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SHORT FORM ORDER

SUPREME COURT - NEW YORK STATE - NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

----------X PART 9

BAHMAN HAKAKIAN,

Plaintiff,

INDEX NO. 14649/10

MOTION DATE: 11/18/10
SEQUENCE NO. 001

-against-

THINK BRONZE, LLC and FELICTY INC. and STEVE MARVISI,

Defendants.

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Notice of Motion, Affs. & Exs.....1
Reply Affidavit.....2
Plaintiffs Memorandum of Law.....3
Affidavit of Steve Marvisi.....4

Upon the foregoing papers, it is ordered that the motion by plaintiff, BAHMAN HAKAKIAN, for summary judgment, pursuant to CPLR §3212, is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

Plaintiff moves for summary judgment on the grounds that there is no triable issue of fact with respect to the enforcibility of a covenant not to compete within a stock purchase agreement, together with attorneys fees and costs. In support of his motion, plaintiff, Bahman Hakakian, submits an Affidavit in which he attests that on or about September 24, 2009, he sold his one-half interest in "Think Bronze," a retail business that sells bronze statues primarily through the internet, to his partner, defendant Steve Marvisi. The sale was made through a stock purchase agreement entered into between plaintiff and Steve Marvisi. The agreement called for 100% of the total outstanding shares of Common Stock to be owned by Mr. Marvisi immediately following the purchase transaction. The stock purchase agreement also contained a non-compete provision which stated that plaintiff has represented to Mr. Marvisi that he no longer wishes to

engage in the Company's business selling statues and merchandise. In consideration of payment made by purchaser of $10,000.00, plaintiff agreed that he would not, at any time within the 5 year period immediately following the closing date, directly or indirectly engage in, or have any interest in any person, firm, or business that engages in any activity in any state, or the American territories of American Samoa, Guam, Northern Marianas, Puerto Rico, or the Virgin Islands, in the import, distribution or sale of bronze, ceramic marble polyresin or resin statues, wall mounts, or art, or any statues bearing similarity to those being sold by the buyer, Steve Marvisi. In addition, plaintiff agreed that he will not compete with Mr. Marvisi, "Think Bronze" or its subsidiaries, or successors of either, on EBAY, any internet retailer, retail, wholesale, or through any other media in the sale of any of the listed merchandise that the company, subsidiary, or successor either is now or will be engaged in.

Plaintiff now argues that said provision is unenforceable due to its duration, its geographical scope and the breadth of its restrictions. He seeks a judgment declaring the non-compete provision unenforceable. Plaintiff argues that the agreement prevents him from opening a similar business anywhere in the world and argues that the provision is overbroad. Plaintiff attests that he was not represented by counsel when he signed the stock purchase agreement containing the within clause. He also attests that he does not need a professional license or special education credentials to operate this business. Plaintiff argues that the clause prevents him from opening a similar business anywhere in the world.

In opposition, defendants submit an affidavit executed by defendant, Steve Marvisi. Mr. Marvisi attests that "Think Bronze" is in the business of "selling merchandise, including, but not limited to, bronze statues. "Think Bronze" and another related company, "Felicity, Inc.," sell their merchandise through the internet. Defendants argue in their opposition papers that plaintiff sold his shares of "Think Bronze" to Steve Marvisi only two years after plaintiff and Steve Marvisi had established "Think Bronze." Defendant, Steve Marvisi attests that the non-compete clause of the stock purchase agreement induced him to enter into the agreement and that he paid a significant amount of money to purchase the goodwill of the business. He attests further that plaintiff's execution of the non-compete clause was to allow the Defendants to develop and expand the business undisturbed for the five year period for which the agreement calls. Defendants argue that Mr. Marvisi relied upon the plaintiff's representations and agreement not

to compete when he bought the stock from him. Mr. Marvisi attests that he would not have purchased plaintiff's interest in the business, and would not have continued to invest in the business, if he had known that plaintiff would directly compete with him less than one year later. Defendants argue that paragraph number "5" of plaintiff's complaint states that "it is the intention of the plaintiff to conduct the business of retail sale of bronze statues to the public through the internet." Defendant contends that plaintiff's desire to violate the terms of the agreement in order to sell merchandise, including bronze statues, is in direct violation of the agreement. Defendants further content that such action would harm Mr. Marvisi's business, as it would allow plaintiff to use the business model and contacts that defendant Marvisi developed and established while the plaintiff and defendants were in business together.

Mr. Marvisi further contends that plaintiff's "subtle assertion" that he needs to be able to pursue this particular business at age 58 "to earn a livelihood" is disingenuous, since plaintiff was only a participant in said business for two years (beginning at age 55), and as selling statues was never plaintiff's primary source of income. Mr. Marvisi annexes a printout from a website which indicates that plaintiff is a Real Estate Broker with the firm of Prudential Douglas Elliman and has been for fourteen years. Mr. Marvisi further states that plaintiff's listings include multi-million dollar investment properties.

Defendants further argue that plaintiff's almost immediate attack on the stock purchase agreement, specifically the non-compete clause, after having been compensated for it, demonstrates plaintiff's disingenuous and bad faith intention to deceive and defraud the defendants and to induce Mr. Marvisi to enter into the agreement.

In the context of the sale of a business, the courts have recognized that where there is a sale of a business involving the transfer of its good will as a going concern, the courts will enforce an incidental covenant by the seller not to compete with the buyer after the sale. (*Purchasing Associates, Inc. v. Weitz*, 13 N.Y.2d 267, 196 N.E.2d 245 (Ct. of App. 1963); *Valenti v. Drory*, 7 Misc.3d 1023(A), 2005 WL 1148498 (N.Y.Sup.Ct. 2005)). Where shareholders of a commercial enterprise sell their interest for consideration, including payment for good will, a covenant restricting the sellers' right to compete with the purchaser is enforceable, so long as the convenant's duration and scope are reasonably necessary to protect the purchaser's legitimate interest in the purchased asset. (*Hadari v. Leshchinsky*, 242 A.D.2d

5576, 662 N.Y.S.2d 85 (2d Dept. 1997)). In the context of the sale of a business involving a transfer of goodwill, the sole limitation on the enforcibility of such a restrictive covenant is that the restraint imposed be "reasonable," that is, not more extensive, in terms of time and space, than is reasonably necessary to the buyer for the protection of his legitimate interest in the enjoyment of the asset bought. (*Purchasing Associates, Inc. v. Weitz*, 13 N.Y.2d 267, 196 N.E.2d 245 (Ct. of App. 1963); *Pontone v. The York Group, Inc.*, 2008 WL 4539488 (S.D.N.Y. 2008)).

In assessing the reasonableness of a restrictive covenant, the courts focus on the particular facts and circumstances giving context to the agreement, the type of business involved, the circumstances underlying the sale, including whether the party subject to the restrictive covenant was represented by counsel. In addition, a factor weighing in favor of reasonableness is whether the individual received compensation. (*Pontone v. The York Group, Inc.*, 2008 WL 4539488 (S.D.N.Y. 2008); *Ticor Title Ins. Co. V. Cohen*, 173 F.3d 63, 73 (2d Cir. 1999)). New York courts have found three to five year restrictions to be reasonable in the context of the sale of a business. (*Id.*; *FTI Consulting Inc. V. PriceWaterhouseCoopers, LLP*, 8 A.D.3d 145, 779 N.Y.S.2d 56 (1st Dept. 2004).

In the case at hand, the defendant paid consideration of $10,000.00 for the covenant not to compete and relied upon same when determining whether to buy the shares of stock in the business of "Think Bronze" from the plaintiff. While a nationwide, five year restriction is extensive, defendant's business is primarily internet based, so the geographical area where he conducts business is wide. As such, the finder of fact could determine that the restriction is not unreasonable in duration or geographical scope. With respect to plaintiff's contention that the non-compete provision limits him in selling *any* type of art, the limitation of the clause pertains only to "the import, distribution or sale of bronze, ceramic, marble, polyresin, or resin statues, wall-mounts, or art, or any statues bearing similarity to those being sold by buyer." Accordingly, under the plain terms of the agreement, plaintiff is limited in the import, distribution or sale of bronze, ceramic, marble, polyresin, or resin art; bronze, ceramic, marble, polyresin, or resin statues; or bronze, ceramic, marble, polyresin, or resin wall-mounts. As these are the types of items being sold by "Think Bronze," the finder of fact could determine that the scope of the clause is not overbroad and that the terms of the covenant not to compete are reasonably

necessary to protect the purchaser's legitimate interest in the purchased asset.

As such, considering the evidence in the light most favorable to the defendant, there is a question of fact as to whether the non-compete covenant of the stock purchase agreement between plaintiff and defendant, Steve Marvisi, is reasonable under the circumstances. With respect to summary judgment, issue finding, rather than issue determination, is the court's function. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)). Accordingly, plaintiff's motion for summary judgment is denied.

Dated: December 22, 2010

Anthony L. Parga, J.S.C.