FILED: KINGS COUNTY CLERK 05/01/2012
NYSCEF DOC. NO. 13

INDEX NO. 500775/2012
RECEIVED NYSCEF: 05/01/2012

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of April, 2012

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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AABLE MULTI SERVICES LLC,

Plaintiff,

- against -

Index No. 500775/12

YOHANCE PERRY,

Defendant.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers Memos of Law	5, 6

On December 7, 2010, plaintiff AAble Multi Services LLC and defendant Yohance Perry entered into an agreement pursuant to which, among other things, Perry was authorized to solicit and write bail bond business and to otherwise further the interests of plaintiff. The agreement provided

that if defendant decided to terminate the agreement before the contract expired, he will not open up a retail bond business for three years in the exact same locations as plaintiff. In the event of any termination of the agreement, defendant agreed not to disclose, or remove any documents, and not to compete or solicit business for three years in the areas plaintiff had an office.

One of the offices maintained by plaintiff was at 48 Mamaroneck Avenue in White Plains. Plaintiff claims that on February 10, 2012, Perry terminated his association with plaintiff and opened his own bail bond agency at 204 East Post Road in White Plains. Plaintiff asserts that defendant is competing with it in the same community, thus violating the agreement. Plaintiff thereupon commenced this action to enjoin defendant from continuing to sell bail bonds or maintaining an office to do so in Kings County, Westchester County, Suffolk County and Monroe County.

In this motion, plaintiff moves to preclude defendant, during the pendency of this action, from maintaining an office to sell bail bonds in the State of New York and specifically in Kings, Westchester, Suffolk and Monroe Counties where plaintiff maintains its offices. In the order to show cause dated April 16, 2012, this court (Ellen M. Spodek, J.), granted a temporary restraining order for that relief.

In opposition, defendant contends that he was hired by plaintiff because of his skills and experience in the industry and to restore profitability to the Westchester office, including using the contacts he had developed prior to joining plaintiff. He received no training by plaintiff, whose

principal came only once a week to collect money. There was, defendant asserts, nothing unique or proprietary about the way plaintiff did business.

Defendant claims he took a few days off and returned February 2, 2012 to find that the locks to the office had been changed. Plaintiff's principal was unhappy he had taken a few days off, but did not say he was fired. Defendant sent a resignation letter February 10, 2012. On February 13, 2012, plaintiff fired him effective February 2, 2012. On March 1, 2012, he began working for All Pro Bail Agency, Inc., as an employee. He is not an owner, founder or shareholder of All Pro, and does not advertise or solicit business for it. Defendant argues that even if the non-compete clause were valid, it would prevent him from opening his own retail bail bond business, competing with plaintiff, or soliciting or advertising. As an employee, he did not open a business, does not compete, solicit business or advertise. The contract does not prevent him from selling bonds as an employee of another company. Moreover, it is argued, the non-compete clause is only triggered when defendant decided to terminate his employment with plaintiff, not if he got fired by plaintiff. Since plaintiff fired him, it is contended, the non-compete should not be enforced. There is nothing unique about how plaintiff conducts its business, plaintiff can easily hire another person to work its Westchester office, and it is unreasonable to prevent defendant from working in four counties enumerated by plaintiff. Enforcing the temporary restraining order, defendant argues, forces him to remain out of work and prevents him from earning a living, causing defendant serious and irreparable harm.

In reply, plaintiff maintains that the restrictive covenant is reasonable and fair, since it is limited to only four counties and for three years, and defendant "can open his bail bond business in any county" other than those four.

The agreement of the parties provides that it may be terminated at any time with 30 days written notice, but may be terminated at any time for cause, i.e. for any action deemed prejudicial to plaintiff. "If at any time defendant terminated the agreement," defendant agreed "if they decide to open their own retail bail bond business of any kind," the defendant "will not open up the retail bail bond business for 3 years in the exact same areas locations, address, counties, states, geographic areas "as plaintiff. In the event of any termination, defendant was not to disclose any documents or ideas of any of plaintiff's operations and will not compete or solicit or advertise in the areas on any of plaintiff's office for three years.

"Restrictive covenants contained in employment contracts are disfavored by the courts, and thus, are to be enforced only if reasonably limited temporarily and geographically, and to the extent necessary to protect the employer's use of trade secrets or confidential customer information" (*Gilman & Cicocia, Inc., v Randello*, 55 AD3d 871 [2d Dept. 2008]; *see BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999]; *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976]). In an action for injunctive relief, defendant employee met his burden of showing that the non-compete agreement did not serve to protect a legitimate employer interest, by establishing that he did not

physically appropriate, copy or memorize any purported confidential business information. Plaintiff failed to raise a triable issue of fact by, *inter alia*, failing to show that enforcement was necessary to protect the goodwill of its clients or that defendant used or threatened to use any protected trade lists or confidential customer list (*see Natrual Organics, Inc., v Kirkendall*, 52 AD3d 488 [2d Dept. 2008]).

A preliminary injunction is an extraordinary provisional remedy requiring a special showing and will only be granted when the party seeking it demonstrates a likelihood of ultimate success on the merits, irreparable injury of the preliminary injunction is not granted, and a balance of the equities in favor of the moving party (*see 1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18 [1st Dept. 2011]). A party seeking a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts (*1234 Broadway v West Side, supra; Omakaze Sushi Restaurant, Inc., v Ngan Kam Lee*, 57 AD3d 497 [2d Dept. 2008]; *Gagnon Bus Co., Inc., Vallo Transp., Ltd.*, 13 AD3d 334 [2d Dept. 2004].

Here, as a threshold matter, it is undisputed that plaintiff terminated defendant as of February 2, before defendant's letter of resignation. Accordingly, it is apparent that the provision of the agreement that is effective if the defendant terminates the agreement, viz. the promise not to open a retail bail bond business for three years in the exact same areas as plaintiff, does not apply. Even if it did, there has been no demonstration that defendant, by accepting employment with another

employer, is in violation of that covenant, since he did not open a business. Nor is there any indication, let alone proof, that defendant disclosed or removed "any known, written, verbal documents, agreements, paperwork, plans, ideas, blueprints to any operations relating to" plaintiff, or that defendant violated the portion of the agreement not to "open or compete or solicit or advertise in the areas" where plaintiff had an office.

Thus, plaintiff cannot be said to have shown a clear right to a preliminary injunction under the law and the undisputed facts, and thus it has not demonstrated a likelihood of ultimate success on the merits. Nor has it demonstrated irreparable injury if the preliminary injunction is not granted or that a balance of the equities is in its favor.

Accordingly, plaintiff's motion for a preliminary injunction is denied. The temporary restraining order in the April 16, 2012 order to show cause is vacated.

The foregoing constitutes the decision and order of this court.

ENTER FORTHWITH,

J. S. C.