Blocks contends that the pathologist failed to maintain professional liability insurance as required by paragraph 6 of the agreement. The pathologist presented a declaration page proving professional liability coverage from June 15, 2009 to June 15, 2010. Although she performed services after June 15, 2010, the pathologist contends that she is not seeking any per diem payment beyond the expiration date of her professional liability policy. This evidence shows that the pathologist

breached the agreement - - even though she is not seeking payment for working on several days after her coverage expired, she exposed Building Blocks to a potential loss by not having coverage. Nevertheless, Building Blocks submitted no evidence of damages resulting from this breach of the agreement. Therefore, no award can be made for this technical breach of the agreement.

Building Blocks also contends that the pathologist breached the covenant not to compete clause ("covenant") found at paragraph 23 of the agreement as well as the confidentiality clause found at paragraph 12 of the agreement. As a result, Building Blocks seeks liquidated damages as provided in paragraph 17 of the agreement. Building Blocks contends that the pathologist violated the covenant because: when she left their employment, they discovered she was working for a competitor and that she persuaded parents to switch their children to her new firm.

In every small claims case, the court is bound to perform substantial justice in accordance with principles of substantive law. Under well settled principles of New York law, non-compete clauses in employment contracts will be enforced only to the extent they are reasonable and necessary to protect valid business interests. *New York Pattern Jury Instructions, 4:21, p. 823.* Public policy militates against sanctioning the loss of a person's livelihood and therefore the courts will subject a covenant not to compete to an overriding limitation of reasonableness. The Court of Appeals (New York's highest court) has adopted a three-pronged test to determine the reasonableness of an anti-competitive covenant. *BDO Seidman v. Hirshberg, 93 NY2nd 382 (1999).* The 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. *Id.* A violation of any prong renders the covenant invalid. *Id.* To be reasonable, the territorial extent of a covenant must not be unduly harsh and oppressive to the employee. *Id.* If the territorial scope of the restraint is so broad as to seriously impede the employee's ability to earn a living, the covenant will

be unenforceable as unreasonable. *See, 104 N.Y. Jur 2nd Trade Regulation § 98.* In this case, the covenant states:

"NON-COMPETITION. During the term of the rendition of services under this agreement and for a period of twelve months thereafter, PROVIDER shall not, directly or indirectly, provide any services or otherwise assist any business that provides services of the type provided by Building Blocks Comprehensive Services, Inc. within the Building Blocks service area * or any clients, businesses, schools or municipalities that have contracted with Building Blocks Comprehensive Services, Inc."

"*For current service area, contact Building Blocks."

After the signature lines of the agreement, there is a list of 17 Western New York Counties preceded by a header stating: "Will Provide Service In:" and a list of 4 types of service recipients preceded by a header stating: "Will provide Services For:". There is a blank line before each county and before each type of service recipient; and, there are no checkmarks or other indications on any of the blank lines.

The covenant here purports to prohibit the speech pathologist from providing services within a 17-county geographical area. In other words, it appears that the covenant is overbroad. Nevertheless, overbroad restrictive covenants are partially enforceable to the extent necessary to protect an employer's legitimate interest. *See, e.g., Malcolm Pirnie, Inc. v. Werthman, 280 A.D.2nd 934 (4th Dept., 2001)* (held that restrictive covenants that are client-based are not unreasonable just because there is no geographic limitation). Here, the pathologist was not claiming that the covenant was overbroad; to the

contrary, Building Blocks is seeking a restriction only in the general Rochester area. Here, there was no evidence that the covenant imposed undue hardship on the pathologist; nor was there any evidence that enforcement of the covenant would be injurious to the public.

Even if the three-pronged conditions have been met, a covenant will be enforced only to the extent necessary to protect the employer (Building Blocks) from unfair competition or loss of good will as the result of the pathologist's use of confidential customer information. *See, 104 NY Jur 2nd Trade Regulation §74.* Building Blocks has produced credible evidence that the pathologist violated the covenant by engaging in employment with a competitor while working for Building Blocks. Although the pathologist claims that she disclosed this conflict with Building Blocks at the outset of her employment, the agreement provides at paragraph 19 that the agreement supersedes any oral promises. There was also credible evidence that the pathologist provided services for persons whose parents left Building Blocks to follow the pathologist and that the pathologist, by her acts or omissions, played a role in that happening.

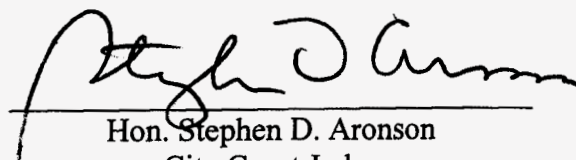
Building Blocks seeks \$5000 under the liquidated damage clause of the agreement. A liquidated damage clause in a noncompete covenant is enforceable if, at the time the covenant was negotiated and executed, the amount specified in the clause was a reasonable estimate of the loss anticipated to be sustained by the employer as a result of the employee's breach of the agreement. *See, 104 N.Y. Jur 2nd Trade Regulation § 76.* Here, there was practically no evidence from which a reasonable estimate of anticipated loss could be calculated. Therefore, the court will fashion an outcome tailored to the circumstances.

In view of all of the circumstances, substantial justice would be served by offsetting the pathologist's claim for services rendered by an equal amount to account for a breach of the agreement.

Accordingly, both claims are dismissed.

ENTERED: Canandaigua City Court, New York

DATED: October 13, 2010

A handwritten signature in black ink, appearing to read "Stephen D. Aronson". The signature is written in a cursive style with a large initial "S".

Hon. Stephen D. Aronson
City Court Judge