

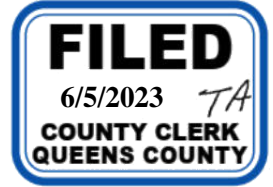
Dikov v Continental Home Care
2023 NY Slip Op 35052(U)
June 1, 2023
Supreme Court, Queens County
Docket Number: Index No. 706928/22
Judge: Karina E. Alomar
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **KARINA E. ALOMAR**
Justice

IA PART 23



-----X
JANET DIKOV,

Plaintiff,

Index No.: 706928/22
Motion Date: 2/23/23
Motion Seq. No.: 3

-against-

CONTINENTAL HOME CARE,

Defendant.

-----X
The following numbered papers read on this motion by defendant for summary judgment, dismissing plaintiff's complaint and awarding defendant attorney's fees in connection to defending this action.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	ECF Nos. 33-49
Answering-Affidavits-Exhibits.....	ECF No. 50
Replying.....	ECF Nos. 51- 53

Upon the foregoing cited papers, it is ordered that defendant's motion, pursuant to CPLR 3212, for summary judgment, dismissing plaintiff's complaint and awarding defendant attorney's fees/court costs in connection to defending this action which motion was reassigned to this part on May 4, 2023, is determined as follows:

Plaintiff alleges that she began working as a health aide at Continental Home Care on or about August 5, 2021. She averred that she applied to work there because a patient with whom she had worked for in the past, Klara Atlas, applied to receive home health care from Continental.

Initially, plaintiff met Klara on or about September of 2013 when she was a home aide for Jewish Association Serving the Aged (JASA). Plaintiff alleges that JASA assigned her to care for Klara and her husband Arkadiy, as they requested an aide who was fluent in the Russian language. Plaintiff then cared for Klara and her husband Arkadiy until 2016, when she took a leave of absence when she was diagnosed with breast cancer. Plaintiff thereafter was able to resume her work activities in May/June of 2017. However, by the time plaintiff was able to resume her work activities, Klara and her husband had moved to Caring Professionals, as upon plaintiff's leave of absence JASA had been unable to provide them with a Russian speaking aide. Upon learning of Klara and Arkadiy's departure from JASA, plaintiff applied for a job with Caring Professionals.

Plaintiff was then hired by Caring Professionals to only care for Arkadiy since Klara's son became her home care attendant under the CDPAS program. She averred that

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even though she was left in a weakened state after cancer treatment, she was still having to care for Arkadiy since he was ambulatory. However, in 2018, it is represented that Arkadiy became wheelchair bound and required more care that plaintiff was able to provide as a result of her weakened condition. As a result, Caring Professionals re-assigned the plaintiff to other patients. Thereafter, on or about April or May of 2021, plaintiff stated that she was contacted by Klara who informed her that her son was no longer her aide, and that she would like for plaintiff to once again be her aide. Klara further informed plaintiff that she was no longer with Caring Professionals but, with Continental who was located in Queens County and more importantly had other Russian speaking aides.

In June of 2021, plaintiff and Klara went to Continental for plaintiff to apply for a job to specifically care for Klara. Plaintiff averred that she advised Continental that she was still employed by Caring Professionals and would only be able to take care of Klara three days per week. Furthermore, she advised that she could not start immediately as she was travelling to Europe to seek alternative medical treatment and asked that they email her their application documents. She further explained that she was not fluent in English and would need time to review the documents with her American friend.

In June of 2021, plaintiff acknowledged receiving the documents, reviewing them with her friend, signing them, and returned them to Continental. Plaintiff further testified that she began her orientation in early August of 2021 and was approached by Ayana Dadanova. She advised plaintiff that more documents needed to be signed and did not provide any explanation as to what they entailed other than they were the same documents that were emailed to her in June of 2021. Plaintiff further represents that the papers never left Ayana's hands and she did not get an opportunity to see or review what she was signing. Plaintiff stated that she was completely unaware that one of the documents she signed was a Confession of Judgment, which was not included in the June 2021 email. Plaintiff further stated that had she been given an opportunity to review the documents, she would have sought the advice of an attorney prior to signing the Confession of Judgment. She further explained that she never received a copy of the documents she signed. Moreover, she represented that she was never taken to the notary and no one at Continental ever identified themselves as a notary.

In early October 2021, it is represented that Klara left the care of Continental as they were unable to provide her with any other Russian-speaking attendants and went to Sincere Care. Plaintiff states that she was not instrumental in prompting Klara to leave Continental. Plaintiff alleges that Klara left Continental on October 12, 2021, and that same day, plaintiff went there to resign, when she was accused of causing Klara to leave them and told she would have to pay \$25,000 pursuant to the document she signed.

By way of background, prior to plaintiff herein commencing this action, it is represented that defendant, Continental commenced a matter against plaintiff bearing Index No. 728704/21 seeking to enforce the Affidavit of Confession of Judgment.

Defendant herein now moves for summary judgment on the basis that the documents plaintiff signed were a pre-condition to her employment and she

acknowledged that the breach would have serious financial consequences for Continental and further acknowledged that such a breach would result in plaintiff's liability to defendant in the amount of \$25,000 plus attorney's fees and court fees.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Lopez v Beltre*, 59 AD3d 683; *Scott v Long Is. Power Auth.*, 294 AD2d 348).

In support of the motion, defendant submits, plaintiff's affidavit, the employment application, the non-solicitation agreement, the Confession of Judgment, and Notary's affidavit.

The Employee Code of Conduct/Non-Solicitation Agreement states in pertinent parts:

4. NON-SOLICITATION AGREEMENT: I understand that, as an employee of Continental Home Care, I am prohibited from referring patients for whom I have provided services at any time during my employment to any other home care agency or to myself, whether as an individual or in any other status. I further agree not to solicit co-workers in the employ of Continental Home Care to work for any other home care agency or directly for any client. I agree not to solicit, seek, and/or accept employment from any client, patient or vendor of Continental Home Care with an address or place of business within 15 miles of any Continental Home Care case to which I am or was assigned for a period of one (1) year following my final date of employment by Continental Home Care.

5. LIQUIDATED DAMAGES / CONFESSION OF JUDGMENT: I understand that any breach of the non-solicitation agreement would have serious financial consequences for Continental Home Care. Therefore, I agree that, should I violate the terms contained in paragraph 4 hereof, I will be liable to Continental Home Care for liquidated damages, in the amount of Twenty-Five Thousand Dollars (\$25,000.00), an amount acknowledged to be less than the actual loss which would be sustained by Continental Home Care in such event, plus attorney and court costs. I agree to contemporaneously execute an Affidavit of Confession of Judgment in such amount in consideration of my employment with

Continental Home Care. I FURTHER CERTIFY that all the information I have provided to Continental Home Care in connection with my application for employment is true and accurate. I understand that any misrepresentation or potential illegality in this regard places Continental Home Care and its clients at serious risk and, accordingly, will be referred to the Office of the District Attorney of the appropriate jurisdiction for prosecution as well as to the applicable licensure agency for review.

Additionally, plaintiff signed an Affidavit of Confession of Judgment dated August 5, 2021, which states in pertinent parts:

- I. As consideration for employment by Plaintiff, Debtor executed an Acknowledgment of Creditor's Code of Conduct/ Compliance Plan on 08/05/2021, which, in pertinent part, provided that, in the event that Debtor breached the non-solicitation agreement contained therein, (s)he agreed to pay the sum of Twenty-Five Thousand Dollars (\$25,000.00) to Creditor, as liquidated damages for the monetary loss sustained by Creditor thereby.
- II. Debtor, as obligor, defaulted in performance of his/her obligations under such Code of Conduct/Compliance Plan, a Debtor, therefore, owes Creditor the sum of Twenty-Five Thousand Dollars (\$25,000.00), which (s)he agrees to pay as follows: Twenty-Five Thousand Dollars (\$25,000.00) within thirty (30) days of such default. Payments must be made to, and received by VIGORITO, BARKER, PORTER & PATTERSON, LLP, Attn: Ruth Kraft, Esq., at 300 Garden City Plaza, Garden City, New York, 11030, on or before the due date. TIME IS OF THE ESSENCE and Debtor hereby confesses and consents to the entry of judgment against him/her for whatever balance of the Twenty-Five Thousand Dollars (\$25,000.00) which remains unpaid only in the event that (s)he defaults on timely payment required hereby or in the event that any check tendered by, or in his/her behalf, fails to clear the first time it is deposited.

Defendant herein takes the position that plaintiff, by signing the aforementioned documents/agreements, subjected herself to, inter alia, non-solicitation covenants. Moreover, defendant argues that the subsection contained in the Employee Handbook and titled "General Rules of Conduct" states that: "all employees will be expected to execute a separate agreement entitled the "Employee Code of Conduct-Non-Solicitation Agreement" which will be provided by the management." As to the notarized agreement, defendant herein provides an affidavit of Megan Pen which states that on August 5, 2021, plaintiff personally appeared before her and notarized her signature. Moreover, defendant highlights that plaintiff, by her own admission, became directly

employed by Klara through CDPAP program upon Klara and plaintiff leaving defendant as a patient, and a home care aide was in direct violation of the Non-Solicitation Agreement.

In opposition, plaintiff takes the position that she was denied the opportunity to read and understand the documents that she was provided on August 5, 2021, that she never appeared before a notary; and that she did not violate the non-compete portion of the non-solicitation agreement because Klara Atlas was no longer a patient of Continental at the time plaintiff began working for her, which was after Klara left Continental and went to Sincere Care in November of 2021. Moreover, plaintiff's counsel referenced the affidavit of Klara Atlas which demonstrates that the plaintiff cared for her and her husband intermittently since 2013, and that it was the plaintiff who brought Klara Atlas to Continental.

In support, plaintiff references the affidavit of Klara Atlas. She averred that she knew plaintiff since 2013 when she started working as a home-attendant with her and her husband. She further stated that sometime in 2017, her and her husband switched her home health care agency from JASA to Caring Professionals since JASA could not consistently provide them with Russian-speaking attendants. She stated that in March of 2021, she had heart surgery and needed home care and offered the plaintiff work as she knew she was a good worker. She further testified that she was no longer with Caring Professionals and was aware that the plaintiff was only available for three days a week. Thereafter, she stated that she signed up with Continental in June of 2021. Atlas explained that on the days that the plaintiff was not available, she found it frustrating to manage with the non-Russian speaking attendants provided by Continental and decided to find another agency. She then stated that it was her own decision to move to another agency and that the plaintiff "had nothing to do with this decision."

It is well settled that Courts will uphold the validity of the agreement only if (1) it is no greater than necessary to protect the employer's legitimate business interests, (2) it does not cause the employee undue hardship, and (3) it does not injure the public. *BDO Seidman v Hirshberg*, 93 NY2d 382, 388-89, 690 NYS2d 854, 856-57, 712 NE2d 1220 (1999). Under this standard, covenants can be enforced "if reasonably limited as to time, geographic area, and scope, are necessary to protect the employer's interests, not harmful to the public, and not unduly burdensome." *Ricca v Ouzounian*, 51 AD3d 997, 998, 859 NYS.2d 238, 238 (2d Dept 2008).

Based on the evidence presented, there are issues of fact as to whether the agreements were in fact signed in the presence of a notary and whether they were in fact breached by the plaintiff, rendering the validity of the Affidavit of Judgment of Confession and Non-Solicitation Agreement moot, if in fact no violation is determined. The affidavits of the plaintiff, non-party Klara Atlas and the notary, Megan Pen are in conflict and raise issues of credibility. The Court finds that the conflicting affidavits and documentary evidence of the parties represent issues of credibility, which is a matter strictly for the jury to determine (*see, Pannetta v Ramo*, 138 AD2d 686).

Accordingly, defendant's motion for summary judgment is denied in its entirety.

Plaintiff is directed to serve a copy of this order on defendant, within thirty (30) days of the date of this order, together with notice of entry.

This constitutes the decision and order of the Court.

Dated: June 1, 2023



KARINA E. ALOMAR, J.S.C.

