SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

R&G BRENNER INCOME TAX CONSULTANTS,

Plaintiff,

INDEX No. 016901/2011

MOTION DATE: May 2, 2016
Motion Sequence # 006

-against-

RICHARD GILMARTIN,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Affirmation/Affidavit in Support..... XX
Affirmation/Affidavit in Opposition..... XX
Reply Affirmation..... X

Motion by plaintiff R & G Brenner Income Tax Consultants for summary judgment and leave to amend the complaint is **granted** to the extent indicated below.

This is an action against a tax accountant to enforce a covenant not-to-compete. Plaintiff R & G Brenner Income Tax Consultants is engaged in the business of preparing tax returns, financial planning, and other services. R & G Brenner's principal office is in Valley Stream, and it maintains approximately 30 other offices in the New York City area.

Defendant Richard Gilmartin is a CPA who worked for R & G Brenner as a tax return preparer from January 2006 through November 9, 2011. Gilmartin's practice included

representing Brenner clients at IRS audits. On December 22, 2010, Gilmartin signed a "General Employee Tax Preparation Agreement," promising not to "prepare or assist in the preparation of any tax returns except for Brenner's clients" unless he obtained Brenner's prior written consent (plaintiff's ex B). The agreement provided for compensation of 25% of the fees generated by the tax preparer. However, if fees exceeded $250,000, the preparer would receive 30%. The preparer would also receive 45% of monies collected for "completed audit cases." The term of the agreement was January 1 through April 30, 2011, i.e. the "2010 tax season."

On the same date, Gilmartin signed a "confidentiality non-solicit and non-compete agreement," for the 2010 tax season. In the non-solicit and non-compete agreement, Gilmartin promised not to "solicit, contact, [or] meet with" any Brenner client for a period of two years after the termination of his employment (Plaintiff's ex C). The non-solicit and non-compete agreement contains a liquidated damages provision of the greater of 1) 150% of all fees earned from each Brenner client during the two year period or 2) two times the highest annual gross fees received from the client during the three years prior to termination. The agreement contains a provision that the employee will pay Brenner's reasonable attorney's fees in connection with any violation of the agreement.

On April 18, 2011, Gilmartin signed a general employee tax preparation off season agreement for the period May 2 through December 31, 2011. In the off season agreement, Gilmartin similarly promised not to prepare or assist in the preparation of any tax returns except for Brenner's clients (plaintiff's ex E).

Brenner alleges that on May 21, 2011 Gilmartin signed a "confidentiality non-solicit and non-compete agreement," for the 2011 tax season (plaintiff's ex F). The 2011 agreement similarly contains a two year covenant not to compete.

Gilmartin resigned from R & G Brenner on November 9, 2011.

This action was commenced on December 2, 2011. In its first cause of action, plaintiff seeks a declaratory judgment that Gilmartin breached the restrictive covenant in his employment agreements. In its second cause of action, plaintiff seeks a permanent injunction restraining Gilmartin from further breaches and otherwise competing with Brenner. In his answer, Gilmartin asserted the affirmative defense of unclean hands, among other defenses.

On February 21, 2012, the court issued a preliminary injunction enjoining defendant Gilmartin from soliciting any former R & G Brenner client who did not have an IRS audit

pending. Additionally, defendant was restrained from keeping or maintaining any R & G Brenner business records, except to the extent necessary to defend pending IRS audits with respect to former R & G Brenner clients.

By notice of motion dated August 31, 2015, plaintiff moves for leave to amend the complaint to assert claims for breach of contract and faithless servant and to seek monetary damages. Plaintiff also moves for summary judgment with respect to all claims.

Leave to amend a pleading shall be freely given upon such terms as may be just (CPLR 3025(b). However, leave to amend may be denied where the proposed amendment is palpably improper or insufficient as a matter of law, or prejudice or surprise will directly result from the delay in seeking amendment (***Koenig v Action Target***, 76 AD3d 997 [2d Dept 2010]). As a matter of discretion, amendment may be granted to increase the ad damnum clause, where defendant is not prejudiced by the amendment (***Nechifor v RH Atlantic-Pacific***, 92 AD3d 514 [1st Dept 2012]). Since the non-compete agreement provided for liquidated damages, and the original pleading gave notice of a claim for violation of the covenant not to compete, defendant has not been prejudiced. Accordingly, plaintiff's motion for leave to serve an amended complaint is **granted**. The amended complaint is deemed served in the form annexed as exhibit 2 to plaintiff's motion.

In support of its summary judgment motion, plaintiff alleges that prior to his resignation defendant set up his own tax business, created a website, signed a lease for office space, removed hundreds of Brenner files, and solicited Brenner clients. As an example, on June 11, 2011, defendant sent an email to Julian Barrowcliffe and David Mooney, Brenner clients, informing them of his "transition" from R& G Brenner and offering to help them with "all your tax issues" (Plaintiff's ex M). Defendant used a Hofstra.edu email address to communicate with Barrowcliffe and Mooney. On November 2, 2011, defendant emailed Mooney, attaching the final version of his 2010 tax return (Plaintiff's ex R). In this communication, defendant used the email address rgilmartin@manhattan-cpa.com. Plaintiff further alleges that during the period of the covenant not to compete defendant solicited, met with, and performed tax services for over 400 Brenner clients. The court concludes that plaintiff has established prima facie entitlement to judgment with respect to all its claims. The burden shifts to defendant to show evidence of a triable issue as to whether defendant violated his duty of loyalty while an employee and whether he violated the restrictive covenant.

In opposition, defendant asserts that plaintiff has unclean hands because it forged his signature to the 2011 confidentiality non-solicit and non-compete agreement. The agreement appears to be initialed rather than actually signed.

Additionally, defendant argues that many Brenner clients followed him because they were victims of another tax preparer, Joseph Gallagher, who was one of Brenner's biggest producers. Gallagher, who developed a large following by fabricating itemized deductions, unreimbursed business expenses, and fictitious "partnership losses," was convicted of tax evasion on August 17, 2011. (Defendant's ex I). The IRS examined 132 income tax returns prepared by Gallagher and made adjustments to those returns totaling $3,801,909 (Defendant's ex I at ¶23). Since Gallagher also handled outside clients, it is likely that not all of the 132 returns were prepared for Brenner clients. Nevertheless, defendant alleges that while working at Brenner he performed audit work resulting from Gallagher's fraud.

Non-compete clauses in employment contracts are not favored and will be enforced to only the extent reasonable and necessary to protect valid business interests (*Morris v Schroeder Capital*, 7 NY3d 616, 620 [2006]). The court concludes that the restrictive covenant limited to Brenner clients for a period of two years was reasonable.

Although Gilmartin denies signing a non-compete agreement for the 2011 tax season, he admits to signing a general employee tax preparation agreement for the 2011 off season. In view of the non-compete provisions for the prior years, a two year non-compete provision was clearly an implied term of Gilmartin's 2011 employment contract. Even assuming that Brenner initialed the non-compete agreement simply to keep Gilmartin's personnel file "current," this internal procedure would not render Brenner's hands so unclean as to prevent them from enforcing the contract.

The measure of damages for violation of a covenant not to compete is net lost profit of which plaintiff was deprived by reason of defendant's improper competition (*Hunts Point Realty Corp. v Pacifico*, 56 AD3d 721 [2d Dept 2008]). For the net lost profit to be recoverable, 1) it must be demonstrated with certainty that the damages were caused by the breach, 2) the extent of the loss must be capable of proof with reasonable certainty, and 3) damages must be fairly within the contemplation of the parties (*Biotronik v Conor Medsystems*, 22 NY3d 799, 806 [2014]).

Because of the liquidated damages provision in the non-compete agreement, damages for lost profits were clearly within the contemplation of the parties. Because Gilmartin was

paid a percentage of the fees, and Brenner retained the balance, the extent of the net lost profit is capable of proof with reasonable certainty. Moreover, because the actual damages are readily ascertainable, the liquidated damages provision is not enforceable (*Bates Advertising v 498 Seventh*, 7 NY3d 115, 120 [2006]). While many clients clearly left Brenner because of Gallagher's improper practices, defendant was nonetheless prohibited from soliciting those clients by virtue of the non-solicitation agreement. Thus, it has been demonstrated with reasonable certainty that Gilmartin's solicitations caused the loss of net fees, except as to those clients for whom defendant began defending tax audits before he left Brenner.

Accordingly, plaintiff's motion for summary judgment is **granted** to the extent of liability on the third cause of action for breach of contract and the fourth cause of action for faithless servant. Additionally, plaintiff's motion for summary judgment as to the first cause of action is **granted** to the extent of declaring that defendant breached the non-solicitation and non-compete provisions and is liable for the net lost fees (gross fees minus Gilmartin's percentage) earned from former Brenner clients for the period November 9, 2011 through November 8, 2013, except for those clients for whom defendant began defending tax audits before November 9, 2011. Because the period of the covenant not to compete has expired, there is no need for a permanent injunction. Accordingly, plaintiff's motion for summary judgment as to the second cause of action is **denied**, and summary judgment as to the second cause of action is **granted** to defendant.

This matter is referred to the Calendar Control Part (CCP), for an inquest to be held on June 21, 2016 at 9:30 a.m. The plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of entry of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Counsel is directed to attach a copy of this Order with his Note of Issue when served upon the Calendar Clerk.

So ordered.

Dated MAY 25 2016

Stephen A. Bucaria
J.S.C.