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Marsh USA Inc. v Doerfler
2015 NY Slip Op 50020(U)
Decided on January 9, 2015
Supreme Court, New York County
Bransten, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
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Decided on January 9, 2015

Supreme Court, New York County

Marsh USA Inc., Plaintiff,

against

Robert Doerfler, AON RISK INSURANCE SERVICES WEST, INC., AON RISK SERVICES COMPANIES, INC., AON CORPORATION, Defendants.

653032/2014

Plaintiff is represented by Clifford R. Atlas and Dana L. Weisbrod of Jackson Lewis P.C.

Defendants are represented by Eric G. Hoffman and Sonia Marquez of Sidley Austin LLP.

Eileen Bransten, J.

Before the Court is Plaintiff Marsh USA Inc.'s motion (sequence no. 001) seeking the

issuance of a preliminary injunction against Defendants Aon Risk Insurance Services West, Inc. ("Aon West"), Aon Risk Services Companies, Inc., and Aon Corporation (collectively, "Aon"),[FN1] and Robert Doerfler, to compel compliance with the December 17, 2012 Non-Solicitation and Confidentiality Agreements between Plaintiff and Doerfler (collectively, the "NSA"), as well additional related relief. Defendants oppose. For the reasons that follow, as well as for the reasons stated on the record at the hearings held on October 6, 2014 (Denise M. Paternoster, SCR) and October 21, 2014 (Nina Koss, OCR), Plaintiff's motion is denied in its entirety.

BACKGROUND

This action arises out of Doerfler's alleged breaches of the NSA during the period after he ceased being employed by Plaintiff. Plaintiff, a risk and insurance services firm, is a Delaware corporation with its principal place of business in New York. Defendant Aon West is a California corporation with offices in the western United States, including in Portland, Oregon. Aon is one of Marsh's chief competitors in the insurance and risk management industry. Defendant Doerfler is an individual residing in the State of Washington. Doerfler's experience in [*2]the insurance industry includes working as an underwriter and as a broker, servicing clients in the forestry, wood products, food, and agriculture sectors.

Doerfler began his career in the insurance industry at Lumbermen's Underwriting Alliance ("LUA"), a forest products specialty insurance carrier. From 1999 to 2011, Doerfler held a number of positions at LUA, focusing on risk assessment and underwriting. During that time, he developed relationships with executives at many of LUA's clients, including Roseburg Forest Products ("Roseburg") and Rosboro LLC ("Rosboro").

In 2011, Doerfler left LUA and joined Aon as an insurance broker in Aon's food and agriculture practice, and also partnered with another Aon employee to provide insurance brokerage services to Aon's forest products clients.

Shortly thereafter, in December 2012, Doerfler left Aon and joined Plaintiff as an insurance broker covering Plaintiff's food and agriculture accounts. Because Doerfler was still subject to a two-year non-competition agreement with LUA at this time, he intended to service Plaintiff's food and agriculture accounts until the end of that two-year period, after which he would transition to servicing Plaintiff's forest products clients.

On December 17, 2012, approximately two weeks after commencing his employment at Plaintiff, Doerfler signed the NSA. Broadly speaking, and of particular relevance here, the NSA applies for a period of one year from the termination of Doerfler's employment with Plaintiff, and during that period restricts Doerfler from soliciting or servicing Plaintiff's clients. On February 24, 2014, Doerfler voluntarily resigned from his position at Plaintiff and commenced his employment at Aon that same day.

Plaintiff commenced this action on October 6, 2014. The complaint asserts causes of action for breach of the NSA, misappropriation of confidential information and trade secrets, tortious interference with contract, and unfair competition, for which Plaintiff seeks both injunctive and monetary relief.[FN2] Plaintiff also moved by order to show cause for the imposition of a temporary restraining order and preliminary injunction, as well as a request for expedited discovery in advance of a future preliminary injunction hearing.

At a hearing on October 6, 2014 (Denise M. Paternoster, SCR), the parties entered into a standstill agreement, obviating the need for the interim relief sought by Plaintiff in its motion. At the next hearing, on October 21st (Nina Koss, OCR), the Court denied Plaintiff's motion as to all but two issues: whether the restriction on Doerfler's ability to service Plaintiff's former clients (Roseburg and Rosboro) should be enforced through the issuance of a preliminary injunction and which state's law (New York or Oregon) should govern the analysis of the NSA's servicing provision. The Court also dissolved the standstill agreement except as to the issue of servicing. Those two remaining issues are the subject of this decision.

ANALYSIS

I.Whether Oregon or New York Law Governs the Analysis of the NSA's Servicing Provision

A.*The Plain Language of the NSA Mandates Enforcement of Its Choice of Law Provision*

Section 10 of the NSA is titled "Governing Law and Choice of Forum." (NSA at 4.) That section provides in pertinent part that the NSA "shall be governed by, and construed in

accordance with, the laws of the State of New York, without regard to its conflict of laws provisions." (NSA at 4.)

It is well-settled that " [a] basic precept of contract interpretation is that agreements should be construed to effectuate the parties' intent.'" *Aon Risk Servs. v. Cusack*, 102 AD3d 461, 463 (1st Dep't 2013) (quoting *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 7 NY3d 624, 629 (2006)). As a result, "New York courts are willing to enforce parties' choice of law provisions." *Aon Risk Servs.*, 102 AD3d at 463. Such provisions are considered "prima facie valid." *Boss v. Am. Express Fin. Advisors, Inc.*, 15 AD3d 306, 307 (1st Dep't 2005), *aff'd*, 6 NY3d 242 (2006). To invalidate such a provision, a party "must show that its enforcement would be unreasonable, unjust, or would contravene public policy, or that the clause is invalid because of fraud or overreaching.'" *Boss*, 15 AD3d at 307-08.

Defendants' principal arguments against enforcing the choice of law provision in the NSA are that the parties and their agreement bear no reasonable relationship to New York and that the application of New York law would be contrary to the policy of Oregon. However, the second phrase of the NSA's choice of law provision—"without regard to its conflict of laws provisions"—forecloses such an inquiry. The Second Circuit interpreted nearly identical language, and concluded that "New York's conflict of law rule regarding trusts [which would have instead called for the application of Cayman Islands law] is not relevant to this case because paragraph 38 clearly states that in interpreting the Settlement Agreement, New York internal' law applies without regard to conflicts of law.'" *Archer Invs. S.a.r.l v. Local 282 Welfare Trust Fund*, 462 F. App'x 122, 123-24 (2d Cir. 2012) (citing *Finucane v. Interior Const. Corp.*, 264 AD2d 618, 620 (1st Dep't 1999)).

Here, as in *Archer*, Defendants' arguments in favor of applying Oregon law would correctly be characterized as "conflict of laws" arguments and therefore may not be considered according to the plain language of the NSA, which requires the application of New York law to the governance and construing of the NSA, without regard to New York's conflict of laws provisions. Accordingly, the choice of law provision must be enforced, such that New York (not Oregon) law governs the parties' dispute.

B.*The NSA Has a Sufficiently Reasonable Relationship to New York*

Even if this Court were to consider Defendants' conflict of laws arguments, New York law would still govern the parties' dispute. As to the question of whether there is a reasonable

relationship to New York, the First Department has held that the scope of the inquiry is whether "the law of the State selected has a reasonable relation[ship]' to the agreement." *Finucane v. Interior Constr. Corp.*, 264 AD2d 618, 620 (1st Dep't 1999) (quoting *A. S. Rampell, Inc. v. Hyster Co.*, 3 NY2d 369, 381 (1957)). In *Finucane*, the First Department held that the laws of the state selected by the parties in their contract (Oklahoma) bore a reasonable relationship to the contract because one party's "principal place of business [was] located in Oklahoma." *Finucane*, [*3]264 AD2d at 620. The court stated further that "even if New York were deemed to have a greater interest in the litigation, the fact that Wiltel's principal place of business is located in Oklahoma is a sufficient basis to support enforcement of the parties' contractual choice of law." *Finucane*, 264 AD2d at 620.

Here, Plaintiff asserts (and it appears to be undisputed) that Plaintiff "is headquartered in New York; all of its significant internal groups and divisions are based in New York; and its offices in New York employ over a thousand people." (Plaintiff's Reply Memorandum of Law ("Pl.'s Reply Mem.") at 7 (citations and internal quotation marks omitted).) The second paragraph of the Complaint states that Plaintiff has "its principal place of business located in New York, New York." (Compl. ¶ 2.) Based on the foregoing, the NSA bears a sufficiently reasonable relationship to New York to permit the application of New York law.

C.*Policy Considerations Favor the Application of New York Law*

The second prong of Plaintiff's argument is that out of deference to Oregon public policy, this Court should disregard the NSA's choice of law provision and apply Oregon law instead. Of course, because the NSA calls for the application of New York law, there can be little doubt that "the law chosen [would not] . . . violate a fundamental public policy of New York." *Finucane v. Interior Constr. Corp.*, 264 AD2d 618, 620 (1st Dep't 1999). Instead, the Court considers whether "the issue is of such overriding concern to the public policy of the other jurisdiction [Oregon] as to override the intent of the parties and the interest of this State in enforcing its own policies." *Marine Midland Bank, N.A. v. United Mo. Bank, N.A.*, 223 AD2d 119, 123 (1st Dep't 1996).

The First Department decision, *Boss v. American Express Financial Advisors, Inc.*, 15 AD3d 306 (1st Dep't 2005), *aff'd*, 6 NY3d 242 (2006), is instructive, although it examined, in effect, the opposite issue—whether New York law should apply to the parties' dispute, notwithstanding their agreement's choice of law provision requiring the application of

Minnesota law. *Boss*, 15 AD3d at 308. In that case, the party seeking the application of New York law argued that "because New York's employment law affords greater protection to its workers than Minnesota's, enforcement of the choice-of-law provision would violate public policy." *Boss*, 15 AD3d at 308.

There, the First Department concluded that "[e]ven assuming that New York provides greater protection to its employees, [p]ublic policy, per se, plays no part in a choice of law problem.'" *Boss*, 15 AD3d at 308 (quoting *Dym v. Gordon*, 16 NY2d 120, 128 (1965)). "Indeed, a mere difference between the foreign rule and our own' does not warrant a refusal to apply the foreign law." *Boss*, 15 AD3d at 308 (quoting *Dym*, 16 NY2d at 128). In affirming the application of the choice of law provision, the First Department further observed that "foreign-based rights should be enforced unless their enforcement would result in approval of a transaction that is inherently vicious, wicked or immoral, and shocking to prevailing moral senses." *Boss*, 15 AD3d at 308 (citing *Intercontinental Hotels Corp. v. Golden*, 15 NY2d 9, 13 (1964)).

Here, the situation is reversed: the choice of law provision calls for the application of New York law, and Defendants argue that the Court should apply Oregon law. Although Defendants characterize the relevant Oregon law as an " an important employment-related [*4]statutory right,'" they have not established that enforcement of New York law "would result in approval of transaction that is inherently vicious, wicked or immoral, and shocking to prevailing moral senses." As noted above, " a mere difference between the foreign rule and our own' does not warrant a refusal to" enforce the parties' choice of law provision. Defendants' provide no explanation as to why the standard espoused in *BDO Seidman v. Hirshberg*, 93 NY2d 382 (1999), the seminal New York case addressing the enforceability of agreements such as the NSA, would be insufficient compared to Oregon law, for protecting Doerfler's rights.

Even Defendants' description of Oregon's comparatively greater interest—that Doerfler worked in Oregon and that the clients at issue are either in Oregon or the broader Pacific Northwest region—falls short of the mark. New York has a "recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world." *Marine Midland Bank*, 223 AD2d at 124. "Indeed, access to a convenient forum which dispassionately administers a known, stable, and commercially sophisticated body of law may be considered as much an attraction to

conducting business in New York as its unique financial and communications resources." *Marine Midland Bank*, 223 AD2d at 124 (determining that the parties' New York choice of law provision governed, and that Kansas law did not apply although the action was brought against a Kansas debtor). The broader and more far-reaching policy considerations favoring the application New York law, outweigh those espoused by Defendants in favor of applying Oregon law, which seem to concern only a few individuals and entities.

For the reasons stated above, the Court finds that the NSA's choice of law provision should not be disregarded, such that New York (not Oregon) law applies in this action.[FN3]

II.Analysis of the NSA's Service Provision Under New York Law

"Under New York law, an employee's noncompetition agreement is reasonable and, therefore, enforceable 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.'" *TBA Global, LLC v. Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dep't 2014) (quoting *BDO Seidman v. Hirshberg*, 93 NY2d 382, 388-89 (1999)). [*5]Accordingly, the Court first considers whether the NSA's restriction on Doerfler's ability to service Plaintiff's former clients is no greater than is required for the protection of Plaintiff's legitimate interest.

A.*Whether Plaintiff's Goodwill With Its Former Clients Is a Legitimate Interest*

Plaintiff submits that it "has a legitimate interest in preventing Doerfler from exploiting or appropriating the goodwill of its clients, like Rosboro and Roseburg, which had been created and maintained at [Plaintiff's] expense." (Plaintiff's Memorandum of Law ("Pl.'s Mem.") at 10.) Examples of the effort and resources expended by Plaintiff to create this goodwill include reimbursing Doerfler for expenses incurred while visiting and entertaining clients, and providing Doerfler with introductions to several "top executives" of Plaintiff's clients, "including the CFOs of Rosboro and Roseburg." (Pl.'s Mem. at 10 (citing Affidavit of David Rix ¶¶ 11-12).)

"[A]n employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment.'" *Crown IT*

Servs. v. Koval-Olsen, 11 AD3d 263, 265 (1st Dep't 2004) (quoting *BDO*, 93 NY2d at 392). This is true even where the goodwill which the employer seeks to protect is related to former (as opposed to current) clients, such as Plaintiff's former clients Rosboro and Roseburg in this case. *See Crown IT Servs.*, 11 AD3d at 264-65.

Accordingly, the Court finds that Plaintiff has a legitimate interest in the goodwill which it created with its clients, including its former clients Roseburg and Rosboro.

B.*Whether the NSA's Servicing Restriction Is No Greater than Is Required for the Protection of Plaintiff's Legitimate Interest in Its Goodwill*

Defendants argue that Doerfler created his own goodwill with Rosboro and Roseburg during his work as an underwriter at LUA. Thus, because the NSA makes no distinction or carve-out for clients with which Doerfler had a prior relation, the NSA impermissibly restricts Doerfler's ability to utilize his own, personal goodwill by continuing to service these clients, which cannot be rightly considered Plaintiff's legitimate interest.

Significantly, it has been held that "whether client goodwill developed as a result of the [employee's] own independent efforts, rather than being generated and maintained primarily at the employer's expense is a triable issue of fact." *Kanan, Corbin, Schupak & Aronow, Inc. v. FD Int'l, Ltd.*, 8 Misc 3d 412, 419 (Sup. Ct. NY Cnty. 2005). In *Kanan*, the court considered the enforceability of restrictive covenants contained in the employment agreements of two former employees of a public relations firm. *Kanan*, 8 Misc 3d at 413. Like the non-servicing provision at issue here, in *Kanan*, "[t]he restrictive covenants contained in the . . . agreements really [sought] to protect the good will' of the clients developed during the [defendants'] tenure of . . . employment with [the plaintiff]." *Kanan*, 8 Misc 3d at 418.

Ultimately, the court in *Kanan* denied plaintiff's motion for a preliminary injunction. In reaching its conclusion, the court observed that where there is a triable issue of fact regarding the goodwill, at least "a minimal showing is required in support of the proposition that the goodwill allegedly misappropriated was created at [the employer's] expense." *Kanan*, 8 Misc 3d at 419-[*6]20.

The affidavit of Lisa Fairchild (Roseburg's Treasury Manager) states that "Mr.

Doerfler's familiarity with Roseburg's needs—which is derived from his long-term relationship with Roseburg, stretching back to his time at LUA—together with his skill in working with underwriters, are valuable to Roseburg, and are not proprietary to Marsh." (Affidavit of Lisa Fairchild ¶ 9.) Similarly, the affidavit of Scott Nelson (Rosboro's Chief Financial Officer) describes the span of Mr. Nelson's relationship with Doerfler, going back to his time at LUA, which continued over a period of many years, and states that "Rosboro would be harmed by being deprived of Mr. Doerfler's industry expertise and high level of service." (Affidavit of Scott Nelson ¶¶ 2, 10.)

One can reasonably conclude from these affidavits that the goodwill Doerfler developed during his work as an underwriter is central to Doerfler's ability to effectively service these clients. Were this a case where Doerfler had not encountered those two clients until his employment by Plaintiff, the analysis would likely be a straightforward one. However, this is not that case. Without some means of distinguishing between the goodwill created by Doerfler prior to his employment by Plaintiff and Plaintiff's own goodwill, issuing a preliminary injunction to prevent Doerfler from servicing these two clients *in toto* would impermissibly deprive Doerfler of goodwill in which he, not Plaintiff, has a legitimate interest.

Based on the foregoing, the Court finds that Plaintiff has not established that the NSA's restriction on servicing is "no greater than is required for the protection of the legitimate interest of the employer."

C.*Whether the Court Should Partially Enforce the NSA's Servicing Provision* [FN4]

Under New York law, courts have the "power to sever and grant partial enforcement for an overbroad employee restrictive covenant." *BDO*, 93 NY2d at 394. Rather than invalidate an entire agreement, "when . . . the unenforceable portion is not an essential part of the agreed exchange, a court should conduct a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement." *BDO*, 93 NY2d at 394. "Under this approach, 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, partial enforcement may be justified." *BDO*, 93 NY2d at 394.

At this juncture, the only "portion" of the NSA for which a preliminary injunction might [*7]be issued is the servicing provision as it relates to Plaintiff's former clients Roseburg and Rosboro. The court in *BDO* was able to partially enforce an agreement by "narrow[ing] the class of BDO clients to which the covenant applies." *BDO*, 93 NY2d at 395. Because there appears to be no way of distinguishing between the goodwill in which Plaintiff has a legitimate interest and the goodwill created by Doerfler with these two clients prior to his employment by Plaintiff, partially enforcing the servicing provision to protect Plaintiff's goodwill without impacting Doerfler's seems impossible.

D.*The Circumstances Militate Against Partial Enforcement*

There is also a factual issue in this case regarding "the conduct of the employer in imposing the terms of the agreement." *BDO*, 93 NY2d at 394. In *BDO*, the court identified certain "facts and circumstances [which] militate[d] in favor of partial enforcement," including that (1) "[t]he covenant was not imposed as a condition of defendant's initial employment, or even his continued employment, but in connection with promotion to a position of responsibility and trust just one step below admittance to the partnership"; (2) "[t]here [was] no evidence of coercion or . . . of some general plan to forestall competition"; and (3) there was "no proof . . . that BDO imposed the covenant in bad faith, knowing full well that it was overbroad." *BDO*, 93 NY2d at 395.

In this case, there is no basis to conclude that the NSA's servicing provision was a product of coercion or bad faith. However, there is some indication that the imposition of the servicing restriction, and the restrictions provided by the NSA as a whole, were imposed as a condition of Doerfler's initial employment with Plaintiff. (*See* Pl.'s Mem. at 3-5; Pl.'s Reply Mem. at 10; Affidavit of Robert Doerfler ¶¶ 21-23.) Under *BDO*, that fact would militate against partial enforcement. Plaintiff's arguments that Doerfler received advanced notice that he would be required to sign the NSA, that he was given access to the NSA online, that he was an experienced professional who was familiar with these types of agreements, and that the NSA was less restrictive than prior employment agreements to which Doerfler had been subject, do not alter the analysis under *BDO*.

For all of these reasons, the Court declines to partially enforce the servicing provision of the NSA. Accordingly, Plaintiff's motion for a preliminary injunction with respect to the servicing restriction of the NSA is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff's motion (sequence no. 001) seeking, among other things, the issuance of a preliminary injunction is denied in its entirety; and it is further

ORDERED that the standstill agreement put into place at the hearing on October 6, 2014, is dissolved in its entirety; and it is further

ORDERED, that pursuant to the stipulation of discontinuance filed on November 4, 2014, this action is discontinued without prejudice as to Defendants Aon Risk Services Companies, Inc., and Aon Corporation, and without costs to any party; and it is further

ORDERED that the caption is amended to reflect the discontinuance of this action as [*8]against Defendants Aon Risk Services Companies, Inc., and Aon Corporation, and that all future papers filed with this Court shall bear the amended caption; and it is further

ORDERED that the action shall bear the following caption:

——-X

MARSH USA INC., Index No.: 653032/2014

Plaintiff,

-against-

ROBERT DOERFLER, and

AON RISK INSURANCE SERVICES WEST, INC.,

Defendants.

——-X

and it is further

ORDERED that within 10 days from the date of this order, Plaintiff shall electronically file and serve a copy of this order with notice of entry upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158) and the Clerk of the E-filing Support Office (Room 119), who are directed to mark the Court's records to reflect the amended caption; and it is further

ORDERED that the parties are directed to appear in Room 442, 60 Centre Street, for a preliminary conference on Tuesday, February 3, 2015, at 10:00 a.m.

This constitutes the decision and order of the Court.

Dated: New York, New York

January*9* , 2015

ENTER:

/s/ Eileen Bransten

Hon. Eileen Bransten, J.S.C.

Footnotes

Footnote 1: On November 4, 2014, the parties filed a stipulation of discontinuance without prejudice as to Defendants Aon Risk Services Companies, Inc., and Aon Corporation.

Footnote 2: On November 7, 2014, Doerfler and Aon West, the remaining Defendants in this action, each filed an answer to the complaint.

Footnote 3: Defendants also claim that Plaintiff misrepresented the fact that Doerfler "would have a significant opportunity to partner with [Val Malliris] on new business in forest products" in order to induce Doerfler to join Plaintiff. (Defendants' Memorandum in Opposition ("Defs.' Opp. Mem.") at 4-5.) However, the record in this case is insufficiently developed for this Court to conclude that the choice of law provision should be "invalid[ated] because of fraud." *Boss*, 15 AD3d at 308. There is, in fact, no basis to conclude that the misrepresentation alleged would rise to the level of fraud, even if proven. In addition, general allegations of fraud are insufficient to invalidate a choice of law provision; rather, the fraud must be specific to the inclusion of the provision in the parties' agreement. *See Equilease Corp. v. Indem. Ins. Co.*, 183 AD2d 645, 648 (1st Dep't 1992); *Rokeby-Johnson v. Kentucky Agric. Energy Corp.*, 108 AD2d 336, 341 (1st Dep't 1985); *see also Bell Constructors v. Evergreen Caissons, Inc.*, 236 AD2d 859, 860 (4th Dep't 1997). As such, Defendants' allegations do not otherwise provide a basis for relief from the NSA's choice of law provision.

Footnote 4: Plaintiff first addresses partial enforcement (or "blue-penciling") in its Reply Memorandum of Law, in response to Defendants' assertion that the Court should decline to even consider partially enforcing the NSA. (Pl.'s Reply Mem. at 10.) There, Plaintiff states that "any argument that blue-penciling should not be permitted . . . is flawed." (Pl.'s Reply Mem. at 10.) While it is unclear whether Plaintiff's statement amounts to a request for partial enforcement, it may nevertheless may be procedurally improper to consider doing so. *See Mulligan v. City of New York*, 120 AD3d 1155, 1156 (1st Dep't 2014) (holding that arguments "raised for the first time in . . . reply affirmations" were "not properly before" the court). Nevertheless, the Court shall consider the issue of partial enforcement on the merits.

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