SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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AMTRUST NORTH AMERICA, INC. and FIRST NATIONWIDE TITLE AGENCY, LLC,

Plaintiffs,

- v -

JAMES W. BOZZOMO and TOWER ABSTRACT SERVICES, LLC,

Defendants.

INDEX NO. 652093/2024

MOTION DATE --

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 72, 77, 139, 164

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR [1].

Defendants James W. Bozzomo and Tower Abstract Services, LLC (Tower) move pursuant to CPLR 6301 to enjoin plaintiffs Amtrust North America, Inc. (AmTrust) and First Nationwide Title Agency, LLC (FNTA) from enforcing the "'Non-Competition, Non-Solicitation, and Non-Disclosure Agreement' that is Exhibit A to the January 1, 2022 'Confidential Employment Agreement' between AmTrust" and Bozzomo. (NYSCEF Doc. No. [NYSCEF] 16, OSC at 2.) Defendants simultaneously move to dismiss the complaint with prejudice.

Plaintiffs allege that "FNTA is a leading provider of title insurance and related services for the commercial real estate industry nationwide." (NYSCEF 1, Complaint ¶

[1] The parties shall read and comply with the Commercial Division rules and this court's part procedures which require (i) a Table of Contents and Table of Authorities (*see* Rules of Commercial Div of Sup Ct [22 NYCRR 202.70 (g)] rule 17) and (ii) that text be in 12-point font, including the Table of Contents and Table of Authorities. (*Id.* rule 6; Part 48 Procedures ¶ 5.)

2.)[2] Bozzomo's employment with plaintiffs began in January 2020. (*Id*. ¶12.) Bozzomo, an attorney, entered an employment agreement to serve as Chief Underwriter, not as an attorney, beginning January 1, 2022 and terminating January 1, 2025. (*Id*. ¶¶13, 15.) In addition, he agreed to non-competition, non-solicitation, and non-disclosure provisions. (*Id*. ¶17.) Bozzomo resigned by letter dated April 19, 2024 asserting "good cause" pursuant to §6(g) of the employment agreement. (*Id*. ¶¶26-27.) Plaintiffs challenge Bozzomo's good cause grounds. (*Id.* ¶28.) Finally, plaintiffs allege that Tower induced Bozzomo's breach and that Bozzomo is working for Tower, a company recently formed by plaintiff's former employees Jason Gordon and Michael Bebon. (*Id*. ¶¶35-41.)

For the reasons stated on the record on July 26, 2024, defendants' motion for a preliminary injunction is denied and defendants' motion to dismiss is granted in part. This decision supplements the decision on the record.

Preliminary Injunction

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual." (CPLR 6301.)

To obtain a preliminary injunction, defendants must establish: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional

[2] The operative complaint is NYSCEF 1 filed on April 22, 2024. Plaintiffs filed an amended complaint (NYSCEF 43) but it was returned for correction. ("You are out of time to add parties pursuant to CPLR 1003 - Please obtain a Court Order, So-Ordered Stipulation, or a Stipulation signed by all parties that have appeared thus far to have the caption changes effectuated by the County Clerk's Office." [NYSCEF, June 26, 2024 document comment].) Plaintiffs have filed a motion to amend instead. (*See* NYSCEF 84, Notice of Motion [mot. seq. no. 007].)

relief is withheld; and (3) a balance of equities tipping in the moving party's favor." (*Doe v Axelrod*, 73 NY2d 748, 750 [1988] [citation omitted].)

The court rejects plaintiffs' procedural argument that defendants cannot seek a preliminary injunction unless defendants have a counterclaim. Defendants' counterclaims were dismissed; defendants intend to replead. (NYSCEF 97, Decision and Order [mot. seq. no. 003]; NYSCEF __, July 26, 2024 tr 15:11-16:3.)[3] CPLR 6301 has no such requirement and plaintiffs offer no legal support for this argument. Rather, CPLR 6301 demands success on the merits. For a defendant without any counterclaims, the merits are that defendant will successfully oppose the plaintiff's claims. Effectively, defendants argue that plaintiffs are not entitled to a preliminary injunction enforcing Bozzomo's employment agreement. This unusual procedural posture shifts the initial burden for a preliminary injunction to defendants.

The court denied the preliminary injunction on the record because issues of fact abound making it impossible to find likelihood of success that defendants will establish their defense to this action. (*Kazantzis v Cascade Funding RM1 Acquisitions Grantor Tr.*, 217 AD3d 410, 411-12 [1st Dept 2023] ["plaintiff failed to establish his likelihood of success on the merits by clear and convincing evidence given the existence of issues of fact as to how both to interpret the relevant documents and to reconcile the parties' competing interpretations thereof"].) For example, are Bozzomo's services unique or does he possess extraordinary skills? Likewise, there is an issue of fact as to when Bozzomo began working for Tower. Another contested issue is whether Bozzomo

[3] The parties shall e-file the transcripts in this matter: June 21, 2024 on motion 002; July 16, 2024 on motion 005; July 26, 2024 on motion 001.

terminated the agreements "with good reason,"[4] consistent with ¶6(g) of the employment agreement. Bozzomo insists that plaintiffs reduced his duties, authority, and responsibilities. (NYSCEF 10, Bozzomo aff ¶¶ 19-26; NYSCEF 12, Bozzomo's termination letter at 1-2.)

Dismissal

Plaintiffs assert two claims: (1) against Bozzomo for breach of contracts – the employment agreement and the non-competition agreement (NYSCEF 1, Complaint ¶¶43-50) and (2) against Tower for tortious interference with contract. (*Id*. ¶¶51-57.)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88[1994] [citation omitted].) However, "conclusory allegations--claims consisting of bare legal conclusions with no factual specificity--are insufficient to survive a motion to dismiss." (*Godfrey v Spano*, 13 NY3d 358, 373 [2009] [citation omitted].)

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and

[4] Paragraph 6(g) provides: "Good Reason. For purposes of this Agreement, 'Good Reason' will mean the occurrence of any of the following, without the Employee's written consent: (i) a reduction in the Employee's Base Salary; (ii) unreasonable business travel requirements or any relocation of the Employee's principal place of employment by more than fifty (50) miles; (iii) any other material breach by the Company of any material provision of this Agreement." (NYSCEF 11, Bozzomo Employment Agreement ¶6[g].)

citation omitted].) "A cause of action may be dismissed under CPLR 3211 (a)(1) only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].) For evidence to be considered documentary, it "must be unambiguous and of undisputed authenticity." (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2nd Dept 2010].) Gordon and Bozzomo's affidavits are not documentary evidence for the purposes of the motion to dismiss. (*S.M. v Madura*, 223 AD3d 486, 487 [1st Dept 2024] ["defendants' affidavit, which simply asserts that he never employed decedent and does not do business with his brothers, does not constitute documentary evidence providing a basis for dismissal under CPLR 3211(a)(1)" (citation omitted)].) Therefore, this discussion is limited to CPLR 3211(a)(7).

On the record, the court granted defendants' motion to dismiss the breach of contract for taking confidential information. The complaint is silent on that claim.

Plaintiffs' claim for breach of the noncompete agreement is dismissed because the noncompete is unenforceable. It provides:

> "Employee agrees not to directly or indirectly, either on Employee's own behalf or for or on behalf of any Competitor or other Person, engage in the following activities during the Restricted Period:
>
> (i) have an ownership interest in, invest in, manage, control, finance, participate in (whether as an officer, director, equity-holder, investor, partner, agent or otherwise), be employed by, provide services for, advise, or consult with any Competitor or Person in relation to Competitive Products or related services, except that Employee may purchase or own five percent (5%) or less of the privately held or publicly traded securities of any Person, provided that such ownership represents a passive investment and that the Employee is not a controlling person of, or a member of a group that controls, such Person;
>
> (ii) assist any Competitor or Person in any Competitive Capacity; and

(iii) engage in the research, development, underwriting, production, marketing, sale, or distribution of any Competitive Products." (NYSCEF 11, Bozzomo Employment Agreement, Exhibit A, ¶5(b) at 13/21.[5])

"'Competitive Capacity'" is defined in ¶1(b) of the Non-Competition Agreement as "performing the same or similar duties to those performed by Employee on behalf of the Company or any of its Affiliates at any time during the 12-month period preceding the Termination Date." (NYSCEF 11, Bozzomo Employment Agreement, Exhibit A, ¶1(b) at 10/21.)

"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 v Hirshberg*, 93 NY2d 382, 388-89 [1999].) Bozzomo asserts the provision here is unreasonable because it contains no geographic limitation and prevents Bozzomo from working in the title insurance industry in any capacity. The absence of a geographic limitation is not unreasonable since plaintiff claims to do business nationally. (*Integra Optics, Inc. v Nash*, 2018 WL 2244460, *7, 2018 US Dist LEXIS 241329, *16 [ND NY, Apr 10, 2018, No. 1:18-CV-0345(GTS/TWD)] [collecting cases].) Nationwide restrictions are not per se invalid, as defendants argue. (*See Malcolm Pirnie, Inc. v Werthman*, 280 AD2d 934, 935 [4th Dept 2001] [holding that the lower "court erred in determining that [restrictive covenants] are unreasonable as a matter of law because they contain no geographic limitations" (citation omitted)].) However, paragraphs 1(b), 1(c), 1(d), 1(g) and 1(h) of the Non-Competition Agreement when read together with paragraph 5(b) prevent Bozzomo from any employment in the title insurance field.

[5] NYSCEF pagination.

"'[R]estrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored by the law.'" (*Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [1977[[citations omitted].) The court rejects plaintiffs' argument, unsupported by any legal authority, that the court cannot dismiss this claim at the motion to dismiss stage. Where appropriate, courts can resolve the issue of whether a noncompetition clause is enforceable at the motion to dismiss stage. (*See e.g. Source v Hubbard*, 2020 NY Misc LEXIS 21365, *12-15 [Sup Ct, NY County 2020]; *Admarketplace Inc. v Salzman*, 2014 WL 1278504, 2014 NY Misc LEXIS 1458, 2014 NY Slip Op 30813[U], *5-6 [Sup Ct, NY County 2014].) Plaintiff's restriction would even bar Bozzomo from working as an attorney in the title insurance industry even though he is not employed as an attorney by plaintiffs. However, plaintiffs' claim for breach of the employment contract by terminating early is viable.

The motion to dismiss the tortious interference claim against Tower is denied. To state a claim for tortious interference with contract, plaintiffs must allege: "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996] [citations omitted].) Plaintiffs have alleged the necessary elements of such a claim: (1) a three-year employment contract between plaintiffs and Bozzomo (NYSCEF 1, Complaint ¶13); (2) which Bozzomo allegedly breached by terminating prior to January 1, 2025 (*id.* ¶¶26,32); (3) Tower's knowledge of the agreement because Tower's principals are former employees of plaintiffs (*id.* ¶¶35-36); (4) Tower's inducement--but for

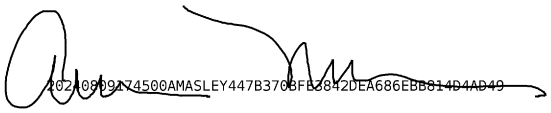
procurement of Bozzomo's breach (*id*. ¶54); and (5) damages for lost business and punitive damages. (*Id*. ¶¶50; *id*. at 9 [c] and [d].) The court rejects defendants' argument that plaintiffs failed to plead the absence of justification. "Since the cause of action is for interference with an existing contract, rather than a prospective economic relationship, the defense of economic justification is inapplicable." (*Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd*., 35 AD3d 317, 318 [1st Dept 2006] [citation omitted], *lv denied* 2007 NY App Div LEXIS 6244 [1st Dept 2007].)

The court has considered the balance of the parties' arguments and finds that they have no merit or do not affect the outcome.

Accordingly, it is

ORDERED that defendants' motion for a preliminary injunction is denied; and it is further

ORDERED that defendants' motion to dismiss is granted as to the first cause of action for breach of the confidentiality provision and the noncompete and otherwise denied.



8/9/2024
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE