



Defendants, Brian Goehringer (“Goehringer”) and CTI Professionals, Inc. d/b/a CTI Personnel Group (“CTI”), from engaging or participating in the temporary staffing business within Nassau and Suffolk Counties, New York; contacting, soliciting or diverting, or attempting to solicit or divert, Plaintiff’s customers to CTI; contacting, soliciting, recruiting, placing or attempting to place on a temporary or full time basis, any individual who is or was accepting temporary work assignments through Plaintiff at any time since August 1, 2005; and contacting, soliciting, recruiting, or attempting to recruit, Greystone’s employees to join CTI.

#### BACKGROUND

Greystone is in the business of providing permanent and temporary staffing to its clients. CTI is in a similar, competing business with Greystone. Goehringer was employed as an account manager by Greystone at its Massapequa office on January 30, 2002.

As a condition of his employment, Goehringer executed an employment contract with Greystone on January 30, 2002 (Verified Complaint, Ex. A [“Employment Contract”]). The contract imposed, *inter alia*, three restrictive covenants upon Goehringer by which he promised that he would not: (1) competitively work in the staffing business “anywhere within a radius of fifty (50) miles from any offices of [Greystone]” for a period of one year after his employment ended (Employment Contract ¶ 7 [a]); (2) solicit or divert Greystone’s customers, employees or temporary personnel for a period of one year after his employment ended (Employment Contract

¶7[b], 7[e]); and (3) use or disclose Greystone's confidential and proprietary information (Employment Contract ¶6).

On July 31, 2006, Goehringer terminated his employment with Greystone and went to work in a similar position for CTI. Defendant's assigned territory at CTI is Suffolk County.

Greystone commenced this action seeking to enjoin Goehringer and CTI from violating the provisions of his Employment Contract with Greystone and to recover damages resulting from his alleged violation of that agreement. In this motion, Greystone claims that injunctive relief is required to enjoin Goehringer and CTI from violating or participating in or benefitting from Goehringer's violations of his contractual and fiduciary duties not to compete unfairly with Greystone, not to disclose Greystone's confidential information and not to interfere in Greystone's contractual or business relationships with its customers or its employees. Greystone also seeks immediate and expedited discovery to learn the full extent of Defendants' legal violations and the extent of the damages they have caused Greystone.

#### DISCUSSION

In order to obtain injunctive relief pursuant to CPLR Article 63, the moving party must demonstrate (1) a likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in the movant's favor. CPLR 6301. See also, Aetna Ins. Co. v. Capasso, 75 N.Y. 2d 860 (1990); and W.T. Grant Co. v. Srogi, 52 N.Y. 2d 496 (1981). The party seeking the preliminary

injunction has the burden of establishing a *prima facie* entitlement to such relief.

Gagnon Bus Co., Inc. v. Vallo Transportation, Ltd., 13 A.D. 3d 334 (2<sup>nd</sup> Dept. 2004); and William M. Blake Agency, Inc. v. Leon, 283 A.D. 2d 423 (2<sup>nd</sup> Dept. 2001). Proof establishing the foregoing elements must be supported by affidavit and other competent proof supported by evidentiary detail. CPLR 6312(c). See, Faberge Intl. Inc. v. Di Pino, 109 A.D. 2d 235, 240 (1<sup>st</sup> Dept. 1985). Bare conclusory allegations are insufficient to support the motion. Neos v. Lacey, 291 A.D. 2d 434 (2<sup>nd</sup> Dept. 2002). In this case, Greystone has met its burden.

In opposing Plaintiff's motion, Defendants argue that in the absence of any showing that Goehringer in fact misappropriated any secrets or confidential information, injunctive relief cannot be granted. Goehringer denies that he removed or otherwise misappropriated any client lists, personnel lists or any type of confidential information from Greystone (Goehringer Aff., ¶14). Thus, Defendants argue, injunctive relief is unwarranted in this case. Specifically, Defendants argue that Plaintiff's claims are unlikely to succeed because: Greystone cannot show that it has any legitimate interest that should be protected by enforcement of the restrictive covenant; there can be no irreparable harm if there is no proof that Defendant actually misappropriated any confidential information; and the balancing of the equities tip in their favor because enforcement of the restrictive covenants deprives Goehringer, a Suffolk County resident, of his right to livelihood in Nassau and Suffolk Counties. This Court is not persuaded by Defendants' arguments.

At the outset, the Court notes that Goehringer, in his affidavit in opposition to Plaintiff's motion, claims to having never received a copy of the employment agreement, never having been told that signing the agreement and the restrictive covenants contained therein was a prerequisite to accepting the employment offer and that he was otherwise left with "no choice but to sign what was now being extracted from [him] as a condition of employment" (Goehringer Aff. ¶¶ 3-5). Although Goehringer was required to sign the contract at the beginning of his employment, there is no evidence of coercion. Rather, Greystone provides ample proof in its reply papers confirming that Goehringer, in fact, received a copy of the contract in his offer of employment five days before he commenced work at Greystone. Thus, he knew the terms of the employment agreement prior to accepting Greystone's offer and commencing work (Reply Aff. Ex. 1).

The lawfulness of a restrictive covenant depends on the facts and circumstances under which it was imposed and the extent of the restriction. The imposition of a restrictive covenant in an employment agreement is not coercive *per se*. Moreover, there is no evidence that Greystone imposed the covenants in bad faith. See, BDO Seidman v. Hirshberg, 93 N.Y. 2d 382, 395 (1999).

As such, this Court is left to determine whether Plaintiff has made a *prima facie* showing that injunctive relief is clear and necessary in this employment agreement context.

\_\_\_\_\_A. Likelihood of Success on the Merits

To establish a likelihood of success on the merits, the movant must show its right to a preliminary injunction is plain on the facts of the case. Peterson v. Corbin, 275 A.D. 2d 35 (2<sup>nd</sup> Dept. 2000). Greystone's application is predicated on Goehringer's breach of the Employment Contract and the restrictive covenants therein.

The only justification for imposing restrictive covenants in an employee agreement is to forestall unfair competition; it does not forestall fair competition. BDO Seidman v. Hirshberg, *supra* at 391. Nor should a restrictive covenant be used solely to insulate an employer from competition. American Broadcasting Co. Inc. v. Wolf, 52 N.Y. 2d 394, 404 (1981); and Walter Karl, Inc. v. Wood, 137 A.D. 2d 22, 29 (2<sup>nd</sup> Dept. 1988). Defendants herein challenge the non-compete, non-disclosure and non-solicitation provisions of the Employment Contract on the ground that the covenants are not necessary to protect the employer's legitimate interests. Specifically, Goehringer and CTI assert that no reasonable interest is being protected by barring Goehringer from working for a year in the area; the covenants are overly broad because they bar the employee from soliciting or providing services to clients with whom the employee never acquired or established a relationship through his or her employment; and the covenants allegedly extend to personal clients recruited through the employee's independent efforts.

Under New York law, "negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness".

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Reed, Roberts Assoc., Inc. v. Strauman, 40 N.Y. 2d 303, 307 (1976). See also, Tender Loving Care v. Franzese, 131 A.D. 2d 747 (2<sup>nd</sup> Dept. 1987). To be enforceable under New York law, a restrictive covenant must satisfy the three pronged test set forth in BDO Seidman v. Hirshberg, *supra*.

A restraint is reasonable if it (1) is no greater in time or area than is necessary to protect the legitimate interest of the employer; (2) does not impose undue hardship on the employee; and (3) does not injure the public. *Id.* at 388-89. See also, Reed, Roberts Assoc., Inc. v. Strauman, *supra* at 307. Moreover, in cases such as that at bar, which involve anticompetitive covenants in personal service contracts, enforcement of such a covenant requires a showing that the employee's services are unique, special or extraordinary. See, American Broadcasting Cos. v. Wolf, *supra*; Reed, Roberts Assoc., Inc. v. Strauman, *supra* at 308. The court's duty is merely to determine the extent to which the parties' agreement is reasonable under the foregoing analysis and to enforce it accordingly.

Plaintiff has neither contended nor produced any evidence that Goehringer's services for Greystone were unique or extraordinary. Therefore, at issue is Greystone's interest in the confidential information, customer relationships and good will that Goehringer acquired or developed during his employment at Greystone.

Customer information is not considered confidential if it is readily obtainable through public sources. See, Leo Silfen, Inc. v. Cream, 29 N.Y. 2d 387 (1972); and Atmospherics Ltd. v. Hansen, 269 A.D. 2d 400 (2<sup>nd</sup> Dept. 1997). In BDO Seidman, the

Court of Appeals expanded this test to protect an employer's legitimate interests as well, in certain circumstances, when the "good will" and relationships that an employee develops with the employer's client at the employer's expense during his employment. *BDO Seidman v. Hirshberg*, *supra* at 391.

The evidence before this Court establishes that Goehringer, as an account manager at Greystone, became intimately familiar with Greystone's business and developed significant relationships with Greystone's clients and customers. As an account manager, Goehringer was responsible for handling many of Greystone's accounts. As such, he was entrusted with the customer lists, personnel lists and other highly sensitive and confidential information concerning Greystone's business, employees and prices. This confidential business information is subject to the protection of the covenants in his employment agreement with Greystone. See, Stanley Tulchin Assoc. Inc. v. Vignola, 186 A.D. 2d 183 (2<sup>nd</sup> Dept. 1992) (An employer's "know how" is a protectible interest).

Plaintiff has also shown that, in working for CTI, Goehringer is working for a direct competitor of Greystone. Goehringer was entrusted with confidential information, including detailed information regarding particular customers, employees and prices, all of which allow Greystone to compete for and obtain the patronage and repeat business of its customers. Indeed, Goehringer does not contest that he enjoyed significant relationships with Greystone's clients. Rather, Goehringer argues that Greystone has failed to prove that he misappropriated any confidential information from Greystone.

Goehringer denies having misappropriated any client lists, personnel lists or any other type of confidential information. This argument, however, misses the point.

There is no doubt that Goehringer had access to highly sensitive information – – not known to persons outside Greystone – – which would be of significant value to a competitor who does not possess such information. See, Ashland Mgt. Inc. v. Jarmien, 82 N.Y. 2d 395 (1993). Thus, Greystone has a legitimate interest in protecting its confidential information. See, BDO Seidman v. Hirshberg, *supra*. It is clear on the present record that the need to protect secrets or other confidential information provides a firm ground for enforcing the agreement, including the non-compete, non-disclosure and non-solicitation covenants therein.

Accordingly, this Court finds that the restrictive covenants in the employment agreement are enforceable to the extent necessary to protect that interest and that, under New York law, Greystone is likely to succeed in enforcing the restrictive covenants in Goehringer's employment contract and in enjoining his continued breach.

B. Irreparable Injury

A party seeking a preliminary injunction must also show, as a threshold requirement, the prospect of irreparable injury if such provisional relief is not granted. Pearlgreen Corp. v. Yau Chi Chu, 8 A.D. 3d 460 (2<sup>nd</sup> Dept 2004). Irreparable injury in this context means any injury for which a monetary award alone cannot be adequate compensation. Walsh v. Design Concepts, Ltd., 221 A.D. 2d 454 (2<sup>nd</sup> Dept. 1995); and McLaughlin, Piven, Vogel v. W.J. Nolan & Co., 114 A.D. 2d 165, 174 (2<sup>nd</sup> Dept. 1986).

Moreover, entitlement to injunctive relief requires the movant to establish not a mere possibility of irreparable harm, but that it is likely to suffer irreparable harm if equitable relief is denied. The injury or harm must be immediate; not remote or speculative Golden v. Steam Heat, Inc., 216 A.D. 2d 440 (2<sup>nd</sup> Dept. 1995).

Here, Plaintiff has shown that it would suffer irreparable injury if its motion is denied because if it loses the right to enforce the restrictive covenants in its employment agreement with Goehringer, it would lose the customers, revenue and goodwill that it has developed over the last twenty years.

Additionally, in his employment contract with Plaintiff, Goehringer expressly acknowledged the confidential nature of Plaintiff's customer, employee and other business information as well as the irreparable harm that would result to Greystone's business and goodwill from his breach of the restrictive covenants (Employment Contract, ¶11).

As such, in the absence of a restraint on Goehringer's solicitation of Greystone's customers or disclosure of its confidential information, Greystone would likely sustain a loss of business that would be difficult, or very near to impossible, to quantify. Therefore, Greystone has shown the irreparable damage necessary to justify the issuance of a preliminary injunction enjoining Goehringer from disclosing Greystone's confidential information and soliciting, communicating, or transacting business with customers or potential customers of CTI with whom he first developed a relationship at Greystone, for the remainder of the twelve-month period following the termination of his

employment at Greystone. See, Ingenuit, Ltd. v. Harriff, – A.D. 3d – , 822 N.Y.S. 2d 301 (2<sup>nd</sup> Dept. 2006); and Composite Panel Fabricators, Inc. v. Webb, 118 A.D. 2d 615 (2<sup>nd</sup> Dept. 1986). Cf. IVI Environmental, Inc. v. McGovern, 269 A.D. 2d 497 (2<sup>nd</sup> Dept. 2000).

C. Balance of the Equities

A plaintiff seeking an injunction must also show that the burden caused to the defendant by the imposition of the injunction is less than the harm caused to the plaintiff by the defendant's activities without the injunction sought. See, McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., *supra* at 174.

Here, the record offers no basis to conclude that Goehringer and CTI have suffered or will in the future suffer significant professional hardship from the limited restraints imposed from an injunction, whereas Greystone would likely suffer injury if the injunction was denied. Notably, the relief that Plaintiff seeks will not prevent Goehringer from working. It will only prevent him from unfairly misappropriating client relationships and disclosing confidential information that Plaintiff paid him to develop and maintain. As such, the balance of equities with respect to the injunction favors Greystone.

The granting of a preliminary injunction does not determine the ultimate issues in the action, but serves only to preserve the status quo until a decision on the merits is made. Ruiz v. Meloney, 26 A.D. 3d 485 (2<sup>nd</sup> Dept. 2006), *citing* Ying Fung Moy v. Hoho Umeki, 10 A.D. 3d 604 (2<sup>nd</sup> Dept 2004). No harm can be done if the status quo is maintained, whereas irreparable injury may result if the requested relief is denied.

Plaintiff, having established irreparable harm absent injunctive relief and that it is unlikely to succeed in its efforts to enforce the terms of the non-compete agreement insofar as they protect its legitimate interest in its client relationships, is entitled to injunctive relief.

Restrictive covenants will be enforced only if they are limited temporally and geographically and to the extent necessary to protect the use of former employer's trade secrets or confidential client information. BDO Seidman v. Hirshberg, *supra*; Reed, Roberts Assoc., Inc. v. Strauman, *supra*; and Michael G. Kessler & Assoc., Ltd. v. White, 28 A.D.3d 724 (2<sup>nd</sup> Dept. 2006).

The restrictive covenant contained in Goehring's employment contract prohibits him from working in a similar business for a period of one year within a fifty (50) mile radius of any of Greystone's offices or the offices of any of Greystone's customers or clients with whom Goehring has been assigned to service. Such a restriction imposes an undue hardship on Goehring. See, BDO Seidman v. Hirshberg, *supra*. The restriction, if enforced, would prohibit Goehring from seeking employment in the employment agency business anywhere in the New York metropolitan area.

Greystone is primarily concerned with protecting its relationship with existing customers which it claims it has taken years to develop.

Where a restrictive covenant is overbroad, the court may sever or "blue pencil" those portions that are unnecessary to protect the former employer's legitimate interest. BDO Seidman v. Hirshberg, *supra*; and Karpinski v. Ingrassi, 28 N.Y.2d 45 (1971).

While the one year restriction is reasonable, the fifty (50) mile restriction is not. Prohibiting Defendants from soliciting business from Greystone's customers with whom Goehringer dealt during his employ with Plaintiff from a period one year is sufficient to protect its trade secrets and confidential information. In so finding, CTI is not restrained from dealing with such customers provided that CTI dealt with such customers prior to hiring Goehringer.

D. Undertaking

Upon the granting of Plaintiff's motion for a preliminary injunction, the Court is required to condition such relief on the posting of an undertaking in the event that it is later determined that the preliminary injunction was improvidently granted. CPLR 6312(b). Upon granting Plaintiff's application for a preliminary injunction an undertaking in the amount of \$50,000.00, shall be posted.

E. Expedited Discovery

Greystone sought expedited discovery to ascertain the full extent of Goehringer's and/or CTI's use of Greystone's confidential or proprietary information so that these facts could be presented at a hearing on whether a preliminary injunction should be issued.

The Court is granting the preliminary injunction without the necessity of a hearing. Therefore, expedited discovery is unnecessary. Discovery on this issue will be relevant to Greystone's damages claim. Such discovery can be conducted during the course of discovery to be scheduled at the Preliminary Conference.

Accordingly, it is,

**ORDERED**, that Plaintiff's motion for a preliminary injunction is **granted** to the extent that, for a period extending to and including July 31, 2007, Defendants are stayed and enjoined from soliciting business from Greystone's customers which were customers at or before the time of Goehringer's termination of employment; provided that Plaintiff posts an undertaking in the sum of \$50,000.00 within ten days of the date of this Order by depositing such sum with the County Clerk, posting a surety bond or depositing such sum in a joint interest bearing escrow to be maintained by counsel for parties. If such sum is not posted as provided herein, the motion is **denied**; and it is further,

**ORDERED**, that Plaintiff's application for expedited discovery is **denied** as academic; and it is further,

**ORDERED**, that counsel for the parties shall appear for a preliminary conference on December 18, 2006 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY  
November 27, 2006

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Hon. LEONARD B. AUSTIN, J.S.C.