TSIG Consulting, Inc.I v ACP Consulting LLC
2014 NY Slip Op 32232(U)
August 18, 2014
Supreme Court, New York County
Docket Number: 651217/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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TSIG CONSULTING, INC.

Index No. 651217/2014

Motion Seq. Nos. 002

Plaintiff,

-against-

ACP CONSULTING LLC, BARBARA PANKOSKI, and HENRY SAUNDERS,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for, *inter alia*, breach of employment agreement by former employees, defendants ACP Consulting LLC ("ACP"), Barbara Pankoski ("Pankoski"), and Henry Saunders ("Saunders") (collectively, the "individual defendants") move to dismiss the complaint of the plaintiff pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction.[1]

The parties also briefed the issue of whether the subject non-compete clauses are enforceable.[2]

Factual Background

Plaintiff, a New York-based corporation, provides accreditation consulting services to

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[1] By the order to show cause (signed on April 22, 2014), the Court issued a temporary restraining order ("TRO") enjoining defendants from "engaging [in] conduct as detailed in the 'non solicitation non disclosure agreement' that is the subject herein, only as limited to solicitation." At a subsequent hearing as to whether Pankoski violated the TRO, the Court held that her actions in providing services to Michael Jones at St. Michael's Hospital in New Jersey pursuant to her contract with Michael Jones at St. Michael's Hospital were not violative of the Court's TRO. The Court held that her agreement was "not the result of a diversion and/or solicitation that commenced after this Court's orders dated those two dates" of April 22 and May 1, 2014 (Transcript, p. 101; see footnote 2).

[2] The propriety of the non-compete provisions was raised during oral argument on the return date of plaintiff's order to show cause (see Status Conference Order dated May 1, 2014). The Status Conference Order directed further oral argument to address the parties' memoranda of law regarding the non-compete provisions.

hospitals and other healthcare institutions located in New York and other parts of the United States. Plaintiff alleges the individual defendants, former Senior Compliance Specialists, violated their contractual non-compete/non-disclosure obligations, as well as their fiduciary obligations, by forming a competing business, ACP, while still employed by plaintiff and have unlawfully diverted business away from plaintiff for their own benefit. The contractual obligations are found a document defendants signed, entitled "Non-Compete & Non-Disclosure Confidential Information" (the "Agreement").

As a result, plaintiff commenced this action alleging breach of contract, unfair competition, breach of fiduciary duty, misappropriation of confidential and proprietary information and trade secrets, fraud, diversion of corporate opportunities, interference with prospective contracts, conversion and unjust enrichment all arising out of the breach of a non-solicitation/non-competition agreement (hereinafter the "Agreement") that was a condition of the defendants' employment by plaintiff.

Now, in support of dismissal, defendants argue that contrary to the allegations in the Complaint, personal jurisdiction does not exist over them under any subsection of CPLR 302 (New York's long arm statute). Pankoski is a citizen of Georgia, Saunders is a citizen of Tennessee, and their company, Accreditation Consulting Partners, LLC (s/h/a ACP), was organized and exists in Georgia. Pankoski and Saunders each attest that the Agreement was emailed to them in their respective states of residence (Georgia and Tennessee), where they signed the Agreement. They each deny visiting New York to negotiate the Agreement. Payroll checks and commission and reimbursement checks were either deposited directly to an out-of-state bank, or mailed to them in Georgia and Tennessee, respectively. Neither of them owns

property or bank accounts in New York. The individual defendants worked exclusively from home, and visited clients in California, Tennessee, Texas, Minnesota, Delaware, Florida and Georgia. They visited New York only two or three times per year, to attend either the company's holiday party in December, or an annual or other meeting.

Defendants deny having had any significant contacts with New York in connection with their employment with plaintiff. Particularly, there is no jurisdiction over defendants under CPLR 302(a)(1) as there is no allegation that defendants "transact business" in New York, or that a claim arises out their business activity in New York. Further, jurisdiction under CPLR 302(a)(2) is lacking since there is no allegation of a single tortious act committed that occurred in New York. And, jurisdiction under CPLR 302(a)(3) does not exist because any alleged loss of business in New York does not qualify as an "injury within the state" as required; there is no allegation of a loss of any specific customers in New York; and it is unreasonable for defendants to expect their alleged out-of-state actions to cause injury in New York.

As to the non-compete provisions which form the basis of plaintiff's complaint, defendants further argue that they are unenforceable because they do not implicate an employer's protectable interests and are overly broad and oppressive. Paragraph 1.52 is a broad-based non-compete provision, with no time limitation, geographic scope, or definition of the "competitive business" intended to be prohibited. Further, Paragraph 1.52 conflicts with Paragraph 2.2, which limits the non-compete to 18 months following termination of employment and in instances where Pankoski or Saunders would be required to reveal or use plaintiff's "trade secrets," a term which is not defined. And, although courts may cure the provision to make it enforceable, courts are not required to do so, especially where there is evidence of overreaching by the employer.

Further, while Paragraph 2.3 prohibits defendants from contacting customers and clients identified by plaintiff, plaintiff never provided any list of such persons, thereby rendering the non-compete provisions unenforceable.

In opposition, plaintiff argues that under caselaw, entering into an employment arrangement with a New York employer is sufficient to confer jurisdiction under CPLR 302(a)(1). Defendants received regular paychecks from New York and regularly came to New York or contacted New York to attend meetings and service clients based here. Thus, they have projected themselves into local commerce and otherwise purposefully directed their activities toward New York. Further, technology enabled Pankowski and Saunders to sustain employment by a New York company while living and physically working elsewhere, and such an arrangement has consistently been held to give rise to 302(a)(1) jurisdiction. Thus, although defendants regularly worked from their homes out of state, Saunders and Pankowski transacted business in New York by accepting an ongoing employment relationship with plaintiff. And, the causes of action arise out of the defendants' breach of the terms of that employment relationship. Further, defendants failed to establish that the exercise of jurisdiction is unreasonable under the circumstances.

Plaintiff also argues that jurisdiction can also be established over all defendants under CPLR 302(a)(3) because all three of the defendants have committed tortuous acts without the state (*i.e.*, in Georgia, Tennessee, New Mexico, North Carolina and through the Internet) causing injury to plaintiff within the state and can reasonably expect their acts to have consequences here and they derive substantial revenue from interstate commerce as their clients (University of New

Mexico Hospitals) and prospective clients are located throughout the United States.

And, Pankowski and Saunders purposefully entered into a multi-year employment relationship with plaintiff, gained access to its confidences and clients, regularly serviced those clients on behalf of plaintiff both here in New York and elsewhere and derived significant income as a result of doing so. The Complaint further alleges that they formed ACP in violation of the terms of their employment and are using the information and client relationships they formed as employees of plaintiff to unfairly compete with plaintiff in violation of the Agreement and their fiduciary obligations. Thus, there are sufficient "minimum contacts" with New York "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Furthermore, defendants cannot establish that the exercise of jurisdiction is unreasonable. The burden on the defendants as senior employees does not exist, New York has an interest in adjudicating a dispute by one of its corporate residents, the plaintiff cannot obtain convenient and effective relief if compelled to sue in Georgia or Tennessee, resolution of this case in New York would appear to advance the interest of the "interstate judicial system" in obtaining the most efficient resolution of this controversy in a single jurisdiction, and allowing the suit to proceed in New York will effectuate the shared interest of the states in furthering the policies of protecting the sanctity of contract, as well as enforcing the promises of employees to honor, among other things, the confidential information and client relationships entrusted to them by their employer. And, defendants do not claim that New York's exercise of jurisdiction would be unreasonable.

As to the non-compete provisions, the individual defendants acknowledged in Paragraph

1.1 that plaintiff's operations, clients, customer lists, suppliers or services sold by the company, the prices charged, and electronic databases are "trade secrets and confidential information." Thus, the provisions are narrowly tailored to protect plaintiff's legitimate interest in safeguarding its confidential and proprietary information from unauthorized use and disclosure and to prevent former employees from using the special knowledge and information they learned as employees to divert leads, clients, employees, consultants and contractors from plaintiff for a reasonable period of time (18 months) following their termination of employment. The Agreement is also reasonable in geographic scope as plaintiff's clients are located throughout the United States. Because plaintiff has a small share of the available market (around 5%), the provisions are reasonable in scope because they do not in any way limit the defendants from performing hospital accreditation consulting services for hospitals and institutions that are not represented in plaintiff's Lead Management System or from going to work for one of plaintiff's competitors. Nor does the Agreement prevent them from starting their own business or developing their own client base after leaving. Because the provisions are no greater than necessary to protect plaintiff's legitimate interest in protecting, for a limited time, information and relationships that belong to it and that the defendants acquired in the course of their employment. They do not impose an undue hardship on the defendants, and are not injurious to the public. Nor is there evidence of overreaching, coercion or anti-competitive conduct on the part of plaintiff.

If, to enforce Paragraph 2.3, the Court carves out clients that the defendants introduced to plaintiff, it should only include those clients that the parties agree are appropriate. Plaintiff also has not seen the list of clients defendants claim they introduced to plaintiff.

Discussion

Personal Jurisdiction

CPLR 3211(a)(8) permits the Court to dismiss an action for lack of personal jurisdiction (*Uzan v. Telsim Mobil Telekomunikasyon Hizmetleri A.S.*, 51 A.D.3d 476, 856 N.Y.S.2d 625[1st Dept 2008]). And, as the party seeking to assert personal jurisdiction, plaintiff bears the ultimate burden of proof on this issue (*see Jacobs v Zurich Ins. Co.*, 53 AD2d 524 [1st Dept 1976]; *Marist Coll. v Brady*, 84 AD3d 1322, 1323 [2d Dept 2011]). However, as plaintiff points out, on a motion to dismiss, courts do not require that the plaintiff make a *prima facie* showing of personal jurisdiction. Rather, to defeat such motion, plaintiff must only demonstrate that facts "may exist" to exercise personal jurisdiction over the defendant (see CPLR 3211 [d]; *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007]; *Ying Jun Chen v Lei Shi*, 19 AD3d 407 [2d Dept 2005]).

CPLR 302(a)(1), upon which plaintiff solely relies, "permits a New York court to exercise "long-arm" personal jurisdiction over a nondomiciliary defendant if the defendant transacted business within the state, and the cause of action arose from that transaction (*Copp v. Ramirez*, 62 A.D.3d 23, 874 N.Y.S.2d 52 [1st Dept 2009]). Under the statute, "proof of one transaction in New York is sufficient to invoke jurisdiction ... so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195, 522 N.E.2d 40 [1988]; *see Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 829, 527 N.Y.S.2d 729, 522 N.E.2d 1027 [1988] (personal jurisdiction under this section exists if it is established that "the

nondomiciliary conducts 'purposeful activities' within the state and the claim against the nondomiciliary involves a transaction bearing a 'substantial relationship' to those activities"); *McGowan v. Smith*, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 419 N.E.2d 321 [1981]). "If either prong of the statute is not met, jurisdiction cannot be conferred" (*Copp v. Ramirez, supra citing Johnson v. Ward*, 4 N.Y.3d 516, 519, 797 N.Y.S.2d 33, 829 N.E.2d 1201 [2005]). Indeed, "[J]urisdiction is not justified where the relationship between the claim and transaction is too attenuated" (*Johnson*, 4 N.Y.3d at 520, 797 N.Y.S.2d 33, 829 N.E.2d 1201).

Once "a court determines that a defendant has transacted business pursuant to CPLR 302(a)(1), then it must further ascertain whether the exercise of jurisdiction comports with due process" (*Deutsche Bank Securities, Inc., supra, citing LaMarca v. Pak–Mor Mfg. Co.*, 95 N.Y.2d 210, 216, 713 N.Y.S.2d 304, 735 N.E.2d 883 [2000]). "Due process is not offended '[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there ... even if not 'present' in that State'" (*Deutsche Bank Securities, Inc., supra citing Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 466, 527 N.Y.S.2d 195, 522 N.E.2d 40 [1988], *citing McGee v. Intl. Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 [1957]). "In order to satisfy the minimum contacts requirement, it is essential that there be 'some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefit and protection of its laws'" (*Deutsche Bank Securities, Inc., supra citing Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 [1958]).

In *Olympus Am., Inc. v Fujinon, Inc.* (8 A.D.3d 76, 779 N.Y.S.2d 184 [1st Dept 2004]), the First Department rejected defendant's claim of lack of jurisdiction, stating that defendant

"*may have attended a few sales meetings in New York*, but he purposely availed himself of the privilege of conducting business here, projecting himself into local commerce *by generating sales between the New York headquarters and the customers in his territories through the phone calls and e-mails he regularly made or sent to New York.* By virtue of these communications, Cisco generated a stream of local commerce, from which he earned his livelihood, originating in New York based on sales that plaintiff's invoices labeled as New York transactions. Cisco was more than a passive participant, playing a crucial role in creating the substance of these transactions, and thus transacting business in New York" (emphasis added)).

Here, plaintiff's allegations that defendants regularly came to New York or contacted New York to attend meetings and service clients based here, coupled with the individual defendants' statements that they attended a few meetings in New York, are sufficient to constitute 'purposeful activities' within the state. Assuming the allegations as true, at this juncture, like the defendant in *Olympus Am., Inc.*, the individual defendants herein purposely availed themselves of the privilege of conducting business here, projecting themselves into local commerce *by generating sales between the plaintiff's New York office and the customers in their respective territories, which according to plaintiff, and directly serviced New York based clients (see also, Opticare Acquisition Corp. v Castillo* (25 A.D.3d 238, 806 N.Y.S.2d 84 [2d Dept 2005] (defendants "may have sold [plaintiff's] products in territories outside of New York, but when they did so, they affected local commerce here [in New York]. Among other things, they changed [plaintiff's] economic position, bringing the company into contractual relations with customers, obligating it to ship products from New York, and creating accounts payable and receivable.")). As plaintiff need only state sufficient facts to support jurisdiction, dismissal

pursuant to lack of jurisdiction under CPLR 308(a)(1) is unwarranted.

Further, to the degree the Complaint alleges that the individual defendants diverted plaintiff's clients for their own benefit, it cannot be said that the causes of action do not arise from defendants' employment-related transactions in New York.

And, there is no showing of a burden upon the individual defendants to come to New York. As plaintiff points out, the Court's reasoning in *Opticare Acquisition Corp., supra*) applies with equal force herein: "it would not have been a burden upon them to come to New York to attend company meetings. It cannot be said that a burden of constitution dimension suddenly emerges once they are called upon to answer in a New York court the allegations of their New York-resident employer, that they violated their employment agreements, thus causing injury to that forum resident" (25 A.D.2d at 249).

Therefore, the exercise of jurisdiction over the defendants would not violate

It is noted that contrary to plaintiff's contention, the record fails to establish personal jurisdiction over the defendants pursuant to CPLR 308(a)(3).

Plaintiff alleges that the individual defendants formed a competing company in Georgia and are diverting customers from various locations in the United States, all in violation of the Agreement. Thus, it is alleged that defendants committed tortuous acts without the state. Plaintiff also claims that such activities caused injury to plaintiff within the state, including irreparable injury, loss of corporate opportunity, and seeks profits defendants obtained from their improper activities. Thus, argues plaintiff, they can reasonably expect their acts to have consequences here and they derive substantial revenue from interstate commerce as their clients

and prospective clients are located throughout the United States.

"The determination of whether a tortious act committed outside New York causes injury inside the state is governed by the 'situs-of-injury' test, requiring determination of the location of the original event that caused the injury (*Magwitch, L.L.C. v. Pusser's Inc.*, 84 A.D.3d 529, 923 N.Y.S.2d 455[1st Dept 2011] *citing Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 791 [2d Cir.1999] *and also Kramer v. Hotel Los Monteros S.A.*, 57 A.D.2d 756, 394 N.Y.S.2d 415 [1977], lv. denied 43 N.Y.2d 649, 403 N.Y.S.2d 1028, 374 N.E.2d 1249 [1978]). Here, defendants' alleged improper activities occurred outside of New York. Notably, the Complaint alleges that the individual defendants have attempted to solicit two of plaintiff's clients, the University of Mexico and another in North Carolina.

Further, "an injury does not occur in New York within the meaning of CPLR 302(a)(3) merely because a plaintiff is domiciled in New York and suffers a loss of income here" *(Storch v. Vigneau*, 162 A.D.2d 241, 556 N.Y.S.2d 342 [1st Dept 1990]). Thus, plaintiff's mere claim that defendants caused injury to plaintiff within the state is insufficient to support jurisdiction under CPLR 301(a)(3).

Therefore, although plaintiff failed to establish jurisdiction under CPLR 302(a)(3), and does not claim personal jurisdiction under CPLR 302(a)(2), the facts establish that the Court may exercise jurisdiction over the defendants under CPLR 302(a)(1), warranting denial of the motion to dismiss.

Enforceability of Non-Compete Clauses in Agreement

"In determining whether to enforce non-compete agreements, the court is to apply a

three-prong test to determine whether the agreement is reasonable" (*Group Health Solutions Inc. v. Smith*, 32 Misc. 3d 1244(A), 938 N.Y.S.2d 227 (Table) [Supreme Court, New York County 2011]). "An employee agreement not to compete will be enforced only if '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'" (*Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 A.D.3d 805, 780 N.Y.S.2d 675 [3d Dept 2004] *citing Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976] and *Battenkill Veterinary Equine v Cangelosi*, 1 AD3d 856, 857 [3d Dept 2003]; *see also*, *BDO Seidman v Hirshberg*, 93 NY2d 382, 393 [1999]).

A "non-solicitation covenant is overbroad and therefore unenforceable '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" (*Brown & Brown, Inc. v. Johnson*, 115 A.D.3d 162, 980 N.Y.S.2d 631 [4th Dept 2014] *citing Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina*, 9 A.D.3d 805, 806, 780 N.Y.S.2d 675, *lv. denied* 3 N.Y.3d 612, 788 N.Y.S.2d 667, 821 N.E.2d 972; *BDO Seidman v Hirshberg*, 93 NY2d 382, 393 [1999]).

Here, Paragraph 2.2 prevents former employees from engaging in any competitive activities that would cause them to reveal, make judgments on or otherwise use any of plaintiff's trade secrets for 18 months following termination. Specifically, Paragraph 2.2 provides:

> For Eighteen (18) months following his/her termination as an Employee, Employee agrees not to undertake any employment or activity competitive with [plaintiff's] business [which] would call Employee to reveal, to make judgments on, or otherwise to use any trade Secrets of [plaintiff's] business to which Employee had access by reason of [plaintiff's] business.

And, importantly, Paragraph 2.3 prevents former employees from soliciting or otherwise diverting leads, clients, employees, consultants and contractors from plaintiff for a specific length of time:

> During the term of this Agreement and for a period of *Eighteen (18) months* subsequent to the termination of his Employment, employee[] agrees that he will not, directly or indirectly, either for itself or for any other person, firm, or corporation, divert or take away or attempt to divert or take away sales and or business offered or performed by [plaintiff] from [plaintiff]. *Employee further agrees that it will not call, contact or solicit . . . any of [plaintiff's], customers, clients . . . identified by [plaintiff] to Employee as potential customers, clients . . . or persons or companies that had been [plaintiff's] customer, clients . . Or companies identified by [plaintiff] to Employees as customers, clients, and/or patrons within twenty four months of Employee's termination of Employment with Company, including but not limited to those on whom he called or solicited or whom it became acquainted while engaged as an Employee of Company.* (Emphasis added).

The non-compete Paragraphs at issue are necessary to protect the employer's legitimate interests. Such agreements are justified by the employer's need to protect itself from unfair competition by former employees (*Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina, supra citing BDO Seidman v Hirshberg*, 93 NY2d 382, 391 [1999] and *Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [1977]).

The record indicates that the parties agreed that plaintiff's method and means of operation constituted "Confidential Information" and thus, the plaintiff's "legitimate interests" in such information needed protection. In this regard, Paragraph 1.1 of the Agreement, executed by the individual defendants, defines "Confidential Information" as follows:

> the "Company's operations, techniques, methods of doing business, clients, customer lists, the identity of suppliers or services sold by [plaintiff], the prices charged . . . [plaintiff's] . . . forms, documents, computer printouts, invoices, software programs, electronic data bases, memoranda, books, papers, letters, formula and other data . . .in any

way relating to [plaintiff's] business . . . *are trade secrets and confidential information . . .*" (Emphasis added).[3]

Even where there "is no showing that a former employee has obtained a competitive advantage through the misappropriation of confidential customer information or that the employee possessed unique or extraordinary abilities, *the employer retains 'a legitimate interest in preventing former employees from exploiting . . . the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment'*" (*Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina, supra citing BDO Seidman v Hirshberg, supra* at 392) (emphasis added)). Here, Michael Jones of St. Michael's Hospital testified at a hearing before the Court that, during the period Pankoski was employed at plaintiff and when he was working at Richmond," he "hired Barbara Pankoski. Her being at TSIG was a byproduct" (Transcript, p. 82). Pankoski likewise testified that her relationship with Michael Jones was created and cultivated while she was employed by plaintiff. This is the type of goodwill that necessitates protection from exploitation.

Thus, under such circumstances, an anticompetitive covenant may prevent the competitive use of client relationships that the employer assisted the employee in developing through the employee's performance of services in the course of employment (*Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina, supra citing BDO Seidman v Hirshberg, supra* at 392; *see also Gelder Med. Group v Webber*, 41 NY2d 680, 685 [1977]).

Furthermore, the non-compete Paragraphs at issue are reasonable in time *(Manhattan*

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[3] Contrary to defendants' contention, "Trade Secrets" therefore derives its meaning from the types of information included in this paragraph.

Real Estate Equities Group LLC v. Pine Equity NY, Inc., 7 Misc. 3d 1008(A), 801 N.Y.S.2d 236 (Table) [Supreme Court, New York County 2004] (covenant of four years, limited to New York business activities, reasonable)). That Paragraph 1.5.2 does not contain any limitation in time does not render it unenforceable, as a plain reading of this section indicates that it is applicable to an "Employee" and not a former employee.[4]

However, to the degree the Paragraphs at issue do not limit its scope to any geographical area, and plaintiff operates in the United States generally, the absence of any geographical limitations renders the non-compete Paragraphs arguably broad. In particular, the first sentence in Paragraph 2.3 prohibits a former employee from " divert[ing] or tak[ing] away or attempt[ing] to divert or take away sales and or business offered or performed by [plaintiff] from" plaintiff, for 18 months subsequent to the termination of the employee. In this regard, such restrictive covenant is unreasonably broad in scope, and greater than necessary to protect the plaintiff's interests.

Nevertheless, plaintiffs state that it "has a relatively small share of the available market (around 5%)" and argues that the individual defendants are *not* limited from "performing hospital accreditation consulting services for . . . the number of hospitals and institutions that are not represented in TSIG's Lead Management System or going to work for one of TSIG's

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[4] Both Paragraphs 1.5.2 and 2.1 prohibit current employees from competing, or conspiring with other employees to compete, with plaintiff's business, and from participating with any of plaintiff's competitors. Specifically, Paragraph 1.5.2 prohibits employees from "planning for" or organizing "any business activity competitive with [plaintiff's] business or combine or join with other employees . . . for the purpose of organizing any such competitive business activity." Similarly, Paragraph 2.1 provides that "During [defendants'] retention by [plaintiff], Employee agrees that he will not . . . operate, join, control, or participate in, [o]r be connected as an officer . . . or principal of any corporation . . . soliciting orders for selling, distributing, or marketing products . . . or services that directly or indirectly compete with [plaintiff's] . . . business."

competitors" (Memorandum of Law, dated May 21, 2014, p. 13). Thus, with the limitation that such restrictive language applies to the categories of persons identified in the second sentence of Paragraph 2.3,[5] the first sentence of Paragraph 2.3 "the applicable two year time period is reasonable and necessary to protect [p]laintiff's interests" (*It Techstop, Inc. v. Amidon*, 2011 WL 4443603 (Trial Order) [Supreme Court, Albany County] (upholding a non-solicitation clause without a geographic restriction, which was "limited to apply only to Plaintiff's relatively small customer base (approximately 15) and did not the former employee "from performing information technology services for the vast number of firms that were not Plaintiff's customers"); *BDO Seidman v Hirshberg*, 93 N.Y.2d at 394-395 [permitting partial enforcement of non-compete agreement where "The only change is to narrow the class of BDO clients to which the covenant applies")). If "the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing, partial enforcement may be justified" (*BDO Seidman v Hirshberg*, 93 N.Y.2d at 394). Here, there is no indication that plaintiff used "overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct" to protect its interests and in entering into the subject agreement.

And, there is no indication that the non-compete Paragraphs at issue are harmful to the

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[5] The categories are defined in the second sentence of Paragraph 2.3 as "customers, clients, patrons, or persons and/or companies identified by Company to employee as potential customers, clients or patron, or persons or companies that had been company's customer, clients[,] patron or individuals or companies identified by Company to employees as customers, clients and/or patron within twenty four months of Employee's termination of Employment with company, including but not limited to those on whom he called or solicited or whom it became acquainted while engaged as an Employee of Company."

general public or unreasonably burdensome to the employee defendants herein.

Therefore, the subject non-compete clauses, as modified, are enforceable.

"[W]hen a party benefit[t]ing from a restrictive covenant in a contract breaches that contract, the covenant is not valid and enforceable against the other party, because the benefit[t]ing party was responsible for the breach" (*Bell & Co., P.C. v Rosen*, 2012 NY Slip Op 33263(U) [Supreme Court, New York County 2014]). Here, it cannot be said that plaintiff breached the subject non-compete clauses by failing to identify the clients and customers (or potential clients and customers) pursuant to Paragraph 2.3. There is no time period by which plaintiff must identify such clients and/or customers (or potential clients and customers) to the individual defendants, and the parties have been directed to exchange clients and customers each contend are and are not subject to this Paragraph.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint of the plaintiff pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction is denied; and it is further

ORDERED that defendants shall serve their Answer within 20 days; and it is further

ORDERED that subject non-compete clauses, as modified herein, are enforceable; and it is further

ORDERED that the parties shall appear for a conference in Part 35 on October 30, 2014, 10:00 a.m. to discuss the status of discovery regarding the Preliminary Injunction; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 18, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD