SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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PRAGER METIS CPAS LLC,

Plaintiff,

- v -

STEVEN KOENIG,

Defendant.

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INDEX NO. 652000/2023

MOTION DATE 08/26/2024

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152, 156

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this breach of contract action, defendant Steven Koenig (Koenig) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint brought by plaintiff Prager Metis CPAs LLC (Prager). For the reasons set forth below, the motion is granted.

Background and Procedural History

The facts underlying this action were set forth in a prior decision and order dated May 29, 2024 (NY St Cts Elec Filing [NYSCEF] Doc No. 96), with which familiarity is presumed. Briefly, Prager, an international accounting firm, admitted plaintiff as a "Class A" member in October 2018. The parties entered into a "Compensation Agreement – Class A Member" dated October 8, 2018 (the Member Agreement), under which Koenig agreed to be bound by the company's operating agreements (NYSCEF Doc No. 10 at 2 and 10 [§§ 1.4 and 3.3]), including a "Fifth Amended and Restated Limited Liability Company of Prager Metis CPAs LLC" dated January 1, 2022 (the LLC Agreement) (NYSCEF Doc No. 9).

The LLC Agreement contains several post-employment non-solicitation covenants (the Restrictive Covenants) found in section 9.4:

> "Non-Solicitation Covenants. A Member who ... voluntarily withdraws from the Firm ..., then for a [sic] so long as such former Member is receiving payments pursuant to Section 8 from the Firm and for a period of two years from the receipt of the last such payment, such former Member shall not, directly or indirectly, whether for such Member individually or on behalf of any other Entity, or as employee, shareholder, member, partner, agent, representative or independent contractor of any other Entity:
> (a) provide any services or products provided by the Company, the Firm or its respective Affiliates in the normal course of its business, to any person, business entity, association, trust, estate, not-for-profit entity or corporation who is or has been (i) a client of the Company, the Firm or its respective Affiliates at any time during the eighteen (18) months prior to the date of termination, or (ii) a potential client of the Company or the Firm, where there has been direct communication between such Member and such potential client during the twelve (12) months prior to termination, as supported by time sheets, reports, letters or other similar documentation;
> (b) solicit any party described in paragraph (a) above for the purpose of providing any services or products provided by the Firm; or
> (c) hire, retain, employ, working with or soliciting for such purpose any person who has been a Member or an employee of the Company or the Firm or its respective Affiliates at any time during the twelve-month period prior to the date of withdrawal.
>
> Each Member acknowledges and agrees that such Member could not engage in activities of the type specified in this Section 9.4 without disclosing or utilizing confidential client information or proprietary information belonging to the Company or the Firm, and accordingly, the covenants contained in this Section 9.4 are necessary to preserve and protect for the benefit of the Company and the Firm such confidential and proprietary information" (NYSCEF Doc No. 9 at 45).

Section 9.7 of the LLC Agreement clarifies that "clients of the Firm" means:

> "(i) clients of the Company, Prager NY, Prager UK, any of the Group Companies, or any Affiliates thereof, (ii) any Entity owned directly or indirectly 50% or more of a client; (iii) any entity or person which owns directly or indirectly 50% or more of a client; (iv) an estate of a deceased client; and (v) a trust created by a client. Clients of the Firm shall also include partners, members, officers and directors of existing clients of the Firm"[1] (*id.* at 47).

[1] "Company" is defined as "Prager Metis CPAs, LLC" (NYSCEF Doc No. 9 at 1). "Group Companies" means any "Strategic Affiliate and such other Affiliates of International, the Company, Prager NY and

In the event of a breach of any part of the Restrictive Covenants, section 9.5 allows Prager to recover liquidated damages from Koenig based on set formula, together with interest, upon receipt of written notice from Prager (*id.* at 46).

Koenig resigned from Prager effective November 1, 2022 (NYSCEF Doc No. 142, Kleinmann affirmation, exhibit D, Lori Roth [Roth] 5/8/2024 tr at 116 and 118; NYSCEF Doc No. 143, Kleinmann affirmation, exhibit E, Glenn Friedman [Friedman] tr at 153). Koenig then joined nonparty Adeptus Partners, LLC (Adeptus), one of Prager's direct competitors, as a partner in Adeptus's Long Island office (NYSCEF Doc No. 124, answer ¶ 8; NYSCEF Doc No. 147, Kleinmann affirmation, exhibit I, Koenig tr at 72). After Koenig resigned, Prager employees reached out to clients Koenig had serviced at Prager (NYSCEF Doc No. 142 at 127). Several unnamed clients informed Prager that they wished to transfer their business to Adeptus (NYSCEF Doc No. 141, Kleinmann affirmation, exhibit C, Joseph Fox [Fox] tr at 16 and 20-22; NYSCEF Doc No. 142 at 131; NYSCEF Doc No. 143 at 22; NYSCEF Doc No. 145, Kleinmann affirmation, exhibit G, Roth 5/9/2024 tr at 23). In addition, Nicholas Andujar (Andujar), an at-will employee, resigned from Prager on October 18 or October 19, 2022, and later began working at Adeptus (NYSCEF Doc No. 142 at 129 and 134; NYSCEF Doc No. 145 at 52-53).

Prager commenced this action alleging that Koenig breached sections 1.4 and 3.3 of the Member Agreement and section 9.4 (a) through (c) of the LLC Agreement (together with the

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Prager UK" (*id.* at 4). The LLC Agreement defines "Strategic Affiliate," in part, as "an operating business created by the Firm and/or certain of its Equity Members as a complement to its core accounting and professional services businesses" and lists nine such affiliates (*id.* at 8). An "Affiliate" is "(a) any other Person directly or indirectly Controlling, Controlled by, or under common Control with, such Person, (b) any officer, director, manager, member, trustee or partner of such Person or such other Person, or (c) any relative of such Person, if a natural person" (*id.* at 1-2). "International" refers to Prager Metis International, LLC (*id.* at 5). "Prager NY" is Prater Metis CPAs LLP (*id.* at 6). "Prager UK" means Prager and Fenton, LLP (*id.* at 7). The term "Firm" includes International, the Company, Prager NY, Prager UK, the Group Companies, Affiliate and Strategic Affiliate (*id.* at 3).

Member Agreement, the Agreements) by: (1) soliciting and servicing Prager's clients; (2) soliciting one or more Prager employees to join Adeptus; and (3) disclosing Prager's trade secrets and confidential information (NYSCEF Doc No. 5, amended complaint ¶¶ 10-12). Koenig interposed an answer in which he asserted 11 affirmative defenses, including a fourth affirmative defense alleging that the Restrictive Covenants are overbroad, overreaching and unenforceable under New York law; a fifth affirmative defense alleging that Prager failed to satisfy two conditions precedent; a sixth affirmative defense alleging that Prager cannot establish its own performance; and a seventh affirmative defense alleging that Prager has not pleaded, and cannot obtain, partial enforcement of the Restrictive Covenants (NYSCEF Doc No. 124 at 14-15).

Prager has agreed to limit its request for damages to liquidated damages as provided for in the Agreements (NYSCEF Doc No. 128). It seeks no less than $500,000 in damages (NYSCEF Doc No. 139, Kleinmann affirmation, exhibit A, ¶ 3). The preliminary conference order dated July 20, 2023, instructed that all party and nonparty documentary discovery to finish by January 26, 2024, all party and nonparty fact depositions to finish by April 26, 2024, and the failure to adhere to the discovery schedule would result in waiver, preclusion or other penalties (NYSCEF Doc No. 33). In a compliance conference order dated May 29, 2024, this court determined that the parties' failure to adhere to these court-ordered deadlines resulted in the waiver and preclusion of all party and nonparty documentary discovery and nonparty fact depositions (NYSCEF Doc No. 95). This court repeated in a status conference order dated July 3, 2024, that the parties had waived certain discovery (NYSCEF Doc No. 128). Then, in a decision and order dated October 16, 2024, this court denied Prager's motion to vacate the compliance conference order and the status conference order in this action, both of which repeated that certain discovery had been waived (NYSCEF Doc

No. 161). Koenig served and filed a note of issue and certificate of readiness on September 16, 2024 (NYSCEF Doc No. 151).

Koenig now moves for summary judgment dismissing the complaint on the ground that Prager cannot establish each element on its breach of contract cause of action. Koenig relies on the deposition transcripts for Friedman, Prager's chief executive officer; Roth, Prager's Rule 11(f) witness and global managing partner; and Fox, Prager's general counsel. Koenig also relies on excerpts from his deposition, Prager's responses to interrogatories, Prager's responses to a combined first notice to admit, and several exhibits that had been filed on his pre-answer motion to dismiss the complaint. Prager opposes the motion.

Discussion

A party moving for summary judgment bears the burden of "tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). The motion must be denied if the moving party fails to meet its prima facie burden, without regard to the sufficient of the opposing papers (*id.*). If the moving party meets its prima facie burden, the party opposing the motion bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324).

To prevail on a cause of action for breach of contract, the plaintiff must prove the existence of a contract, the plaintiff's performance, the defendant's breach, and the plaintiff's damages from that breach (*Noto v Planck LLC*, 228 AD3d 516, 516 [1st Dept 2024]).

Koenig posits that Prager cannot establish the existence of an enforceable contract because the Restrictive Covenants are overbroad, as they cover all of Prager's clients and employees, irrespective of whether Koenig ever worked with that client or employee, and that Prager cannot obtain partial enforcement of the Restrictive Covenants. Not only have two of Prager's witnesses testified that Prager seeks to enforce the Restrictive Covenants in full (NYSCEF Doc No. 143 at 187; NYSCEF Doc No. 145 at 13), but Prager did not plead partial enforcement in its complaint and cannot demonstrate that partial enforcement is warranted given its anti-competitive conduct.

Prager counters that the Restrictive Covenants are eminently reasonable. First, Prager contends that the Restrictive Covenants protect its legitimate business interests, including client lists and information, employee lists, and other confidential information. Second, the Restrictive Covenants do not impose an undue hardship on Koenig as they do not prohibit him from working in the accounting industry. Third, enforcement of the Restrictive Covenants is not injurious to the public. Prager also contends that Koenig breached section 9.4 (a) and (b) of the LLC Agreement because at his deposition, Koenig identified 70 clients he serviced at Prager who are now Adeptus clients.[2] Roth testified that Koenig must have disclosed Prager's confidential information because Koenig's clients at Prager asked to transfer their files to Adeptus. Prager further asserts that Koenig breached section 9.4 (c) of the LLC Agreement based on testimony from Roth and Friedman that Andujar resigned from Prager's employ at or near the same time as Koenig.

As set forth above, the first element on a breach of contract claim requires the existence of a contract (*Noto*, 228 AD3d at 516). The plaintiff's failure to establish the existence of a valid, enforceable contract between the parties warrants dismissal of a breach of contract claim (*see*

[2] Prager cites pages 85 to 96 and 100 to 121 in Koenig's deposition transcript, that had been submitted as exhibit I to Koenig's motion. However, Koenig submitted only select excerpts from his transcript, and the pages cited in Prager's opposition were not included in the exhibit.

Odonata Ltd. v Baja 137 LLC, 206 AD3d 567, 568 [1st Dept 2022] [dismissing a breach of contract claim where the documentary evidence established that there was no valid and enforceable contract between the parties]).

It is well settled that "[r]estrictive covenants in the employment context are carefully scrutinized, and are disfavored since there are 'powerful considerations of public policy which militate against sanctioning the loss' of a person's livelihood" (*JAD Corp. of Am. v Lewis*, 305 AD2d 545, 545 [2d Dept 2003], quoting *Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [1977]). New York courts will enforce a restrictive covenant in an employment contract if is it reasonable, meaning "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, 388-389 [1999]). "A violation of any prong renders the covenant invalid" (*id.* at 389). "[T]he application of the test of reasonableness of employee restrictive covenants focuses on the particular facts and circumstances giving context to the agreement" (*id.* at 390).

Generally, the enforcement of a non-solicitation or non-compete agreement is "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*, 9 AD3d 805, 806 [3d Dept 2004], *lv denied* 3 NY3d 612 [2004]; *see also Harris v Patients Med., P.C.*, 169 AD3d 433, 434 [1st Dept 2019] ["[i]n cases between professionals, courts recognize the legitimate interest an employer has against unfair competition"]). This includes "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.*, 9 AD3d at 806 [internal quotation marks and citation omitted]; *TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d

571, 572 [1st Dept 2014] [protection of client relationships a legitimate interest]; *Contempo Communications v MJM Creative Servs.*, 182 AD2d 351, 354 [1st Dept 1992], *rearg denied* 588 NYS2d 1003 [1st Dept 1992] ["restrictive covenant was reasonable and necessary to protect the employer in view of the 'special relationship' which developed between the individual defendants and their clients"]). This also includes "protect[ing] 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 NY2d at 389).

While the protection of confidential client data and relationships can constitute a legitimate interest, the Restrictive Covenants herein far exceed what is reasonably necessary. Section 9.4 (a) and (b) broadly prohibit Koenig from servicing or soliciting any persons or entities who were Prager's clients in the 18-month period preceding his withdrawal from Prager. They also prohibit him from servicing or soliciting persons or entities with whom Prager had directly communicated with as potential clients in the 12-month period before his withdrawal (NYSCEF Doc No. 9 at 45). Roth testified that Koenig did not work with all of Prager's clients and that she did not know if Koenig ever worked with any clients of Prager's affiliates (NYSCEF Doc No. 145 at 13-14). Roth also testified that Koenig was not permitted to work with any Prager clients, including those who had been his pre-existing or personal clients, after he left Prager (NYSCEF Doc No. 142 at 136). Fox testified that he believed Prager had at least 10 affiliates (NYSCEF Doc No. 141 at 101), and Friedman testified that Prager possibly had a half dozen affiliates (NYSCEF Doc No. at 143 at 199).

Thus, Section 9.4 (a) is overbroad on its face because it "prohibit[s] [Koenig] from working with *any* of plaintiffs' … [customers], even those [Koenig] had never met, did not know about and for whom [Koenig] had done no work" (*Brown & Brown, Inc. v Johnson*, 25 NY3d 364, 370-371

[2015]; *Good Energy, L.P. v Kosachuk*, 49 AD3d 331, 332 [1st Dept 2008] [finding that a non-compete covenant was unreasonable as it restrained the defendant from dealing with the plaintiff's entire client base]). Section 9.4 (a) does not carve out an exception for clients Koenig had previously worked before joining Prager (*compare Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 264 [1st Dept 2004] [restrictive covenant enforceable where "the clause is limited to only former clients to which the [defendant] has been introduced directly or indirectly through [plaintiff]"]), nor does it carve out an exception for those Prager clients for whom Koenig performed no work (*compare Contempo Communications*, 182 AD2d at 354 [restrictive covenant did not prohibit the defendant "from soliciting those of plaintiff's clients for whom they had *not* worked, but were only barred from competing with those companies with they whom they *had* worked prior to their termination"]).

Section 9.4 (a) is also over broad because it prohibits Koenig from servicing any Prager client that Koenig may have acquired through his own independent efforts (*see Zinter Handling, Inc. v Britton*, 46 AD3d 998, 1001 [3d Dept 2007] ["since plaintiff's covenant not to compete seeks to bar defendants from soliciting customers with whom it never had an established relationship and clients recruited through defendants' independent efforts, the covenant not to compete is manifestly overbroad"]). As for section 9.4 (b), a prohibition against the solicitation of prospective clients is impermissible, as there is no protectable client relationship (*see Marsh USA Inc. v Karasaki*, 2008 WL 4778239, *17, 2008 US Dist LEXIS 90986, *53 [SD NY, Oct. 30, 2018, No. 08 Civ. 4195 (JGK)], quoting *Johnson Controls, Inc. v A.P.T. Critical Sys.*, 323 F Supp 2d 525, 540 [SD NY 2004] ["[t]he protection of client relationships does not justify enforcement of the portions of the non-compete clauses relating to *potential* clients of [the employer] who [are] merely *solicited* at the direction of [the employee]'"]). Last, Prager operates internationally, and

section 9.4 (a) and (b) contain no geographical restriction (*see Sussman Educ., Inc. v Gorenstein*, 175 AD3d 1188, 1189 [1st Dept 2019]).

Section 9.4 (c) broadly prohibits Koenig from "hir[ing], retain[ing], employ[ing], working with or soliciting for such purpose any person who has been a Member or an employee of the Company or the Firm or its respective Affiliates" in the 12 months preceding his withdrawal from the company (NYSCEF Doc No. 9 at 45). Although "[a] covenant not to solicit employees is inherently more reasonable and less restrictive than a covenant not to compete" (*Genesee Val. Trust Co. v Waterford Group, LLC*, 130 AD3d 1555, 1558 [4th Dept 2015]), the same three-prong test of reasonableness articulated in *BDO Seidman* applies because "a non-recruitment provision still operates as an anti-competitive agreement" (*Mastercard Intl. Inc. v Nike, Inc.*, 164 F Supp 3d 592, 600-601 [SD NY 2016]; *Perella Weinberg Partners LLC v Kramer*, 230 AD3d 451, 451 [1st Dept 2024], *affg as mod* 78 Misc 3d 1241[A], 2023 NY Slip Op 50501[U], *9 [Sup Ct, NY County 2023] [applying the reasonableness test in *BDO Seidman* to a personnel non-solicitation clause]; *Lazar Inc. v Kesselring*, 13 Misc 3d 427, 430 [Sup Ct, Monroe County 2005] [stating that "a covenant not to solicit former coemployees is a species, albeit a limited one, of a covenant not to compete in the broad sense and is governed by the three-part test of reasonableness articulated in *BDO Seidman* and section 188 of the Restatement (Second) of Contracts"]). "A restrictive covenant that forbids solicitation of employees must be tailored so that it protects against 'the misappropriation of the employer's trade secrets or of confidential customer lists or competition by a former employee whose services are unique or extraordinary'" (*Permanens Capital, L.P. v Bruce*, 2022 WL 4298731, *1, 2022 US Dist LEXIS 169074, *3 [SD NY, Sept. 19, 2022, No. 21-cv-10525 (JSR)(RWL)], quoting *BDO Seidman*, 93 NY3d at 389).

As applied here, section 9.4 (c) fails the first prong of the reasonableness test because it calls for restrictions greater than necessary to protect Prager's legitimate interest. "[A]n employer has a legitimate interest in enforcing a personnel nonsolicitation covenant if its employee has cultivated or developed personal relationships with clients through the use of the employer's resources" (*Perella Weinberg Partners LLC*, 230 AD3d at 452). In this case, Prager has not asserted in its amended complaint that the interest underpinning section 9.4 (c) is its need to protect its client relationships. Similarly, there is no allegation in the amended complaint, and Prager's witnesses did not testify, that Andujar, the Prager employee Koenig is alleged to have recruited, possessed confidential or property information, was a particularly valuable or unique employee, or provided services that Prager could not easily replace (*see Lazer Inc.*, 13 Misc 3d at 433 [concluding that the non-recruitment provision "will not serve any legitimate employer interest in the circumstances" where the employer failed to present evidence showing that the recruited employee was particularly valuable or unique or provided services that could not be easily replaced); *see also In re Document Tech. Litig.*, 275 F Supp 3d 454, 468 [SD NY 2017] [denying an application for a preliminary injunction where the plaintiff failed to allege that the employees defendant recruited possessed particularly unique or extraordinary services]).

In sum, the Restrictive Covenants are "too broad to be enforced as written" (*Columbia Ribbon & Carbon Mfg. Co.*, 42 NY2d at 499).

In response, Prager fails to raise a triable issue of fact. First, Prager fails to address whether the Restrictive Covenants are overbroad. Instead, it contends that the Restrictive Covenants are enforceable in full and maintains that Koenig breached them because he currently services several of its former clients and Andujar currently works at Adeptus. Prager, though, has not shown that it tailored the Restrictive Covenants to protect a legitimate interest. For instance, at her deposition,

Roth identified 79 Prager clients that Koenig is alleged to have solicited away to Adeptus (NYSCEF Doc No. 145 at 146). Roth, though, admitted that she had no personal knowledge of how that list of clients had been compiled. Roth further admitted that she unaware if Koenig had serviced any of those clients before he joined Prager or if any were his personal clients (*id.* at 154-156).

Likewise, nothing in the record supports Prager's claim that Andujar's services were unique and irreplaceable in that "his special value was in his relationships with [clients], cultivated partially through the use of his expense account while employed by plaintiff" (*Henson Group, Inc. v Stacy*, 66 AD3d 611, 612 [1st Dept 2009]; *see also Perella Weinberg Partners LLC*, 230 AD3d at 452 [stating that the "solicited employees spent eight years working for plaintiff; that the solicited employees utilized expense accounts to support their work with plaintiff's clients; that the solicited employees were tasked with forging relationships with plaintiff's clients, and that these employees were paid substantial compensation by plaintiff to do so before they were terminated"]; *Renaissance Nutrition, Inc. v Kurtz*, 2012 WL 42171, *4, 2012 US Dist LEXIS 2490, *14 [WD NY, Jan. 9, 2012, No. 08-CV-800S] [determining that there were sufficient facts to show the plaintiff had supported the solicited employees in developing client relationships, and that those same employees diverted those clients to a competitor]).

Nor has Prager sought, let alone argued in its opposition, that partial enforcement of the Restrictive Covenants is available in this case. To begin, "there is no rule that automatically invalidates overbroad employment agreements not to compete" (*Gaon Wellness Acupuncture Physical Therapy & Chiropractic P.L.L.C. v Jiae*, 235 AD3d 491, 492 [1st Dept 2025]). Instead, the court may sever and grant partial enforcement of an overbroad restrictive covenant, provided the unenforceable part of the covenant is not an essential part of the agreed exchange (*see BDO*

Seidman, 93 NY2d at 394). Whether an overbroad restrictive covenant is capable of partial enforcement involves a case specific analysis that focuses on the employer's conduct in imposing the agreement (*id.*). Partial enforcement may be justified "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" (*id.*). Factors that militate against partial enforcement include "the imposition of the covenant in connection with hiring or continued employment[,] … the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant was overly broad" (*Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 807).

Here, Prager has failed to set forth any basis for partial enforcement, arguing only that Restrictive Covenants pass the test of reasonableness and ought to be enforced in their entirety. This is insufficient (*see Long Is. Minimally Invasive Surgery, P.C. v St. John's Episcopal Hosp.*, 164 AD3d 575, 578 [2d Dept 2018], *lv denied* 32 NY3d 913 [2019]). Additionally, since the 1999 decision in *BDO Seidman*, employers are on notice that a non-solicitation covenant targeting an employer's entire client base is overbroad (*see Veramark Tech., Inc. v Bouk*, 10 F Supp 3d 395, 407 [WD NY 2014]). Prager presented Koenig with the Restrictive Covenants in 2018, nearly 20 years after the Court of Appeals rendered its decision in *BDO Seidman*. Thus, "[t]he fact that the covenant is clearly overbroad casts doubts on the plaintiff's good faith in imposing it" (*Long Is. Minimally Invasive Surgery, P.C.*, 164 AD3d at 578; *Scott, Stackrow & Co., C.P.A.'s*, 9 AD3d at 808 [refusing to enforce an overly broad restrictive covenant even partially where the plaintiff required the defendant to sign the agreement well after *BDO Seidman* had been decided]; *Veramark Tech., Inc.*, 10 F Supp 3d at 407 [same]). Requiring Koenig to execute the Member

Agreement, that incorporated the LLC Agreement's terms, as a condition of his admission to Prager, could conceivably be construed as Prager engaging in overreaching or engaging in the use of coercive dominant bargaining power (*see e.g. Brown & Brown, Inc. v Johnson*, 158 AD3d 1148, 1149 [4th Dept 2018]). Finally, the LLC Agreement contains a forfeiture provision in section 9.8 that provides:

> "Forfeiture. In the event that any withdrawn Member, or counsel on behalf of such partner, asserts or alleges in any arbitration or other legal proceeding that any of the provisions of this Section are or may not be enforceable in whole or in part, in strict compliance with their terms, then such withdrawn Member shall thereupon automatically forfeit any payments other than of capital not yet paid to such Member" (NYSCEF Doc No. 9 at 47).

Assuming that payments other than capital are due to a withdrawn member, the forfeiture provision gifts Prager with a windfall if that member challenges the enforceability of the Restrictive Covenants.

Even if the Restrictive Covenants were enforceable, Koenig has shown that Prager's proof of his alleged breach of the Restrictive Covenants is based on speculation, assumption and conjecture (*see Twin City Fire Ins. Co. v Arch Ins. Group, Inc.*, 143 AD3d 533, 533-534 [1st Dept 2016], *lv dismissed* 29 NY3d 995 [2017] [granting summary judgment where there was no evidence in the record that the individual defendants either breached a confidentiality agreement or disclosed confidential information]; *Petrelli Assoc. v Germano*, 268 AD2d 513, 214 [2d Dept 2000] ["[t]he record is devoid of evidence that the appellants breached the agreement"]). Friedman testified that Koenig "took clients of Prager Metis, he took personnel, and he took trade secrets" (NYSCEF Doc No. 143 at 21 and 44). Friedman testified that he had no personal knowledge of those events, but added that Koenig must have solicited Prager's clients because they moved to Adeptus (*id.* at 22-24). When Roth was asked how Prager knew that Koenig had taken confidential

information or trade secrets, Roth responded, "[t]his is a supposition that Prager has that since the clients were taken there for Mr. Koenig, he had to have taken and disclosed it to Adeptus" (NYSCEF Doc No. 145 at 31-32), and that "[i]t happened many times before I have seen it and people come here and they come with the lists, and that is the way it goes" (*id.* at 35). Roth admitted that Prager had no knowledge that Koenig had disclosed Prager's client list to Adeptus (*id.* at 36) and that Prager was not aware of any trade secrets that Koenig had given to Adeptus (*id.* at 51). Roth also testified that Prager was unaware of how Koenig recruited Andujar and was unaware if Andujar could have applied for a position there independently of an invitation from Koenig (*id.* at 52-53). Instead, Roth stated that the only fact to support Prager's belief that Koenig had provided employee names to Adeptus was "[t]he fact they went to work there" (*id.* at 60).

Prager, in opposition, failed to tender any non-speculative evidence that Koenig breached the Restrictive Covenants. In *Perella Weinberg Partners LLC*, the Court concluded that the plaintiff had presented sufficient evidence to raise a triable issue of fact as to whether its former employee had breached a client non-solicitation provision (230 AD3d at 453). Testimonial and documentary evidence showed that the defendant had contacted one client "and offered to pitch his new company's services" and that the defendant had informed another client of his plans upon leaving plaintiff (*id.*). Despite Roth listing 79 of Koenig's clients at Prager who are alleged to have moved to Adeptus, Prager has failed to offer evidence from any of those clients to establish whether Koenig had solicited their business.

Accordingly, it is

ORDERED that the motion of defendant Steven Koenig for summary judgment (motion sequence no. 004) is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATE: 5/13/2025

MELISSA A. CRANE, JSC

Check One: [ ] Case Disposed [X] Non-Final Disposition

Check if Appropriate: [X] Other (Specify DECISION + ORDER ON MOTION)