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Eric Woods, LLC v Schrade
2014 NY Slip Op 51473(U)
Decided on October 2, 2014
Supreme Court, Albany County
Platkin, J.
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Decided on October 2, 2014

Supreme Court, Albany County

Eric Woods, LLC, Plaintiff,

against

Richard A. Schrade and WILCAR INSURANCE AGENCY, LLC, Defendants.

A811-2014

APPEARANCES:

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Richard M. Platkin, J.

Plaintiff Eric Woods, LLC ("Woods LLC") moves for a preliminary injunction to enforce the terms of a covenant against competition given by defendant Richard A. Schrade in connection with the sale of his insurance agency.

[*2]BACKGROUND

On August 29, 2011, plaintiff purchased an Allstate insurance agency from Schrade pursuant to an Asset Purchase Agreement ("APA"). Among the assets purchased by Woods LLC were "any and all customer lists and customer files used and maintained in connection with the Business" and "any and all goodwill of Seller" (APA §§ 1.1 [gg], [iv]).

As required by the APA and in partial consideration for the sale of the business

(*id.* § 6.6), Schrade entered into a Non-Competition Agreement ("Agreement"). The Agreement begins with Schrade's acknowledgment that his "many years" of experience have left him knowledgeable about "all aspects of the Business", including its "methods of doing business, policyholders, prospective policyholders, amounts of insurance coverage, premium amounts, locations and values of insured property, policy renewal dates, claims information and other information related thereto (Confidential Information')" (3rd Whereas Clause). "[I]n order to protect [the purchaser], the Business, and [the purchaser's] investment in the Business", the parties recognized that "it is necessary that Schrade refrain from certain post-closing actions directly or indirectly in competition with the business" (*id.* 4th Whereas Clause).

Accordingly, Section 3 of the Agreement imposes the following post-sale covenant against competition and solicitation:

For a period of five (5) years from [August 29, 2011], Schrade will not directly or indirectly, for himself or as agent of, on behalf of, or in conjunction with [anyone else]:

(A)engage in the business of selling policies of insurance of any kind or nature within a twenty five (25) mile radius of his former office located at 636 Delaware Avenue, Delmar, New York 12054. Saratoga County however shall be excluded . . . .

(B)canvass, solicit or accept any business from any customers/policyholders listed on

annexed Schedule A,[FN1] and he will not for any reason . . . request or advise any of the aforesaid customers to withdraw or cancel any of their insurance business with [Woods LLC] regardless of the place of business or residence of any such customers/policyholders; or

(C)solicit for employment any employee of [Woods LLC] or encourage any employee to leave the employ of [Woods LLC].

The Agreement goes on to state that the foregoing "time and other limitations are reasonable and properly required for the protection of the business and affairs of [the purchaser]" (*id*. § 4). In the event that a court were to determine otherwise, Schrade agreed "to submit to the reduction of these limitations to such a period or otherwise as the court may determine to be reasonable" (*id*.).

The parties also acknowledged Schrade's possession of "Confidential Information" concerning the purchased business and recognized the "irreparable damage" that unauthorized disclosure would cause (Agreement § 2). Accordingly, it was agreed that Schrade would not "duplicate, remove, download, use or disclose . . . any such Confidential Information" (*id*.).

Finally, the Agreement includes several remedial provisions. Recognizing that a breach of the foregoing covenants may cause the purchaser to "suffer damages incapable of ascertainment" that are "irreparabl[e]" in nature, Schrade "consent[ed]" to the entry of injunctive relief "without the necessity of posting a bond" (*id*. § 5). The parties further agreed that the non-prevailing party in any litigation to enforce the covenants shall be responsible for the legal fees and all other expenses of the prevailing party (*id*.).

In or about June 2013, plaintiff's sole member, Eric Woods ("Woods"), learned that Schrade had purchased an insurance agency in Ballston Spa, New York, which is located in Saratoga County. Woods also learned that Schrade had moved his own personal insurance policy to the new agency. When Woods asked about the transfer, Schrade allegedly reassure Woods that he was only moving his own personal policy and that he had no intention of moving any other policies.

In January 2014, Woods became aware that Schrade's accountant had transferred several personal policies to Schrade's new agency. At the time, Schrade allegedly advised Woods of his belief that he was allowed to solicit his former customers since he was doing so from Saratoga County. Woods stated his contrary view, and Schrade reassured him again that "[he] had nothing to worry about".

In or about March 2014, Woods learned that Schrade was taking over the local GEICO office in Albany, New York. Schrade allegedly claimed that the office was being relocated to Saratoga County. However, GEICO allegedly insisted the office remain in Albany.

In the Spring of 2014, the parties entered into negotiations concerning the offices of Woods LLC, which remained in a building leased from Schrade ("Building"). In connection with a possible renewal of the lease or sale of the Building, Schrade proposed an amendment to the Agreement that would have allowed him to open an office at 1770 Central Avenue, Albany, New York, which is about ten miles away from plaintiff's agency. Woods refused to agree to the proposed amendment, but held off initiating the instant litigation until issues concerning the Building were finalized. Plaintiff took title to the Building on July 31, 2014.

Woods avers that in the last several months, Schrade has commenced a "full scale marketing effort" for his new GEICO insurance agency located at 1770 Central Avenue, Albany, New York, including direct mailers and radio advertisements. Woods claims that he already has lost clients to Schrade and will continue to do so in the future unless an injunction enforcing the covenant is granted.

On September 8, 2014, plaintiff commenced this action to enforce the terms of the Agreement. By an Order to Show Cause ("OTSC") of the same date, the Court established an expedited briefing schedule on plaintiff's application for a preliminary injunction. In addition, the Court granted a temporary restraining order prohibiting defendants "from soliciting former clients contained in the Book of Business' list sold to plaintiff." For purposes of the temporary injunction, the term "solicitation" shall "include targeted mailings or phone calls but shall not include mass mailings or general advertisements." The OTSC was made returnable on [*3]September 19, 2014. This

Decision and Order follows.

ANALYSIS

Plaintiff seeks a preliminary injunction enforcing a covenant against competition. In order to obtain preliminary injunctive relief, the moving party must demonstrate "that irreparable harm will occur if the injunction is not granted, that such party has a likelihood of success on the merits, and that the balance of equities tip in its favor" (*Marietta Corp. v Fairhurst*, 301 AD2d 734, 736 [3d Dept 2003] [citation omitted]). In determining whether plaintiff has met this heavy burden, the Court is mindful that a preliminary injunction is a "drastic remedy which is not routinely granted" (*id.*).

A.Likelihood of Success

Covenants against competition "are not favored" under New York law and will only be enforced in limited circumstances (*Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 620 [2006]). "Undoubtedly judicial disfavor of these covenants is provoked by powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood'" (*Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976], quoting *Purchasing Assoc. v Weitz*, 13 NY2d 267, 272 [1963]).

In general, a post-employment restraint against competition "will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 389 [1999][internal quotation omitted]). However, covenants against competition that are ancillary to the sale of an ongoing business are treated in a more deferential manner:

Where, for instance, there is a sale of a business, involving as it does the transfer of its good will as a going concern, the courts will enforce an incidental covenant by the seller not to compete with the buyer after the sale. This rule is grounded, most reasonably, on the

premise that a buyer of a business should be permitted to restrict his seller's freedom of trade so as to prevent the latter from recapturing and utilizing, by his competition, the good will of the very business which he transferred for value. . . . The sole limitation on the enforcibility of such a restrictive covenant is that the restraint imposed be "reasonable," that is, not more extensive, in terms of time and space, than is reasonably necessary to the buyer for the protection of his legitimate interest in the enjoyment of the asset bought.

(*Purchasing Assoc., Inc. v Weitz*, 13 NY2d 267, 271-272 [1963] [internal citations omitted]; *see also Mohawk Maintenance Co. v Kessler,* 52 NY2d 276 [1981]).

There is no dispute that the covenant sought to be enforced by plaintiff was given in connection with the sale of an ongoing business in which goodwill was transferred. Accordingly, the Court must apply the more relaxed standard of reasonableness applicable to post-sale covenants, rather than the stricter post-employment standard emphasized by defendants (*see Reed, Roberts*, 40 NY2d at 307; *Purchasing Assoc.*, 13 NY2d at 271-272). For this reason, plaintiff need not demonstrate a "legitimate interest" in enforcing the covenant beyond its protection of the confidential customer/policyholder information and goodwill that it purchased [*4]from Schrade for value (*see Purchasing Assoc.*, 13 NY2d at 271-272; *cf. BDO Seidman*, 93 NY2d at 389-391).[FN2]

Plaintiff has shown a clear likelihood of success in establishing that the scope and duration of the covenant are reasonable. By prohibiting Schrade from soliciting or doing business with the customers whose names appear on the "Book of Business" list, the covenant reasonably protects plaintiff's legitimate interest in the enjoyment of a valuable asset that it purchased (*see Purchasing Assoc., Inc. v Weitz*, 13 NY2d at 271). Further, given that the vast majority of the customers identified in the "Book of Business" reside within 25 miles of plaintiff's office, the geographic component of the covenant reasonably serves to protect the goodwill of the transferred business. Further, the 25-mile radius agreed upon by the parties falls well within prevailing notions of reasonableness.

As to duration, plaintiff argues persuasively that a five-year covenant will allow it to foster and cultivate relationships with its purchased client base, free of interference by the

seller. Moreover, covenants of similar duration routinely are given in commercial transactions in which the goodwill of an existing enterprise is purchased (*see e.g. Mohawk Maintenance Co. v Kessler*, 52 NY2d 276 [1981]; *FTI Consulting, Inc. v PriceWaterhouseCoopers, LLP*, 8 AD3d 145 [1st Dept 2004]; *Hadari v Leshchinsky*, 242 AD2d 557 [2d Dept 1997]; *Brintec Corp. v Akzo N.V.*, 129 AD2d 447 [1st Dept 1987]). [FN3] In fact, courts have enforced covenants of unlimited duration ancillary to the sale of a business, so long as they were otherwise reasonable (*see e.g. Town Line Repairs v Anderson*, 90 AD2d 517, 518 [2d Dept 1982]; *Goos v Pennisi*, 10 AD2d 643, 644 [2d Dept 1960]; *see also Diamond Match Co. v Roeber*, 106 NY 473 [1887] [99-year covenant]).

The reasonableness of the covenant is confirmed by Schrade's own acknowledgments in the section of the Agreement entitled "Reasonableness of Limitations". "Schrade acknowledges and agrees that the foregoing time and other limitations are properly required for the adequate protection of the business and the affairs of the [plaintiff]" (§ 4). Further, the parties to the APA and the Agreement were represented by counsel, and the record shows that the terms of the covenant, including the carve-out for Saratoga County, were the product of arm's length negotiation.

The Court further finds that plaintiff is likely to succeed on its claim that Schrade is in violation of the covenant. There is no dispute that Schrade "engage[s] in the business of selling policies of insurance . . . within a twenty five (25) mile radius of his former office" from a location outside of Saratoga County. Thus, Schrade is in direct and flagrant violation of Section 3 (A) of the Agreement.

Further, plaintiff is likely to succeed in showing that Schrade is violating Section 3 (B), which prohibits him from soliciting or accepting business from customers/policyholders identified on the Book of Business list. Plaintiff has submitted proof that defendants are doing [*5]business with former customers/policyholders, and Schrade's attempt to dismiss these violations as "administrative mistake[s]" on the part of his staff is unpersuasive. To the extent that Schrade actually has procedures in place to prevent this type of violation, the limited record compiled at this early stage of the litigation demonstrates their lack of efficacy.

While Schrade emphasizes that the policy transfers were not the product of his direct, personal solicitation, the Agreement flatly prohibits Schrade's "accept[ance of] any business" from his former customer base. And there is no dispute that defendants and GEICO have engaged in large-scale direct mail campaigns at pertinent times.

Finally, the fact that GEICO and other insurance agents can compete fairly against plaintiff does not excuse or justify defendants' unfair competition in violation of the clear terms of the Agreement.

Based on the foregoing, the Court finds that plaintiff has demonstrated a clear likelihood of success on the merits so as to warrant the requested grant of preliminary injunctive relief.

B.Irreparable Harm

A party seeking a preliminary injunction must also show the prospect of irreparable injury (*see Town of Liberty Volunteer Ambulance Corp. v Catskill Regional Med. Ctr.*, 30 AD3d 739 [3d Dept 2006]).

Irreparable injury is presumed where the "covenant not to compete was part of the consideration for the sale of an existing business with its goodwill" (*Frank May Assoc. v Boughton*, 281 AD2d 673, 674 [3d Dept 2001]; *see New York Real Estate Inst., Inc. v Edelman*, 42 AD3d 321 [1st Dept 2007]).

Further, in executing the Agreement, Schrade recognized that a breach of the covenant may give rise to "damages incapable of ascertainment" that would cause plaintiff "irreparabl[e] damage" in the absence of enforcement (§ 5). For that reason, Schrade consented to an injunction restraining actual or threatened breaches of the Agreement.

In addition, courts routinely find irreparable harm in cases similar to this one based on the difficulty in calculating an award of monetary damages that would successfully redress the loss of goodwill and clients (*see e.g. Confidential Brokerage Servs., Inc. v*

Confidential Planning Corp., 85 AD3d 1268, 1269 [3d Dept 2011]; *Alside Div. of Associated Materials v Leclair*, 295 AD2d 873 [3d Dept 2002]).

Based on all of the foregoing, and given Schrade's persistent and continuing breach of the Agreement, the element of imminent and irreparable harm has been established.

C.Balancing of the Equities

Plaintiff purchased Schrade's insurance business, including the Book of Business and all associated goodwill, for hundreds of thousands of dollars. As part of this transaction, plaintiff insisted that its purchase be protected by an express covenant against post-sale competition that prohibits Schrade from recapturing and utilizing the assets and goodwill that he sold to plaintiff. Schrade agreed to these terms and accepted the benefits of the bargain, including $80,000 in consideration tied directly to the covenant against post-sale competition.

Schrade now maintains that the equities weigh against enforcement of the Agreement. He argues that the requested injunctive relief would cause him severe financial hardship, damage his reputation with customers and entail significant administrative burdens. He further speculates that plaintiff's customers may switch to GEICO regardless of his involvement, [*6]whether on their own initiative or due to the solicitations of other GEICO agents unburdened by a restrictive covenant. Schrade also asserts that an injunction should be denied on account of undue hardship to the public and plaintiff's delay in seeking relief.

While the Court certainly is sensitive to the economic and non-economic burdens associated with the requested injunctive relief, these hardships largely are self-created. Notwithstanding Schrade's persistent efforts to deflect blame and responsibility to others — including GEICO, his office staff and plaintiff — it was Schrade who "gr[ew] restless in retirement" and decided to open a competing insurance office in close proximity to the business that he sold to plaintiff for a substantial sum, in flagrant violation of the Agreement. Indeed, Schrade's efforts to market and expand the new business only increased after plaintiff denied his request for permission to amend the covenant. Thus, the

burden imposed upon defendants by the injunction, while substantial, cannot be said to be inequitable. Further, defendants have not shown that the burden of enforcement on third parties, including customer/policyholders and GEICO, is so severe as to tip the balance of the equities against enforcement.

Nor does the Court see merit in defendants' claim of undue delay. Schrade consented to the entry of injunctive relief, and defendants have not alleged or established the elements of equitable estoppel or laches. Accordingly, plaintiff's delay in commencing suit does not preclude the granting of preliminary injunctive relief or tip the equities in defendants' favor under the circumstances presented herein (*see Edelman*, 42 AD3d at 321-322).

Accordingly, the Court finds that the balance of the equities tips decidedly in favor of the injunctive relief sought by plaintiff.

D. Undertaking

"[P]rior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction" (CPLR 6312). Defendants seek an undertaking in the amount of $100,000 every two weeks, an amount said to represent his agency's gross revenues from insurance premiums.

Even if defendants' gross revenues on policies represented a reasonable measure of damages, which it certainly does not, Section 5 of the Agreement authorizes the entry of an injunction "without the necessity of posting a bond". Defendants' submissions ignore this provision and offer no basis for disregarding Schrade's written stipulation (*see Private One of NY, LLC v JMRL Sales & Serv., Inc.*, 21 Misc 3d 1106(A) [Sup Ct, Kings County 2008]; *Awwad v Capital Region Otolaryngology Head & Neck Group, LLP*, 18 Misc 3d 1111(A) [Sup Ct, Albany County 2007]). Accordingly, no undertaking shall be required.

CONCLUSION

Based on the foregoing,[FN4] it is

ORDERED that plaintiff's motion for a preliminary injunction is granted; and it is further

ORDERED that during the pendency of this action, Richard A. Schrade shall not, directly or indirectly, for himself or as agent of, on behalf of, or in conjunction with any other [*7]person or entity: (a) engage in the business of selling policies of insurance of any kind or nature within a twenty five (25) mile radius of 636 Delaware Avenue, Delmar, New York 12054, excluding Saratoga County; or (b) solicit or accept business from any of his former customers/policyholders listed on the "Book of Business" list sold to plaintiff; and it is further

ORDERED that for purposes of the preceding paragraph, "solicitation" shall include targeted mailings or phone calls but shall not include mass mailings or general advertisements; and it is further

ORDERED that no undertaking shall be required; and finally it is

ORDERED that the parties shall appear for a preliminary conference in the Chambers of the undersigned (Albany County Courthouse, Room 256) on November 3, 2014 at 10:30 a.m. after conferring in compliance with Commercial Division Rule 8.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to plaintiff's counsel; all other papers are being transmitted to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York

October 2, 2014

RICHARD M. PLATKIN

A.J.S.C.

Papers Considered:

Order to Show Cause, dated September 8, 2014;

Affirmation of Ryan M. Finn, Esq., dated September 8, 2014, with attached exhibits 1-2;

Affidavit of Eric Woods, sworn to September 8, 2014, with attached exhibits A-F;

Affidavit of Jessica Silber, sworn to September 8, 2014, with attached exhibits 1-2;

Affidavit of Richard A. Schrade, sworn to September 15, 2014, with attached exhibits A-D;

Reply Affirmation of Ryan M. Finn, Esq., dated September 18, 2014, with attached exhibit 1;

Reply Affidavit of Eric Woods, sworn to September 18, 2014.

Footnotes

Footnote 1: Schedule A is a "Book of Business Listing" containing the name, contact information, policy information and premium amounts for approximately three thousand insurance policies.

Footnote 2: In this connection, the Court rejects defendants' claim that the confidential information that plaintiff purchased from Schrade concerning customers/policyholders can be obtained from public sources.

Footnote 3: This Court has enforced a covenant of eight years in connection with the sale of an ongoing business (*see e.g. Conway v Waddell*, Index No. 8737-07, December 13, 2007 [unpublished]).

Footnote 4: The Court has considered defendants' remaining arguments and contentions, but finds them unavailing.

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