DECISION AND ORDER

2018-1073
12/04/2018 08:29:38 AM

Debra A. Goodrich Delaware Co Clerk

Clerk: DAG

At a Term of the Supreme Court of the State of New York, held in and for the County of DELAWARE, at the Courthouse located in Delhi, NY on November 29, 2018.

PRESENT: HON. RICHARD D. NORTHRUP, JR.,
ACTING SUPREME COURT JUSTICE

STATE OF NEW YORK
SUPREME COURT: COUNTY OF DELAWARE

JONATHAN H.F. DAVIS, DVM,

Plaintiff,

-against-

MATTHEW R. ZEH, DVM,

Defendant.

DECISION AND ORDER

Index No.: 2018-1073
R.J.I. No.: 2018-386

This matter comes before the court on Plaintiff's motion by order to show cause for a preliminary injunction and temporary restraining order prohibiting Defendant from practicing veterinary medicine within 40 miles of Plaintiff's Valley Veterinary Associates clinic ("VVA").

In determining this motion, the court considered the pleadings and the following documents:

1. Plaintiff's proposed order to show cause with annexed exhibits, including Plaintiff's affidavit and the affirmation of Joseph Ermeti, Esq., attorney for Plaintiff;
2. Plaintiff's brief;
3. Defendant's Affidavit and Memorandum of Law;
4. Affidavit of Carlo A.C. de Oliveira, Esq., attorney for Defendant;
5. Letter from Attorney Ermeti, dated November 26, 2018;
6. Letter from Attorney de Oliveira, dated November 29, 2018.

BACKGROUND

Plaintiff is a veterinarian and is the sole proprietor of VVA. Defendant, a veterinarian, entered into an employment contract with Plaintiff on April 8, 2016. Defendant agreed at paragraph 9 of the agreement,

> "not to own, manage, operate, control, be employed by, participate, or be connected in any manner with the ownership, management, operation, or control of any business or professional including that of a mobile practice that shall have the effect of competing with [VVA] by providing veterinary medical or any other services substantially similar to those of the Hospital."

The restriction was to be in effect for a period of five years from Defendant's termination from employment and applied within a 40-mile radius of VVA. According to Plaintiff, Defendant was terminated from employment by Plaintiff on March 16, 2018. Plaintiff alleges that Defendant breached VVA's employment manual by engaging in inhumane and cruel treatment of dogs at the VVA facility and by verbally abusing VVA employees. Defendant claims that he was terminated on March 12, 2018 after Plaintiff told Defendant that he was being terminated and attempted to pay Defendant $30,000.00 in exchange for Defendant signing a release of liability that incorporated by reference the non-compete clause from paragraph 9 of the employment contract.

On June 11, 2018, Defendant opened his own practice, Davenport Veterinary Clinic P.C. ("DVC"), located between Davenport and Stamford. It is undisputed that DVC's location is less than 40 miles from VVA's facility.

Hence, Plaintiff claims that Defendant has breached the restrictive covenant in the employment contract and is causing permanent harm to VVA by taking clients and good will. In addition to a permanent injunction, Plaintiff seeks a preliminary injunction during the pendency of this action and a temporary restraining order. By order to show cause dated November 9, 2018, this court granted Plaintiff's request for a temporary restraining order.

DISCUSSION

"The party seeking a preliminary injunction must demonstrate a likelihood of success on the merits, irreparable injury if temporary relief is not granted, and that a balancing of the equities favors the movant" (*Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 AD3d 856, 857 [3d Dept 2003]). "The purpose of a preliminary injunction is to maintain the status quo pending determination of the action. The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court" (*Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 AD3d 1072, 1073 [2d Dept 2008] [internal quotation marks and citations omitted]).

Likelihood of Success

Covenants restricting professionals from competing with a former employer are common and generally enforceable as long as the restriction "(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. A violation of any prong renders the covenant invalid" (*BDO Seidman v. Hirshberg*, 93 NY2d 382, 388–89 [1999]; *see also Gelder Med. Grp. v. Webber*, 41 NY2d 680, 683 [1977]). Here, Plaintiff has failed to establish either the first or second prongs. Plaintiff cites to both *Gelder* and *Battenkill* to support the reasonableness of the covenant. While the court in *Battenkill* did find that the employer's three-year, 35-mile restriction was reasonable in scope, Plaintiff fails to mention that the covenant was also limited in that it only prohibited the practice of equine veterinary medicine, leaving the employee free to pursue her profession in any other kind of veterinary medicine (*Battenkill* at 858). The covenant here is broader in both time and range and is unlimited as to scope of practice. Plaintiff has made no showing that these terms are "no greater than required" to prevent unfair competition. Similarly, as to the hardship imposed on the employee, in *Gelder*, the employee had no roots in the area in which the employer was established and had repeatedly moved from practice to practice across the country (*Gelder* at 685). By contrast, here, Defendant did not move to the region for the sole purpose of joining Plaintiff's practice but had already been practicing at other clinics within Plaintiff's practice area before joining the clinic. Defendant and his family are independently invested in the area and he thus

has a much greater interest than Dr. Gelder did in being able to practice his profession locally.

Even if the court were to find the covenant to be reasonable, however, there remains a serious question as to its enforceability against Defendant. Where, "the employer terminates the employment relationship without cause . . . his action necessarily destroys the mutuality of obligation on which the covenant rests" (*Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 NY2d 84, 89 [1979]). It is not at all clear from Plaintiff's own papers that he will succeed in proving that Defendant's termination was for cause, since the only allegations that Defendant violated the employment handbook were on "information and belief" and not based on Plaintiff's personal knowledge. Moreover, the Defendant's affidavit and submission of the Release form that Plaintiff allegedly tried to induce Defendant to execute cast doubt on Plaintiff's version of events.

For all the above reasons, the Plaintiff has failed to show a likelihood of success on the merits of his pleadings.

Irreparable injury and Balance of Equities

Plaintiff alleges that he will suffer irreparable harm if Defendant is allowed to continue to practice veterinary medicine contrary to the terms of the restrictive covenant during the pendency of this action. According to Plaintiff, Defendant's familiarity with his pricing schedule and client list enables him to compete unfairly with VVA. Plaintiff also claims that the fee schedule and client list are trade secrets. Plaintiff asserts that an injunction is necessary "to stop [Defendant]—as well as his current associates—from quitting [Plaintiff's] practice after they are trained and setting up shop across the street." This argument is clearly irrelevant since it is undisputed that Defendant did not quit but was fired. As for the client list and fee schedule, the Third Department's discussion in *Battenkill* applies equally here:

> "[P]laintiff failed to adequately demonstrate that defendant improperly appropriated its customer list or used confidential client information. Such lists are generally not considered confidential unless information contained therein is not known in the trade and discoverable only through extraordinary efforts (*see H. Meer Dental Supply Co. v Commisso*, 269 AD2d 662, 664 [2000]; *859 *Empire Farm Credit v Bailey*, 239 AD2d 855, 856 [1997]). Despite its allegations, plaintiff failed to prove that its customer list information was not ascertainable through public sources, such as horse shows, breeders' associations, signs on houses and barns, or even the phone book. While a physical taking or studied copying of the employer's client information may result in a court enjoining solicitation based not on a trade secret violation but as an egregious breach of trust and confidence (*see Silfen, Inc. v Cream*, 29 NY2d 387, 391-392 [1972]), on this motion plaintiff failed to prove its allegation that defendant took a handwritten customer list before her employment was terminated."

(*Battenkill* at 858–59; with respect to pricing data, *see Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 738 [3d Dept 2003]). Likewise, here, no proof was submitted by Plaintiff showing that the customer list or pricing data were the products of extraordinary efforts or that Defendant had more than a general familiarity with the information such that his serving Plaintiff's clients constitutes an "egregious breach of trust" (*id.*). Furthermore, besides conclusory assertions that he has lost patients and goodwill, Plaintiff has made no showing that he stands to suffer a permanent loss if Defendant is allowed to practice during the pendency of the

action or that, should Plaintiff ultimately succeed, his loss cannot be compensated by a monetary award.

Taking all the foregoing facts and conclusions together in determining whether a preliminary injunction is warranted, the court finds that the balance of the equities favors the Defendant. Defendant was terminated involuntarily from his employment, and he stands to lose far more if the injunction is granted than Plaintiff does if it is denied. It is therefore

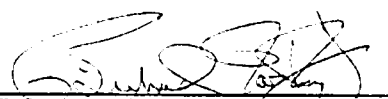
ORDERED that Plaintiff's motion for a preliminary injunction and temporary restraining order is hereby denied; and it is further

ORDERED that the temporary restraining order contained in the Order to Show Cause dated November 9, 2018 is hereby VACATED in its entirety.

DATED: December 3, 2018

Delhi, New York

ENTER



Hon. Richard D. Northrup, Jr., ASCJ

Entered December 4, 2018 at 8:29 AM Debra A. Hendrick, Clerk