[* 1]

Sean

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

BLACKMAN PLUMBING SUPPLY COMPANY, INC.,

Plaintiffs,

- against -

SEAN CONNELLY and GREEN ART PLUMBING SUPPLY,

Defendants

INDEX NO.: 600148/2011
MOTION DATE: 5/18\2011
SEQUENCE NO.: 01

The following documents were read on this Motion:

Order to Show Cause to Enjoin Defendant Connelly from Certain Activities 1.
Plaintiff's Memorandum of Law in Support of Motion ..... 2.
Affirmation in Opposition ..... 3.
Supplemental Affirmation in Compliance with Uniform Court Rule § 202.7 4.

PRELIMINARY STATEMENT

Plaintiff moves by Order to Show Cause for Injunctive Relief to prevent defendant Sean Connelly from contacting, soliciting or communicating with Blackman customers for the purpose of obtaining sales or business; becoming employed or affiliated with any business, including Green Art, which engages in business in competition with Blackman; selling products to Blackman customers; using proprietary items or information of Blackman's, including customer specifications and sales history data; soliciting any Blackman employee to leave and join a competitor. It also seeks to enjoin Green Art from employing Connelly for the duration of a non-compete period agreed to by Connelly; or

misappropriating any Blackman trade secret or confidential information from Connelly to solicit Blackman customers.

BACKGROUND

Sean Connelly started employment with Blackman in 1998 as an outside warehouse employee. He rose in responsibility to a sales representative, and, on or about June 24, 2003, he signed a non-compete, non-disclosure agreement as a condition of his continued employment. Section 2 of that agreement contains a provision that upon termination of employment, there is a two-year period of non-competition, during which Connelly was prohibited from soliciting Blackman customers or seek employment with a competitor in the counties of New York, Brooklyn, Queens, Nassau and Suffolk. Section 3 prevents Connelly from disclosing any of the plaintiff's trade secrets, including information relating to their customers, products and finances.

On or about February 14, 2011, soon after Connelly was named manager of Blackman's Kingston location, he terminated his employment with plaintiff and accepted a position at Green Art, a plumbing supplier in Baldwin. After Blackstone received three credit inquiries from Green Art for Blackstone customers, they advised Green Art that Connelly was in violation of the non-competition agreement.

Plaintiff obtained a temporary restraining order precluding Connelly from selling material to Blackman customers, using proprietary information, including customer specifications and sales history data, and from soliciting any Blackman employee to leave and join a competitor. Plaintiff now seeks an injunction to the same effect.

DISCUSSION

The issuance of temporary restraining orders and preliminary injunctions is governed by CPLR § 6301, which provides as follows:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and

> tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

To be entitled to a preliminary injunction, the movant must demonstrate by clear and convincing evidence "(1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position." (*Apa Sec., Inc. V. Apa,* 37 A.D.3d 502, 503 [2d Dept. 2007]); (*W.T. Grant v. Srogi,* 52 N.Y.2d 496, 517 (1981); (*Ruiz v. Meloney,* 26 A.D.3d 485 — 486 [2d Dept. 2006]).

The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property which could render a judgment useless. (*Ying Fung Moy v. Hohi Umeki,* 10 A.D or .3d 604 (*Ying Fung Moy v. Hohi Umeki,* 10 A.D.3d 604 [2d Dept. 2004]). All that is required of the Plaintiff is the likelihood of success, and the existence of factual questions will not preclude the grant of injunctive relief. *Id.* at 604 — 605 (internal citations omitted).

The Court of Appeals set forth the "modern, prevailing common-law standard of reasonableness" for the enforceability of employee noncompete agreements. (*BDO Seidman v. Hirshberg,* 93 N.Y.2d 382, 388 [1999]). "A 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.* at 388 — 389. A noncompete agreement must also be reasonably limited temporally and geographically. (*Elite Promotional Mktg., Ind. v. Stumacher,* 8 A.D.3d 525, 526 [2nd Dept. 2004]; *Natural Organics, Inc. v. Kirkendall,* 53 A.D.3d 488, 489 [2d Dept. 2008]).

" ' To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts' ". (*Matter of Related Properties v. Town/Vil. of Harrison,* 22 A.D.3d 587 [2d Dept. 2005], quoting

Blueberries Gourmet v. Aris Realty Corp., 255 A.D.2d 348, 349 — 350 [2d Dept. Is1998]). The parties disagree as to the reasonableness of the restriction, and therefor its enforceability. In order to be found reasonable, it must be temporally and geographically limited, and even 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 lists". (*VI Environmental, Inc. v. McGovern, et al.*, 269 A.D.2d 497, 498 [2d Dept. 2000], quoting *Gelder Med. Group v. Webber*, 41 N.Y.2d 680, 683 [1977]).

In order to enforce a restrictive covenant in and employment contract, the employer must overcome the recognized fact that such restrictions are disfavored as a matter of public policy. (*American Broadcasting Companies, Inc. v. Wolf*, 52 N.Y.2d 394 [1981]). There have long been recognized "powerful considerations of public policy whith militate against sanctioning the loss of a man's livelihood". (*Purchasing Assoc. v. Weitz*, 13 N.Y.2d 267, 272 [1963]).

As stated in *Purchasing Assoc. id.*, "a covenant given by an employee that he will not compete with his employer when he quits his employ, and the general limitation of 'reasonableness', to which we have just referred, applies equally to such a covenant". It is, therefor, reasonableness, which is the sine qua non of the requisite establishment of likelihood of success on the merits. While the temporal restriction of two years may be considered reasonable, the geographic limitations, extending from the westernmost border of Manhattan to the eastern tip of Montauk Point, is hardly reasonable for the protection of the business interests of the employer. In fact, unless Connelly were to uproot himself and his family, the restriction essentially precludes him from engaging in the sale of plumbing equipment and fixtures, a field in which he has been continuously engaged for approximately thirteen years.

To the extent that restrictive covenants in employment contracts are enforceable, it is to preclude unfair, not all, competition. To that end, the motion insofar as it seeks to prevent Connelly from communicating with any Blackman customer, becoming employed

or otherwise affiliated with a business which competes directly or indirectly with Blackman, or selling any product to a Blackman customer, is denied. Connelly is, however, precluded, for a period of two years from his termination of employment with Blackman, from using proprietary information which may have been taken from Blackman, and from actively seeking to induce Blackman employees from leaving their employment.

To the extent that Blackman customers are remembered by Connelly, or are discoverable by means of resort to other than records of Blackman, they do not constitute proprietary information, and Connelly is not precluded from communicating with them. (*Apa Sec., Inc. v. Apa,* 37 A.D.3d 502, 503 [2d Dept. 2007), citing *Reed, Roberts Assoc. v. Strauman,* 40 N.Y.2d 303 [1976), et al.).

In cases in which the departing employee is not the seller of goodwill, there is no implied covenant imposing barriers on their conduct. To the extent that Blackman customers follow Connelly, or by happenstance seek to do business with Green Art, the public interest is best served by free access to competing entities.

The motion to enjoin Green Art from employing Connelly for the duration of the non-compete period is denied. The motion to preclude Green Art from utilizing trade secrets or confidential information imparted to them by Connelly is granted. While Green Art is not a party to any restrictive covenant with plaintiff, Blackman has a proprietary interest in customer information which is not readily ascertainable from other sources, and, to the extent that plaintiff can show that Green Art is utilizing such material to unfairly compete with Blackman, they are enjoined from doing so. (*Marcone APW, LLC v. Servall Co.,* 85 A.D.3d 1693 [4th Dept.2011]).

This constitutes the Decision and Order of the Court.

Dated: August 23, 2011

J.S.C.