SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CRAIG BOWER,

Plaintiff,

Index No.
651420/2016

DECISION and ORDER

- against -

FDR SERVICES CORPORATION,

Defendant.

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

Plaintiff Craig Bower ("Bower" or "Plaintiff") brings this action for declaratory and injunctive relief, seeking a declaration that the terms of the non-compete, non-solicitation and confidentiality provisions of an employment agreement entered into between Plaintiff and defendant FDR Services Corporation ("FDR" or "Defendant") on or about April 19, 2013 (the "Employment Agreement") are void and unenforceable, and enjoining Defendant from enforcing the terms of the restrictive covenants contained in the Employment Agreement.

Plaintiff alleges in the complaint that he commenced employment with Defendant in the capacity of Director of Uniform Services on or about May 6, 2013. As a condition of his employment, Plaintiff was required to sign an Employment Agreement. On or about August 1, 2014, Plaintiff assumed the position of Vice President of Sales and Marketing with Defendant. On or about September 1, 2015, Plaintiff assumed the position of Vice President of Operations and Information Technology with Defendant. Plaintiff did not execute any contract, memoranda or addendum continuing or applying the terms of the Director of Uniform Services Employment Agreement to his position as Vice President of Sales and Marketing, Vice President of Operations and Information Technology or any other position Plaintiff occupied with Defendant. On January 31, 2016, Plaintiff tendered his resignation to Defendant, effective February 12, 2016.

On March 2, 2016, Plaintiff secured a position of employment with JVK Operations LTD ("JVK") as Vice President of Sales and Service, commencing

March 7, 2016. JVK's offices are located in Amityville, New York. JVK provides linen services for hospital systems, long term care centers, and specialty care centers throughout the tristate area. Defendant maintains its corporate office in the County of Nassau and provides linen and uniform rental and management services to healthcare facilities on the East Coast.

By letter dated February 17, 2016, Defendant advised Plaintiff that Defendant deemed Plaintiff bound by the restrictive covenants contained in the Director of Uniform Services Employment Agreement. Defendant stated that FDR would "take whatever steps necessary to defendant its rights against either [Plaintiff] or [Plaintiff's] new employer" if at any time in the future FDR felt that Plaintiff had broken his employment agreement.

By letter dated March 22, 2016, Defendant, through its counsel Moses & Singer, LLP, sent a letter to Plaintiff and his employer, stating that "Paragraph 10(c) of the Agreement prohibits [Plaintiff] from working for [a] competitor of FDR for 18 months following the termination of [Plaintiff's] employment." The letter further stated: "[W]e believe that your position with JVK requires you to violate the confidentiality and non-solicitation provisions of the Agreement." Finally, the letter stated that Plaintiff had engaged in activities that were "clear, intentional and flagrant violations of the Agreement" and constituted "unfair competition" and "tortious interference with existing and prospective business relationships." Defendant indicated that FDR "intend[ed] to hold JVK jointly responsible for any and all damages that FDR has suffered and continues to suffer."

Plaintiff now moves, by way of Order to Show Cause, for an order pursuant to CPLR 6301, enjoining and restraining Defendant during the pendency of this action from enforcing the terms of the restrictive covenants contained in the Employment Agreement and taking any other steps or commencing any proceedings to compel compliance with such restrictive covenants.

Plaintiff submits his own affidavit and the attorney affirmation of Ralph A. Somma. Plaintiff argues that the restrictive covenants in the Employment Agreement are overbroad and unenforceable because they are unlimited in geographic scope, applicable to all of Defendant's customers, and unreasonably burdensome to the Plaintiff. Plaintiff further argues that such provisions do not protect any of Defendant's legitimate business interests and that Plaintiff's services to Defendant were not "unique or extraordinary." In his affidavit, Plaintiff avers that he is presently 43 years old and has been employed in the linen and uniform rental and management industry servicing healthcare facilities with various entities for the duration of Plaintiff's 18-year career. Finally, plaintiff asserts that the restrictive

covenants in the Employment Agreement expired when he assumed a different title and role.

In opposition, Defendant submits the affidavit of James McCormack, the Vice President of FDR Services Corporation. McCormack avers that, although Bower served in several different titles during the course of his employment with FDR, as a practical matter, Bower's role within FDR remained unchanged and he served as McCormack's second in command. McCormack states that none of the essential terms and conditions of Bower's employment, as set forth in the Employment Agreement, changed, and that his salary and other benefits remained constant. McCormack further avers that JVK is one of FDR's few direct competitors in the hospital laundry industry. During Bower's employment with FDR, FDR lost an important contract with New York University Langone Medical Center. Since Bower's departure from FDR, FDR has lost contracts with Stamford Health Systems and University Hospital. McCormack notes that FDR would have no objection if Bower sought employment within the laundry industry, so long as he did not seek employment with one of FDR's two direct competitors.

Defendant argues that, in light of the competitive nature of the hospital laundry industry, the restrictions on subsequent employment in the employment agreement, the restrictions on Bower's use of FDR's confidential information, and the restrictions on soliciting FDR's clients, are reasonable and necessary. Defendant further argues that the Employment Agreement did not expire when Bower's title was changed from "Director of Uniform Services" to "Vice President of Sales and Marketing" because Bower continued in the same role within FDR and continued to receive the same salary and benefits.

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor. *See* CPLR § 6301; *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).

New York has adopted the prevailing standard of reasonableness in determining the validity of employee agreements not to compete. *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. *BDO Seidman*, 93 N.Y.2d at 388–89 (1999); *see also Reed, Roberts Assocs. v. Strauman,* 40 N.Y.2d 303, 307 (1976) ("[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."). Generally, an employer's legitimate business interests are limited to "the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." *BDO Seidman*, 93 N.Y.2d at 389. The application of the test of reasonableness of employee restrictive covenants focuses on the particular facts and circumstances giving context to the agreement. *BDO Seidman*, 93 N.Y.2d at 390 (citing *Karpinski v. Ingrasci*, 28 N.Y.2d 45 (1971)).

Paragraph 10, section (c) of the Employment Agreement contains the following non-compete provision:

> 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, franchiser 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 this Agreement.

Here, Plaintiff has demonstrated a likelihood of success on the merits with respect to the non-compete provision. Indeed, this Court reviewed the same non-compete provision in *Godoy v. FDR Services Corp.*, 2013 WL 1966707 (N.Y. Sup. 2013) and determined that it was overbroad and unenforceable. To reiterate, the non-compete provision, which prohibits Plaintiff from "engag[ing] in or participat[ing] in any business activity" that is "directly or indirectly, competitive with any business carried on by the Company or its subsidiaries and affiliates[,]" is unenforceable because it is greater than necessary to protect any legitimate business interest of Defendant. *See Elite Promotional Mktg., Inc. v. Stumacher*, 8 A.D.3d 525, 526 (2d Dept. 2004) ("Legitimate interests are limited to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary."). In addition, the non-compete provision imposes an undue hardship on Plaintiff because it contains no geographic limitation and seeks to bar Plaintiff from working in an entire industry. Although Defendant suggests that the restriction applies only to its direct competitors—*i.e.* businesses engaged in the hospital laundry

industry in the East Coast corridor, the restrictive covenant, by its plain terms, is not limited as such. This Court declines Defendant's proposal to modify the restrictive covenant so as to restrict Plaintiff only from working for defendant's two direct competitors in the hospital laundry industry. *See Crippen v. United Petroleum Feedstocks, Inc.*, 245 A.D.2d 152, 153 (1st Dept. 1997) (declining to modify and barring enforcement of a restrictive covenant that was "unreasonably broad on its face both geographically and with respect to the types of positions plaintiff may not accept").

In *Godoy*, this Court granted Godoy's motion for a preliminary injunction, enjoining and restraining FDR from taking any action based upon the non-compete provision, because there was evidence of irreparable harm—namely, as a result of FDR's cease and desist notice sent to JVK, JVK rescinded its employment offer to Godoy. Here, by contrast, there is no evidence that JVK intends to terminate Plaintiff's employment as a result of FDR's cease and desist letter. Plaintiff has not pointed to any imminent and non-speculative harm that he would suffer in the absence of an injunction. *See Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739 (2d Dep't 2010) ("The movant must show that the irreparable harm is 'imminent, not remote or speculative.'"); *Valentine v. Schembri*, 212 A.D.2d 371, 372 (1st Dep't 1995) (rejecting as "speculative" the allegation that a possible loss of health benefits constitutes a showing of irreparable harm and reversing the trial court's grant of a temporary restraining order in the absence of a showing of irreparable harm). Accordingly, Plaintiff has failed to demonstrate irreparable harm in the absence of an injunction.

Wherefore, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction with temporary restraining order, pursuant to CPLR section 6301, is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JUNE 28, 2016

JUN 28 2016

Eileen A. Rakower, J.S.C.