SCAN

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

NATIONAL ARBITRATION AND MEDIATION, INC.,	**TRIAL/IAS PART: 20 NASSAU COUNTY**
Petitioner,	**Index No: 003957-11** **Motion Seq. No: 1** **Submission Date: 3/28/11**
Pursuant to Article 75 of the Civil Practice Law and Rules,	
- against -	
SHELLEY ROSSOFF OLSEN,	
Respondent.	

The following papers have been read on the motion:

Order to Show Cause, Verified Petition, Affidavit in Support and Exhibits...x
Supplemental Affirmation and Exhibit.....x
Affidavit Pursuant to CPLR § 511(b) and Exhibits..... x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits (including Affidavit in Support).....x
Correspondence dated March 25 and 31, 2011.....x

This matter is before the Court for decision on the Order to Show Cause filed by Petitioner National Arbitration and Medication, Inc. ("NAM" or "Petitioner") on March 15, 2011 and submitted on March 28, 2011. For the reasons set forth below, the Court grants the Order to Show Cause to the extent that the Court 1) directs that the temporary restraining order issued by the Court on March 15, 2011 shall remain in effect, and directs Petitioner to post a bond in the sum of $10,000, within thirty (30) days of this Order, as a condition of that continued injunctive relief; and 2) compels Respondent Shelley Rossoff Olsen ("Olsen") to arbitrate all claims and

disputes arising under or concerning the parties' Retainer Agreement, including but not limited to, the disputes and/or controversies set forth in the Demand for Arbitration and Notice of Intent to Arbitrate. The Court denies Petitioner's application for an Order enjoining Respondent from litigating any arbitrable claims or disputes, concluding that such a directive would be inappropriate in light of related litigation pending in the Supreme Court of New York County.

BACKGROUND

A. Relief Sought

Petitioner moves for an Order, 1) granting Petitioner the relief sought in the Verified Petition ("Petition"); 2) pursuant to CPLR § 7503, compelling Respondent Shelley Rossoff Olsen ("Olsen" or "Respondent") to arbitrate all claims and disputes arising under or concerning the parties' Retainer Agreement dated as of December 18, 2009 ("Agreement"), including but not limited to, the disputes and/or controversies set forth in the Demand for and Notice of Intent to Arbitrate ("Arbitration Demand") dated March 10, 2011, and enjoining Respondent from litigating any arbitrable claims or disputes; 3) pursuant to CPLR §7502(c), for a preliminary injunction in aid of arbitration preventing Respondent from engaging in or being employed, on behalf of any persons or entities, as an arbitrator or mediator, individually or with any competitor of Petitioner, within a fifty (50) square mile area of anywhere Respondent has provided alternative dispute resolution ("ADR") services ("ADR Services"), as that term is used in the Agreement, that is, New York City (including the five boroughs), Nassau, Suffolk and Westchester Counties, until March 1, 2010, except as an employee of the Court System, but expressly permitting her to be an advocate in any mediation or arbitrating and permitting her to act as an attorney, on the ground that any award to which Petitioner may be entitled will be rendered ineffectual without such provisional relief, such being a restriction expressly agreed to by Respondent under the Agreement; and 4) permitting Petitioner to file a complete and unredacted copy of the Agreement under seal.

Respondent opposes Petitioner's application.

B. The Parties' History

In the Petition, filed March 15, 2011, NAM alleges as follows:

Pursuant to the Agreement (Ex. 1 to Petition),[1] Respondent agreed to provide services as a mediator or arbitrator for NAM, with a guaranteed minimum salary. Paragraph 11 of the Agreement, titled "Arbitration" ("Arbitration Clause"), provides as follows:

> The parties agree that in the event of any dispute or controversy arising out of or in connection with this Agreement, or any alleged breach thereof, (a "Dispute"), the parties shall arbitrate the Dispute before three arbitrators with the arbitration to be held in New York City under the rules promulgated by NAM, except the arbitrators selected shall not be on NAM's panel. NAM and Olsen shall each choose 1 arbitrator and then the 2 arbitrators chosen shall jointly choose the 3rd arbitrator. The parties shall have 10 business days from receipt of a demand for arbitration in which to choose an arbitrator. If a party fails to choose an arbitrator within such time period, the arbitrator chosen by the non-defaulting party shall choose an arbitrator and the arbitration shall proceed before only 2 arbitrators. Nothing in this Agreement shall prevent NAM or Olsen from seeking appropriate injunctive relief in aid of arbitration to enforce any provision of this Agreement from a federal or state court located in New York, and the parties irrevocably and unconditionally consent to the exclusive jurisdiction of such courts in New York solely for any such injunctive action. The decision of the arbitrators will be final and binding upon the parties, and the judgment of a court of competent jurisdiction may be entered thereon. Fees of the arbitrator and the cost of the arbitration shall be borne as determined by the arbitrators.

The Agreement sets forth the terms of Olsen's retention, and contains language regarding the exclusivity, length of term and automatic renewal of that retention. Specifically, the Agreement would automatically renew for one year unless either party provided the other party with 90 days written notice of its intention not to renew.

Respondent sent a notice ("Notice") dated February 28, 2011 (Ex. 2 to Petition), which Respondent received on March 1, 2011, purporting to terminate the Agreement. That notice, addressed to Roy Israel ("Israel"), the President and CEO of NAM, read as follows:

> After much deliberation, I have decided not to renew my independent contractor Agreement with NAM. Please accept this letter as my formal notice of resignation within the initial term of the Agreement.
>
> I apologize for not giving you 90 days advance notice, but I will be happy to help mediate or transition the cases assigned to me over the next 90 days, if you'd like.
>
> With respect to subparagraph 8(a) of the Agreement, the noncompete clause, it

[1] Petitioner affirms that the Retainer Agreement provided was redacted to delete proprietary and confidential information.

is unenforceable (see DR 2-108).

I wish you continued success with NAM.

Paragraph 8(a) of the Agreement ("Non-Compete Clause"), to which Respondent refers, provides as follows:

> In consideration of Olsen's retainer with NAM and other good and valuable consideration to be received by Olsen from NAM during the course of such retainer, the receipt and sufficiency of which are hereby acknowledged, Olsen agrees:
>
> (a) That in the event Olsen does not renew this Agreement, pursuant to paragraph 12 below [titled "Renewal"], or if she otherwise breaches or terminates this Agreement, she will not engage in or be employed by or act as an arbitrator or mediator as an individual or with any competitor of NAM within a 100 square mile area of anywhere Olsen has provided ADR services for NAM, for a period from the time NAM provides Olsen written notice of such breach or termination, in the case of a breach or termination by Olsen, until twelve months after the end of the Initial Term or in the case of non-renewal of this Agreement by Olsen, pursuant to paragraph 12 below, until twelve months after the end of the Initial Term. This subparagraph 8(a) shall not apply in the event that NAM does not renew this Agreement pursuant to paragraph 12 below, or if Olsen returns to the "court system".

NAM did not terminate the Agreement, and submits that the Agreement renewed for another 1-year term in light of Petitioner's failure to provide the required 90 day notice of termination.

The Petition alleges that Disciplinary Rule ("DR") 2-108, to which Respondent referred in the Notice, is no longer in effect. The Petition further alleges that, upon information and belief, Respondent intends to violate the Non-Compete Clause. Petitioner submits that the dispute regarding the enforceability of the Non-Compete Clause and timeliness of the Notice, including damages incurred by Petitioner as a result of Respondent's alleged breaches of the Agreement, are subject to arbitration under the Agreement.

On or about March 10, 2011, Petitioner served the Arbitration Demand (Ex. 3 to Petition), pursuant to the Agreement. The Arbitration Demand lists the following matters in controversy: 1) the validity of the Notice, 2) breach of the Agreement by Respondent in light of her failure to provide adequate notice of her intent to terminate, 3) the validity and enforceability of the Non-Compete Clause, and the breach thereof, and 4) assessing damages for Respondent's alleged failure to provide adequate notice and breach of the Non-Compete Clause.

The Petition contains two cases of action. In the first, Petitioner alleges that the dispute concerning the validity and enforceability of the Arbitration Clause is appropriate to arbitrate, and requests an Order compelling Respondent to arbitrate this dispute, and any dispute or controversy she wishes to raise, concerning the Agreement, and enjoining Respondent from litigating these disputes. In the second, Petitioner seeks an injunction in aid of arbitration to enjoin Respondent from violating the Non-Complete Clause. Petitioner alleges that, without the issuance of injunctive relief, the arbitration award would be rendered ineffectual. Petitioner notes that the Non-Compete Clause 1) does not prohibit Respondent from representing clients in an arbitration or mediation as an advocate; 2) does not prohibit Respondent from providing ADR services more than 100 miles from the territory in which she was assigned cases; and 3) does not prohibit Respondent from working as a court attorney. Petitioner alleges that the Non-Compete Clause is reasonable in scope and duration, and that Petitioner "made a huge investment in protecting its goodwill, including in attracting clients, which legitimate interests it may protect by a non-competition agreement" (Pet. at ¶ 27).

In his Affidavit in Support, Israel affirms as follows:

Israel provides extensive background information regarding NAM, including the services it provides and method of assigning arbitrators. Israel also provides details regarding the negotiations between NAM and Olsen, and affirms that the Retainer Agreement was "customized to address certain issues raised by Respondent during the course of negotiations" (Israel Aff. in Supp. at ¶ 16), and that Respondent "negotiated the specific terms and scope of the non-competition clause (*id.*).

Israel affirms that the purpose of the 90-day notice provision was to ensure that NAM would cease giving assignments to Olsen if the Retainer Agreement were terminated. The Non-Compete Clause was designed "to protect NAM's investment in a particular neutral should that person terminate his...agreement with NAM" and "to protect NAM by limiting the neutral's ability to take NAM's investment with him...if that person's relationship with NAM ends" (Israel Aff. in Supp. at ¶¶ 21 and 22). Israel avers that he discussed the Non-Compete Clause with Olsen before she signed the Agreement, and that Olsen knew that this Clause did not prevent her from practicing law or serving as an advocate for clients in an ADR proceeding. In fact, it was Olsen who included the handwritten language in the Non-Compete Clause "or if

Olsen returns to the 'court system," to confirm the parameters of the restrictive covenant.

Israel also outlines NAM's significant investment of time, effort and resources in Olsen, and disclosures that were made to Olsen while she was with NAM. Olsen obtained private information, including 1) access to a portion of the NAM computer system, a proprietary system, which explained how NAM operated its business, 2) NAM's marketing techniques and advertising plans, 3) the composition of NAM's staff and assignment of Clients, and 4) Clients' information, including the extent to which they used ADR.

In light of Respondent's failure to provide adequate written notice of her termination, and NAM's decision not to terminate the Agreement, the Agreement automatically renewed so that its second term would end on February 28, 2012. NAM continued to assign Olsen to new matters, which she accepted. On December 22, 2010, NAM signed a lease agreement in Garden City, to provide adequate space for Respondent and other NAM hearing officers.

On March 1, 2011, NAM received the Notice from Olsen. Prior to the Notice, Olsen had never communicated to Israel that she did not intend to continue the Agreement. Israel suggests that Olsen intentionally failed to provide the required notice so that she could continue working for NAM, inform Clients of her decision to leave and persuade them to join her at the competing company at which she had agreed to work after she left NAM. In support, Israel affirms that, shortly before sending the Notice, Olsen asked NAM to change the text of an advertisement it was running to reflect that Olsen had experience with medical malpractice cases. Israel suggests that she requested that change to make her more attractive to a future employer, not to act in NAM's best interests.

Counsel for Petitioner affirms that, on or about March 1, 2011, Olsen filed a plenary action in the Supreme Court of New York County ("New York County Action"), but did not serve Petitioner with that complaint. In the New York County Action, Olsen seeks a declaration that the Non-Compete Clause is unenforceable.

On March 14, 2011, NAM advised Olsen that it intended to file the Order to Show Cause *sub judice*. Respondent's counsel subsequently asked Petitioner's counsel to accept service of the complaint in the New York County Action, and Petitioner agreed. The parties appeared before the Court on March 15, 2011 and, during the argument regarding the proposed TRO, Respondent never raised the issue of venue. Petitioner received its copy of the complaint in the

New York County Action on March 17, 2011. Counsel for Respondent subsequently sent Petitioner's Counsel an e-mail dated March 21, 2011 (Ex. B to Garay Aff. Pursuant to CPLR § 511(b)) in which he asserted that venue regarding the parties' dispute is only proper in New York County. On March 23, 2011, Respondent served a Demand to Change Venue (*id.* at Ex. A). Petitioner submits, further, that in light of Respondent's failure to address the venue issue at the argument on the TRO, that issue is waived.

In her Supplemental Affirmation, counsel for Petitioner affirms that Respondent has participated in the arbitration as reflected by Respondent's selection of an arbitrator on her behalf and pursuant to the Arbitration Provision. In support, counsel for Petitioner provides a copy of a letter dated March 21, 2011 from Respondent's counsel regarding that selection (Ex. A to Garay Supp. Aff.).

On March 15, 2011, the Court issued a temporary restraining order ("TRO") which directed that, pending the hearing and determination of the underlying arbitration, Respondent, individually or with any competitor of petitioner, is enjoined from:

> (i) providing "ADR Services", as that term is used in the Retainer Agreement, in competition with Petitioner within a 50-mile radius of NAM's Manhattan Office; (ii) providing ADR Services in connection with any of the arbitrations or mediations to which she was assigned or was in the process of being assigned or that were being processed by Petitioner with the intention of assigning them to her (based on client discussions) at the time that she purportedly tendered her notice of non-renewal ("In-Process Matters"), except through NAM; (iii) providing ADR Services for any individuals and/or entities that manage or participate in the resolution of litigation and/or ADR matters (including, but not limited to, *pro se* individuals, law firms, insurance companies, businesses, corporations, municipalities and their employees/ representatives ("Clients") she served at NAM by reason of her association with Petitioner (that is, Clients in (i) cases that she heard/conferenced or (ii) In-Process Matters); and (iv) providing ADR Services within a 50-mile radius of NAM's Manhattan office on behalf of herself or her own entity or any entity providing ADR Services, except for the New York Court System, however, such temporary restraining order shall <u>not</u> prevent Respondent from representing any person or entity as an attorney in any matter on behalf of a client, or as an advocate, including in any alternative resolution proceeding (including arbitrations and mediations), or returning to the New York Court System, except that [Respondent] may provide ADR Services that have already been scheduled as of 3/15/11.

In her Affidavit in Opposition, Olsen affirms, *inter alia*, that 1) shortly after beginning work for NAM, she circulated an announcement, at her own expense, to 2,000 contacts; 2) the

only marketing activity in which she participated while at NAM was attending industry functions although she concedes that NAM did promote her and other mediators; 3) she did not require or receive training while at NAM; 4) when she was retained by NAM, she was not advised that she would be required to commute but, ultimately, she was required to commute in approximately 40% of her mediations; 5) she did not receive assignments after she served her Notice; 6) if she were to return to "the world of litigation" (Olsen Aff. in Supp. at ¶ 18), she would be known as an advocate which would undermine her credibility as a "neutral" making it impossible to return to her job as a mediator; and 7) since serving the Notice, she has not "finalized any new affiliations[,] advertised my services, made [any] official announcement or sought out my former clients" (*id.* at ¶ 20).

C. The Parties' Positions

Petitioner submits that 1) the Court should enforce the Arbitration Provision, which is clear and unequivocal; 2) the enforceability of the Non-Compete Clause is a "dispute" under the Agreement which should be arbitrated; 3) the Non-Compete Clause is enforceable given that it expressly permits Respond to practice law and does not limit her ability to represent clients; and 4) NAM is entitled to injunctive relief given its showing of a likelihood of success on the merits, irreparable injury by virtue of Olsen's work with a competing company to whom she may impart confidential information of NAM and a balance of the equities in favor of Petitioner, particularly in light of Respondent's unclean hands in failing to provide the required written notice and continuing to receive assignments that may benefit a company with which NAM competes. Petitioner also submits that Respondent's selection of an arbitrator, as reflected in the March 21, 2011 letter provided, acts as a waiver of any right to proceed with the New York County Action.

Respondent submits, *inter alia*, that 1) in light of the New York County Action, NAM was required to file its Order to Show Cause in New York County; 2) the Non-Compete Clause is unenforceable and, therefore, the Court should deny NAM's application; 3) injunctive relief is inappropriate because NAM's injury, if any, is compensable by money damages; and 4) a balancing of the equities weighs in Olsen's favor because if the Non-Compete Clause is enforced, she would be unable to earn a living.

RULING OF THE COURT

A. General Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its

alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Standards Regarding Arbitration and Remedies in Connection with Arbitration

CPLR § 7501, titled "**Effect of arbitration agreement**" provides:

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

CPLR § 7502(c) provides as follows:

> (c) Provisional remedies. The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The court may reduce or expand this period of time for good cause shown. The form of the application shall be as provided in subdivision (a) of this section.

CPLR § 7503(a) provides as follows:

> A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502 [addressing limitations of time], the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved

> in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

Generally, it is for the courts to make the initial determination whether a particular dispute is arbitrable, that is whether the parties have agreed to arbitrate the particular dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975) quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960). The ultimate disposition of the merits, however, is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is tenable, or otherwise passing on the merits of the dispute. *Nationwide General*, 37 N.Y.2d at 95, citing CPLR § 7501.

With regard to the scope of an arbitration clause, a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v. Carp*, 32 N.Y.2d 190 (1973). A court may exclude a substantive issue from issues that are submitted to an arbitrator only if the arbitration clause itself specifically enumerates the subjects intended to be put beyond the arbitrator's reach. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299 (1984).

Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate. *Shah v. Monpat Construction*, 65 A.D.3d 541, 543 (2d Dept. 2009). The Court must determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement. *Sisters of Saint John the Baptist v. Geraghty*, 67 N.Y.2d 997, 999 (1986). The Court's inquiry ends, however, when the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate. *Id.*

Once a party receives notice of his adversary's intention to arbitrate, the proper procedure is to make application by special proceeding to stay arbitration. *Ferndale Corp. v. Schulman Urban Dev. Assocs.*, 758 F. Supp. 861, 867 (S.D.N.Y. 1990), citing CPLR § 7502(a), CPLR § 7503, commentary at 366 (McKinney 1980) and *D.M.C. Constr. Corp. v. A. Leo Nash*

Steel Corp., 70 A.D.2d 635 (2d Dept. 1979), *app. dism.*, 49 N.Y.2d 1040 (1980). In *Ferndale*, the Court held that, where defendant's attorney notified plaintiff that defendant planned to seek arbitration, the fact that plaintiff "voiced its objection" to having an arbitrator appointed was not the equivalent of instituting a special proceeding to stay arbitration as the statute requires and, therefore, arbitration properly proceeded. *Ferndale,* 758 F. Supp. at 868.

A party waives its right to a stay of arbitration by participating in the arbitration. *See Allstate v. Khait*, 227 A.D.2d 551 (2d Dept. 1996) (petitioner's right to stay of arbitration was waived by its active participation in selection of arbitrators and adjournment of arbitration hearing without reservation of rights.

C. Restrictive Covenants

Covenants restricting a professional from competing with a former employer or associate are common and generally acceptable if they are reasonable as to time and area, necessary to protect legitimate interests, not harmful to the public, and not unduly burdensome. *North Shore Hematology/Oncology v. Zervos*, 278 A.D.2d 210, 211 (2d Dept. 2000).

D. Application of these Principles to the Instant Action

Preliminarily, the Court declines to dismiss Petitioner's Order to Show Cause on the grounds that Petitioner was required to file this application in New York County. The Court notes that Respondent did not initially serve Petitioner with a copy of the complaint in the New York Action and did not raise any objection to venue during the argument before the Court regarding the TRO. Moreover, the New York County Action is not a special proceeding to compel or stay arbitration, but rather an action for a declaratory judgment regarding the enforceability of the Non-Compete Clause. Finally, Petitioner has participated in the arbitration to some degree in light of her selection of an arbitrator, as reflected by the March 21, 2011 letter discussed *supra*, and may be deemed to have waived her right to a stay of arbitration. Under all the circumstances, the Court denies Respondent's application to dismiss Petitioner's Order to Show Cause based on improper venue.

The Court concludes, further, that the issues set forth in the Arbitration Demand, which relate to the adequacy of the Notice and enforceability of the Non-Compete Clause, are clearly

Disputes within the meaning of the broad Arbitration Provision which requires the parties to arbitrate "any dispute or controversy arising out of or in connection with this Agreement, or any alleged breach thereof."

The Court also concludes that Petitioner has demonstrated its right to injunctive relief. Petitioner has demonstrated a likelihood of success on the merits by establishing that Petitioner failed to provide adequate notice of her intent to terminate the Agreement, and intends to breach the Non-Compete Clause by engaging in new employment with a company that competes with Petitioner. Moreover, Respondent concedes in the Notice that she failed to provide the required written notice. And while the enforceability of the Non-Compete Clause will ultimately be a determination for the arbitrator, the fact that the Non-Compete Clause permits Respondent to earn a living by representing clients supports the conclusion that it is a reasonable and enforceable restriction. The Court is unpersuaded by Respondent's assertion that practicing law will adversely affect her ability to be an effective arbitrator in the future.

The Court determines, further, that Petitioner has demonstrated that it may suffer irreparable harm without injunctive relief, given the investment it made in Respondent and the potential loss of Clients to Respondent in her new position. *See Albany Medical Collage v. Lobel*, 296 A.D.2d 701 (3d Dept. 2002) (plaintiff demonstrated strong probability of irreparable harm by establishing, *inter alia*, that it would lose investment it made in hiring defendant and establishing specialized practice for which he was recruited, and lose patients and revenues to defendant's new practice).

Finally, the Court concludes that the equities balance in favor of Petitioner, given Respondent's execution of the Agreement, consent to the Non-Compete Clause, acknowledgment of her failure to provide the required notice of her intent not to renew the Agreement and ability to learn a livelihood by representing clients. The Court also concludes, under all the circumstances, that the award to which Petitioner may be entitled may be rendered ineffectual without some provisional relief.

In light of the foregoing, the Court grants Petitioner's application for injunctive relief to the extent that the Court 1) directs that the TRO shall remain in effect, and directs Petitioner to post a bond in the sum of $10,000, within thirty (30) days of this Order, as a condition of that

continued injunctive relief; and 2) compels Respondent to arbitrate all claims and disputes arising under or concerning the parties' Retainer Agreement, including but not limited to, the disputes and/or controversies set forth in the Arbitration Demand. The Court denies Petitioner's application for an Order enjoining Respondent from litigating any arbitrable claims or disputes, however, concluding that it would be inappropriate for the Court to issue such a direction in light of the pending New York County Action, which is not before the Court.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

April 5, 2011

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

APR 11 2011

NASSAU COUNTY

COUNTY CLERK'S OFFICE