

Godoy v FDR Servs. Corp.

2013 NY Slip Op 30985(U)

May 6, 2013

Supreme Court, New York County

Docket Number: 152540/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 150272/2013
GODOY, RICARDO
vs
FDR SERVICES CORP.
Sequence Number : 001
PREL INJUNCTION/TEMP REST ORDER

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/6/13


_____, J.S.C.

HON. EILEEN A. RAKOWER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

RICARDO GODOY,

Plaintiff,

- v -

FDR SERVICES CORP.,

Defendants.

INDEX NO. 152540/2012

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes X No

In this action, Plaintiff Richard Godoy, seeks, among other relief, a declaratory judgment declaring the parties' Employment Agreement and the Restrictive Covenant contained therein unenforceable.

As alleged in the Complaint, pursuant to an Employment Agreement, dated August 25, 2011 (the "Employment Agreement"), defendant FDR Services Corp., ("FDR"), a healthcare linen and laundry specialist company, hired Plaintiff as its Northeast Vice President of Operations. On November 8, 2012, Plaintiff was terminated without cause.

In the Complaint, Plaintiff alleges that FDR breached the parties' Employment Agreement by failing to provide Plaintiff with two weeks notice of his termination and two weeks severance pay. Plaintiff asserts that after his termination from FDR, he received an employment offer from JVK Operations Ltd ("JVK"). The Complaint alleges that despite FDR's breach of the parties' Employment Agreement, FDR

sought to prevent plaintiff from working with JVK, pursuant to the Agreement's restrictive covenant, which prevents Plaintiff from undertaking any services "directly or indirectly competitive with any business operated by FDR" for 18 months after Plaintiff's termination. Plaintiff asserts that as a result of FDR's cease and desist notice sent to JVK, JVK rescinded its employment offer to plaintiff.

Plaintiff brings this motion for an Order pursuant to CPLR §6312 enjoining and restraining FDR during the pendency of this action from taking any action by litigation or otherwise based upon the Employment Agreement and restrictive covenant and enjoining and restraining FDR during the pendency of this action from hindering or preventing Plaintiff from seeking and performing employment.

The relevant Restrictive Covenant provision in the parties' Employment Agreement is set forth in paragraph 10, section c, and provides:

Employee will not, during the Employment Term (including any extensions, thereof) and for an 18 month period thereafter, directly or indirectly, under any circumstance other than at the direction and for the benefit of the Company or its subsidiaries or affiliates, engage in or participate in any business activity, including but not limited to, acting as a director, officer, employee, agent, independent contractor, partner, consultant, licensor or licensee, franchisor or franchisee, proprietor, syndicate member, shareholder or creditor or with a person having any other relationship with any other business, company, firm, occupation or business activity, that is directly or indirectly, competitive with any business carried on by the Company or its subsidiaries and affiliates during the term of the Employment.

To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction. (*See, CPLR §6301; Doe v. Axelrod*, 73 NY2d 748, 532 NE2d 1272, 536 NYS2d 44 [1988]).

"[A] restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." *BDO v. Seidman v. Hirschberg*, 93 N.Y. 2d 382, 388-

89 [1999] (citations omitted). Determination of whether a restrictive covenant should be enforced is reasonable is fact sensitive. *See id.* at 390 (“the application of the test of reasonableness of employee restrictive covenants focuses on the particular facts and circumstances giving context to the agreement.”) “A covenant will be rejected as overly broad, however, if it seeks to bar the employee from soliciting or providing services to clients with whom the employee never acquired a relationship through his or her employment or if the covenant extends to personal clients recruited through the employee's independent efforts. (*Id.*)

Plaintiff submits his own affidavit and the attorney affirmation of Anthony Balsamo. Plaintiff argues that the restrictive covenant is not enforceable as any confidential or proprietary information obtained by Plaintiff is not required for the full performance of his duties with his prospective employer and the information will not be used to compete against Defendant. As set forth in Plaintiff's affidavit, Plaintiff has been employed in the health care industry for forty years and has worked in various capacities for a number of different businesses. In 2011, while employed at Superior, Plaintiff was offered the position of Northeast Vice President of Operations at FDR. Plaintiff's duties “were operational, and were primarily concerned with matters such as production and distribution, engineering, monitoring deliveries, quality control; monitoring the plant to adhere to all federal, state, and local regulations; and to oversee the performance of management and staff.” As Northeast Vice President of Operations, his duties were “essentially the same as [his] duties with Superior, except on a larger scale.” Plaintiff asserts that his position and service at FDR were neither “unique nor extraordinary.” Plaintiff asserts that the position that he was offered at JVK was similar to that he had at Superior and was neither “unique nor extraordinary.”

In opposition, FDR submits the affidavit of James McCormack, vice president of FDR. FDR contends that Plaintiff was privy to confidential or proprietary information, and that if this information is divulged to JVK, Plaintiff could target specific FDR employees and customers based on his knowledge of FDR's pricing, compensation, and operations. Defendant asserts that contrary to Plaintiff's assertion that FDR and JVK's business models are different, JVK and FDR offer many of the same services including, but not limited to, linen rentals, linen management and uniform services.

Here, Plaintiff has demonstrated a likelihood of success in establishing that the restrictive covenant which prohibits him from “directly or indirectly, under any circumstance other than at the direction and for the benefit of the Company or its subsidiaries or affiliates, engage in or participate in any business activity, including but not limited to, acting as a director, officer, employee, agent” is greater than necessary to protect any legitimate interest of Defendant, and as such, is unenforceable. The provision, which contains no geographic limitation, seeks to bar Plaintiff from working in an entire industry and therefore soliciting or providing services to any clients with whom Plaintiff may never have acquired a relationship through his employment. Furthermore, in opposition to Plaintiff’s motion, Defendant does not claim that the services of Plaintiff are unique or extraordinary nor does Defendant provide any evidentiary support to substantiate its allegations that this restrictive covenant is necessary to protect its legitimate interests. The Court notes that the parties’ Employment Agreement also contains separate provisions that prohibit Plaintiff from using or disclosing to any third party any trade secrets or confidential information of Defendant (Paragraph 10(b) and soliciting or inducing any “creditor, customer, client supplier, officer, employee or agent of [Defendant] or its past or present subsidiaries or affiliates . . .” (Paragraph 10(d)), which would protect Defendant’s confidential or proprietary information that Plaintiff may have been privy to in connection with his employment at Defendant.

In addition, Plaintiff has demonstrated irreparable harm in the absence of an injunction, and further that a balance of the equities weighs in favor of granting the injunction in light of the fact that Plaintiff cannot resume employment if the injunction is not granted and Defendant’s business will nevertheless continue notwithstanding said injunction.

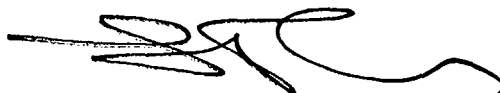
Wherefore, it is hereby,

ORDERED that plaintiff Ricardo Godoy’s motion for a preliminary injunction is granted to the extent that defendant FDR Services Corp. is enjoined and restrained during the pendency of this action from taking any action by litigation or otherwise based upon the restrictive covenant as set forth in paragraph 10, section (c), and enjoined and restrained during the pendency of this action from hindering or preventing Plaintiff from seeking and performing employment.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated:

5/6/13



J.S.C.
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE