UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EDWARD SODEL AND JOSEPH FREEDMAN CO., INC.	:	CIVIL ACTION NO. 302CV726(JCH)
Plaintiffs,	:	
V.	:	
METAL MANAGEMENT AEROSPACE, INC.,	:	
Defendant.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

The above-captioned action arises out of defendant Metal Management Aerospace, Inc.'s ("MTLM") termination of plaintiff Edward Sodel ("Mr. Sodel") because of his age, in violation of 29 U.S.C. § 623(a), and MTLM's subsequent attempt to induce Mr. Sodel's current employer, plaintiff Joseph Freedman Co., Inc. ("Freedman"), to terminate Mr. Sodel's employment on the basis of certain anti-competitive covenants contained in Mr. Sodel's employment contract with MTLM. Count Two of the Amended Complaint seeks a declaration that the anti-competitive terms of Mr. Sodel's employment contract are ineffective and an injunction to prevent MTLM from attempting to enforce those provisions. Count One of defendant's counterclaim seeks damages for Mr. Sodel's alleged breach of the anti-competitive provision of his employment contract.

Plaintiffs respectfully request that the court grant summary judgment in plaintiffs' favor

on plaintiffs' second cause of action and defendant's first cause of action in its counterclaim on the ground that the anti-competitive terms of MTLM's employment contract are invalid as a matter of law and undisputed fact because they are (1) unreasonably long; (2) unlimited in their geographic scope; (3) overly broad in the protection accorded to MTLM; (4) an unreasonable restraint on Mr. Sodel's ability to pursue his occupation, and (5) contrary to public policy.

STATEMENT OF FACTS

Mr. Sodel is 58 years old, and has been employed in the scap metal business for 32 years. Affidavit of Edward Sodel, ¶ 3 (hereinafter "Sodel Affid."). Between May 1970 and April, 1998, Mr. Sodel was employed as by Stanley Sack Company, Inc., a scrap metal business. Id. On or about April, 1998, Metalico-Hartford, Inc. ("Metalico"), bought the assets of Stanley Sac Company. Id., ¶ 4. Metalico agreed to continue Mr. Sodel's employment in the business as a buyer with the title of Vice-President pursuant to an employment agreement ("the Agreement.") Id.

The April 14, 1998 employment agreement between Mr. Sodel and Metalico-Hartford, Inc. ("the Agreement") provided that during the "Employment Period" and "Post-Employment Period," Mr. Sodel could not: (i) be employed by any business within a 100 mile radius of Bloomfield, Connecticut, which competed with MTLM; or (ii) for his own account or for the account of another, solicit business of the same or similar type as MTLM from any person known by Mr. Sodel to be a customer of MTLM at the time of the solicitation. Sodel Affid., Exhibit A, § 8(b)(i), (ii). The Agreement further prohibited Mr. Sodel, for five years after the "Employment Period," from "interfer[ing] with the Employer's relationship with any person, including any person who at any time during the Employment Period was an employee,

contractor, supplier, or customer of the Employer." Id., § 8(b)(iii)(B).

Pursuant to the Agreement, the Employment Period commenced on April 14, 1998 and continued for three years, until April 14, 2001. Id., §§ 1, 2(b). The Agreement defined the "Post Employment Period" to mean "in the case of termination, without cause, four years following the date hereof, and in the case of termination with cause, voluntary termination, or termination upon disability, the remainder of the original term hereof plus one year." Id., § 8(b). Thus, in either event, the restrictions related to the Post Employment Period would terminate on April 14, 2002.

In March, 2001, MTLM informed Mr. Sodel that it intended to exercise its right to terminate the Agreement, which it did on or about April 14, 2001. Sodel Affid., ¶ 5; Answer and Counterclaims, ¶ 11. However, MTLM allowed Mr. Sodel to remain employed by MTLM on a part-time basis, until September 10, 2001, at which time MTLM terminated Mr. Sodel's employment allegedly on the ground that it did not have sufficient work for him. Sodel Affid., ¶ 6. Answer and Counterclaims, ¶ 12. Following his termination from MTLM, Mr. Sodel sought employment at another scrap metal business, Joseph Freedman Company ("Freedman"). Sodel Affid., ¶ 7. However, MTLM contacted Freedman, and informed Freedman that the Agreement prevented Mr. Sodel from being employed by Freedman at that time. Sodel Affid., ¶ 7; Answer and Coutnerclaims, ¶ 13. Accordingly, Freedman agreed not to hire Mr. Sodel until after April 14, 2002, when the restrictions on his employment with a competitor would no longer be in force. Sodel Affid., ¶ 7.

While defendant has alleged "on information and belief" that "beginning in or before April 2002, Sodel initiated a course of conduct in violation of his Employment Agreement," defendant does not, and could not, have a shred of evidence to support this allegation. Answer and Counterclaims, ¶ 17. Mr. Sodel did not work for any competitor of MTLM, nor did he contact any person or business that has any relationship to MTLM in order to solicit business, until after April 14, 2002. Sodel Affid., ¶ 8. The five year restriction provided in Section 8(b)(iii) of the Agreement is the only provision of the Agreement that could conceivably apply to Mr. Freedman. See Answer and Counterclaims, dated May 24, 2002, ¶¶ 7(a)-(d). However, as set forth herein, that provision is invalid and unenforceable.

ARGUMENT

A. STANDARD FOR GRANTING MOTION FOR SUMMARY JUDGMENT

The court should grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Bryant v., Maffucci, 923 F.2d 979, 982 (2d Cir. 1991). "Viewing the evidence produced in the light most favorable to the nonmovant, if a rational tryer could not find for the nonmovant, then there is no genuine issue of material fact and entry of summary judgment is appropriate." Binder v. Long Island Lighting Co., 933 F.2d 187, 191 (2d Cir. 1991), citing, Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 251-252, 100 S.Ct. 2124 (1986). The determination of whether a restrictive covenant is enforceable is a question of law for the court based upon a review of the facts. Hare v. McClellan, 234 Conn. 581, 589-590, 662 A.2d 1242 (1995), citing, Robert S. Weiss & Assoc., Inc. v. Wiederlight, 208 Conn. 525, 530, 546 A.2d 216 (1988).

B. SECTION 8(b)(III)(B) OF THE AGREEMENT IS INVALID

The courts will only enforce a covenant that restricts the activities of an employee following the termination of his employment, if the restraint is reasonable in (1) the length of time the restriction operates; (2) the geographic area covered; (3) the fairness of the protection accorded to the employer; (4) the extent of the restraint on the employee's opportunity to pursue his occupation; and (5) the extent of interference with the public's interest. Trans-Clean Corp. v. Terrell, 1998 Conn.Super.LEXIS 717 at * 14-15 (March 17, 1998) (Melville, J.), citing, Scott v. General Iron & Welding Co., 171 Conn. 132, 137, 368 A.2d 111 (1976) and Robert S. Weiss & Assoc., Inc. v. Weiderlight, 208 Conn. 525 n.2, 546 A.2d 216 (1988).[1] A finding that the covenant is unreasonable in any one of the five criteria is enough to render the covenant unenforceable. Trans-Clean, at * 15, citing, New Haven Tobacco Co. v. Perrelli, 18 Conn.App. 532, 534, 559 A.2d 715, cert. denied, 212 Conn. 809, 564 A.2d 1071 (1989). The covenant at issue in this case is unreasonable as measured by each and every one of the five criteria and is

[1] This is because "[a]ll interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable--reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public." The Samuel Stores, Inc. v. Abrams, 94 Conn. 248, 252, 108 A.2d 541 (1919); Beit v. Beit, 135 Conn. 195, 198, 63 A.2d 161 (1948)

thus unenforceable.

First, the covenant is unenforceable because it lacks any geographical limitation. See Lester Telemarketing v. Pagliaro, 1998 Conn.Super.LEXIS 2483 at *15-16 (September 3, 1998) (Barnett, J.) (covenant that purported to restrict employee from contracting with former employer's clients or from influencing or attempting to influence even a prospective client to decline a service offered by the former employer was unenforceable because of the lack of a geographical limitation); Cf, Robert S. Weiss and Assoc., supra, 208 Conn. at 531 (geographic limitation was inherent in a provision that barred the employee from soliciting accounts that existed at the time he left employment because, upon termination of the agreement, the clause fixed the geographical scope to a definite and limited area.)

Second, the purported restriction on Mr. Sodel "interfer[ing] with the Employer's relationship with any person" for five years following the Employment Period, is overreaching and over-broad in its protection of MTLM. The covenant not only purports to prevent Mr. Sodel from soliciting current customers of MTLM, with whom he previously had contact as an employee of MTLM, but from taking **any** action that could be construed as "interfering," with respect to **any** person, including anyone who, **at any time**, past, present or future, was or may be, in **any way** connected to MTLM. This restriction plainly goes beyond the reasonable and fair protection of MTLM's business by including individuals who are no longer even customers of MTLM or who were not customers of MTLM during Mr. Sodel's employment. Compare, New England Insurance Agency, Inc. v. Miller, 1991 Conn.Super.LEXIS 817 (April 16, 1991) (Healey, J.) (convenant that restricted the employee from soliciting any "present or future clients of the Employer" for a three year period constituted an unreasonable restriction.) with Robert S.

Weiss and Assoc., Inc., supra, at 531-532 (covenant that precluded employee, for two years, from "soliciting the plaintiff's accounts that existed when [employee] left" was reasonable), citing, May v. Young, 125 Conn. 1, 8, 2 A.2d 385 (1938) (restraint may reasonably cover actual clients or customers of employer). The restriction in this case is much more broad than the restrictions at issue in any of the above cited cases and, indeed, in any of the cases that plaintiffs have found.

Third, and relatedly, the covenant, as interpreted by MTLM, is so broad and vague as to unreasonably restrict Mr. Sodel's ability to pursue his occupation for a full five years. In the seminal case of The Samuel Stores, Inc., supra, the Connecticut Supreme Court explained that, unlike a covenant that precluded a retail sales employee from soliciting customers of the store in which he had previously worked, a covenant the prevented an employee from working for a competitor in any city where the employer had a branch store, so that he could not interfere with any of the employer's customers, anywhere, regardless of whether he had served those customers during his employment, was an unreasonable restriction on the employee's liberty of trading and employment. Id., at 254-256. Similarly, in this case, the covenant is overly restrictive and thus unenforceable because it purports to prevent Mr. Sodel not only from soliciting former customers with whom he developed a relationship during his employment, but from having any contact that could be construed as "interfering" with "any person" with whom MTLM previously had, currently has, or will in the future have, a relationship.

Indeed, the covenant is so broad and restrictive as to effectively prevent Mr. Sodel from gainful employment in his line of work, if enforced.. "A restrictive covenant is unenforceable if by its terms the employee is precluded from pursuing his occupation and thus prevented from

supporting himself and his family." Trans-Clean Corp., at * 18. The restriction, which purports to prevent Mr. Sodel from having any contact that could be construed as "interefering," with "any person" with whom MTLM previously had, currently has, or will have, a relationship, would effectively prevent Mr. Sodel from engaging in his employment as a scrap metal buyer, given the limited number of contractors, suppliers, and customers for this business. Sodel Affid., ¶ 9; See New England Insurance Agency, Inc., at *46-47 (provision that precluded former employee from soliciting past and future customers of former employer unreasonably restricted employee's ability to pursue his occupation.)[2]

Finally, the covenant excessively interferes with the public's interest in free competition. The public has "an interest in every person's carrying on his trade freely." The Samuel Stores, Inc., 94 Conn. at 254. Covenants such as the one at issue in this case, that not only restrict a

[2] The prohibition in Section 8(b)(i) of the Agreement would also be void based on its overly broad geographic scope and the breadth of the conduct it prohibits. See New England Insurance Agency, Inc., at * 38-39, * 44-45 (3 year restriction on employee participating in insurance business within 25 mile radius of employer was "unreasonable under any prong of the test."); Timenterial, Inc. v. Dagata, 29 Conn.Supp. 180, 183-184, 277 A.2d 512 (1971) (provision that prohibited employee from engaging in his profession within a 50 mile radius of former employer was unreasonable in that it deprived employee of the opportunity to perform work for which he was suited and to support himself and his family in reasonable comfort); Cf. Scott v. General Iron and Welding Company, Inc., 171 Conn. 132, 368 A.2d 111 (1976) (upholding covenant that restricted employee from working in metals business in a management capacity for five years, because the restriction did not prevent the employee from participating in the metals business "as an employee" and thus did not deprive him of the opportunity to earn a livelihood).

former employee's ability to sell products or services to the particular individuals with whom he developed relationships through his previous employment, but prevent the employee from engaging in his business and thereby competing with his former employer, go beyond protecting the legitimate interests of the former employer and excessively interfere with the public's interest. See New England Insurance Agency, Inc., at *44-45.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant summary judgment in plaintiffs' favor on plaintiffs' second cause of action and on defendant's first cause of action in its counterclaim on the ground that the anti-competitive terms of MTLM's employment contract are invalid as a matter of law and undisputed fact.

Dated:

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