Employee Relations
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From the Courts

Discrimination and Non-Competition Developments in New York

By Kenneth A. Novikoff

This column discusses a number of recent employment discrimination cases and cases involving complaints stemming from non-competition agreements. All of the decisions analyzed in this column are by New York courts – federal and state. The courts' decisions have broad applicability and illustrate key principles about federal and state employment discrimination laws as well as the enforceability of non-compete agreements under New York law.

FEDERAL COURT REJECTS CLAIM BY VETERAN WITH PTSD AND TRAUMATIC BRAIN INJURY THAT HE WAS DISABLED UNDER FEDERAL REHABILITATION ACT

The U.S. District Court for the Western District of New York has granted the defendant's motion in an employment discrimination lawsuit brought under the federal Rehabilitation Act, finding that the plaintiff failed to demonstrate that he was disabled or considered to be disabled by his employer.

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The Case

As the court explained, the plaintiff was a veteran of the U.S. Army who served in Iraq. In the course of his service, the plaintiff sustained skull fractures and injuries to his back resulting in ongoing symptoms including migraines, hearing loss and memory issues. The plaintiff also was diagnosed with post-traumatic stress disorder ("PTSD") and a traumatic brain injury (a "TBI").

During his service in the army, the plaintiff attended military police training school. He was honorably discharged and joined the U.S. Department of Veterans Affairs ("VA") as a police officer on October 15, 2006. The plaintiff initially was assigned to the VA facility in Syracuse, New York.

In July 2007, the plaintiff began working at the Canandaigua Veterans Affairs Medical Center ("CVAMC") in Canandaigua, New York. In May 2015, the plaintiff was reassigned to a position as a social services associate ("SSA") within CVAMC.

In April 2017, the plaintiff filed a lawsuit against the Secretary of the VA, alleging that management at the CVAMC discriminated against him on the basis of disability.

The defendant moved for summary judgment.

The Court's Decision

The court granted the motion.

In its decision, the court explained that the plaintiff asserted that his suit was "authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 ('ADA'), 42 U.S.C. § 12117(a), which incorporates by reference Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ('Title VII'), 42 U.S.C. § 1981, and pursuant to the Rehabilitation Act of 1973, as amended 29 U.S.C. § 706, 791 et seq." The court pointed out, however, that in the U.S. Court of Appeals for the Second Circuit, "Section 501 of the Rehabilitation Act provides the exclusive route by which federal employees may raise claims of employment discrimination on the basis of disability."

Thus, the court evaluated the plaintiff's disability claims pursuant to the Rehabilitation Act.

As the court noted, Section 794(a) of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency. . . ."

The court observed that claims of intentional discrimination pressed under the Rehabilitation Act are analyzed pursuant to the following framework:

> To survive summary judgment on a claim related to an adverse employment action, a plaintiff must first establish a prima facie claim of discrimination. Once a plaintiff establishes such a case, a presumption arises that more likely than not the adverse conduct was based on the consideration of impermissible factors and the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the disparate treatment. If the employer offers such a legitimate reason, the burden shifts back to the plaintiff to prove that the employer's reason was in fact pretext for discrimination.

The court added that, to make out a prima facie claim of employment discrimination in violation of the Rehabilitation Act, a plaintiff must allege that:

- The plaintiff's employer is subject to the Rehabilitation Act;
- The plaintiff was disabled within the meaning of the Rehabilitation Act;
- The plaintiff was otherwise qualified to perform the essential functions of the plaintiff's job, with or without reasonable accommodation; and
- The plaintiff suffered an adverse employment action because of the plaintiff's disability.

Discrimination on the basis of disability may take the form of "disparate treatment, disparate impact, or failure to make a reasonable accommodation," the court said.

According to the court, the defendant conceded that it was subject to the Rehabilitation Act; that the plaintiff was qualified to perform the essential functions of his position as a police officer; and that the plaintiff's reassignment as an SSA was an adverse employment action.

The court then agreed with the defendant's argument that the plaintiff was not disabled or perceived to be disabled within the meaning of the Rehabilitation Act and that, as a result, the plaintiff failed to present sufficient evidence to set forth a prima facie case of discrimination pursuant to the Rehabilitation Act.

As the court explained, the Rehabilitation Act defines the term "individual with a disability" by cross reference to the ADA. The ADA

defines a disability as "'(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

The court then ruled that although the plaintiff's memory issues and fear of flying related to his TBI and PTSD constituted an impairment, the evidence in the record was insufficient to demonstrate that the plaintiff's impairments "substantially limited a major life activity as defined by the ADA."

The court found "no evidence" that the plaintiff's fear of flying or having been required to fly had any impact on his ability to perform a major life activity or bore on his duties as a police officer in any capacity. The court added that there also was "no indication in the record" that the plaintiff's PTSD limited any major life activity in any other way, and that there was no indication that any such limitation was substantial. Thus, the court ruled that the plaintiff failed to establish that his PTSD constituted a disability within the meaning of the ADA.

The court next ruled that although memory issues fell squarely within the "neurological" or "learning" categories contemplated by the ADA, the plaintiff failed to put forth any evidence that his impairment limited a major life activity such as caring for himself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working, or that any such limitation was substantial.

The court rejected the plaintiff's description of an instance in which he left his key in the door and forgot that he had done so as an indication of a substantial limitation on a major life activity, reasoning that "difficulties with short-term memory . . . are not uncommon among the general population, and plaintiff's description of [his] difficulties does not suggest that [his] limitations . . . are significant rather than mild."

Accordingly, the court held that the plaintiff failed to show that he was disabled within the meaning of the Rehabilitation Act.

Finally, the court also ruled that the plaintiff failed to demonstrate that CVAMC management regarded him as disabled. The court noted that deposition testimony from CVAMC representatives indicated that each of them considered the plaintiff to be a "good" or "outstanding" officer and that CVAMC management officials did not consider his impairments to render him disabled.

The court added that even if CVAMC officials knew about the plaintiff's conditions, the "mere fact" that an employer was aware of an employee's impairment was "insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action."

Accordingly, the court concluded, summary judgment in favor of the defendant was appropriate.

The case is *Larnard v. McDonough*, No. 6:17-CV-06257 EAW (W.D.N.Y. Jan. 4, 2022).

EMPLOYMENT DISCRIMINATION CLAIMS BROUGHT BY FORMER TRANSIT AUTHORITY EMPLOYEE ARE DISMISSED BY FEDERAL COURT IN NEW YORK

The U.S. District Court for the Southern District of New York has dismissed employment discrimination claims brought by a former employee of the New York City Transit Authority ("Transit Authority") under the Americans with Disabilities Act of 1990 ("ADA") and the New York City Human Rights Law ("NYCHRL").

The Case

The plaintiff, a former employee of the Transit Authority, alleged in his lawsuit that, during his employment, he suffered knee injuries and underwent at least three surgeries that rendered him disabled for the purposes of performing his work duties.

The plaintiff filed a complaint with the New York State Division of Human Rights ("Division of Human Rights"). According to the Division of Human Rights' determination and order after investigating the plaintiff's case, dated November 26, 2018, the plaintiff alleged that he "started receiving notices of employment termination . . . and . . . a write-up" while he was disabled on the job. The plaintiff further alleged that he "followed all proper procedures and gave the employer the proper documentation from his doctor that stated that [he] cannot travel at the time, [but] he was still terminated from his job."

The plaintiff subsequently charged the Transit Authority with discrimination based on disability and age in violation of the New York State Human Rights Law ("NYSHRL").

The Division of Human Rights found no support for the plaintiff's allegation of discrimination and dismissed his case. Specifically, the Division of Human Rights found that the documentation submitted by the Transit Authority demonstrated that the termination of the plaintiff's employment came after the Transit Authority's investigation of the plaintiff's worker's compensation injury claim, which resulted in disciplinary charges being brought against the plaintiff "for violating [the Transit Authority]'s Dual Employment Policy and for submitting falsified statements."

A disciplinary hearing was scheduled, but the plaintiff apparently failed to attend. He apparently also failed to attend a rescheduled hearing, and his employment was terminated.

The plaintiff sought review of his dismissal from the Equal Employment Opportunity Commission ("EEOC"). The EEOC notified the plaintiff that his case against the Transit Authority was "deleted" because a case he previously filed against the Division of Human Rights contained similar allegations. The EEOC letter also noted that the plaintiff's Division of Human Rights case had been closed since November 26, 2018, and that he had been issued a notice of right-to-sue by the EEOC, "allowing [him] to file suit in federal court based on [his] allegations, if [he] so chose within 90 days of receiving the Notice."

Thereafter, the plaintiff filed an action against the Transit Authority and the Transit Authority's director of labor relations, alleging violations of the ADA and the NYCHRL.

The defendants moved to dismiss.

The Court's Decision

The court granted the motion to dismiss.

In its decision, the court first explained that the plaintiff's claim under the NYCHRL was subject to an election-of-remedies provision of a New York City law. The court ruled that although the plaintiff claimed only a violation of the NYSHRL by the Transit Authority in his Division of Human Rights complaint, his claim against the Transit Authority under the NYCHRL arose "out of the same incident on which [his Division of Human Rights] complaint was based" – namely, the Transit Authority's termination of the plaintiff's employment after he suffered his knee injuries. The court found that no exception applied to the election-of-remedies provision in the New York City law and, therefore, ruled that the plaintiff's NYCHRL claims against the Transit Authority were barred. Moreover, the court decided, the plaintiff's claim against the Transit Authority's director of labor relations arose out of the same incident and also was barred even though the director of labor relations was not named a defendant in the plaintiff's Division of Human Rights case.

The court reached the same conclusion with respect to the plaintiff's ADA claims against the Transit Authority.

The court explained that, for ADA claims, a plaintiff must file a charge of discrimination with the EEOC and obtain a right to sue letter from the EEOC before proceeding to federal district court. It added that a timely ADA claim in a federal district court must be filed within 90 days of the plaintiff's receipt of a right-to-sue letter from EEOC.

Here, the court pointed out, the EEOC told the plaintiff that his complaint with the Division of Human Rights had been closed since November 26, 2018, and that he had been issued a right to sue notice by the EEOC that allowed him to file suit in federal court based on his

allegations within 90 days of receiving the right-to-sue letter. Because the plaintiff filed his lawsuit against the Transit Authority and its director of labor relations on June 6, 2019, the court decided that it could not find that it was timely.

Moreover, because there is no right of recovery against defendants in their individual capacity under the ADA, the plaintiff's claim against the Transit Authority's director of labor relations had to be dismissed, as well.

The case is *Jackson v. New York City Transit Authority*, No. 19-CV-5351 (VSB) (S.D.N.Y. Jan. 14, 2022).

RETALIATION CLAIMS FAIL WHERE PLAINTIFF DID NOT ACTUALLY COMPLAIN TO HER EMPLOYER, NEW YORK DISTRICT COURT DECLARES

The U.S. District Court for the Southern District of New York has rejected an employment discrimination action brought by a plaintiff against her former employer in which she asserted claims of unlawful retaliation, finding among other things that the plaintiff had not actually engaged in any protected activity that led to her dismissal.

The Case

The plaintiff worked from March 2017 to January 2019 at Bikini.com LLC, a subsidiary of Remark Holding, Inc., both of which were headquartered in Las Vegas, Nevada. The plaintiff worked remotely from her home in Manhattan as manager for marketing and brand communications.

After being dismissed, the plaintiff filed an employment discrimination lawsuit asserting claims of retaliation against her former employer under Title VII of the Civil Rights Act of 1964 and under the New York City's Human Rights Law ("NYCHRL"). She contended that she protested conduct that violated Title VII on three occasions and that in retaliation many of her job responsibilities were reassigned and her employment was terminated.

The defense moved for partial summary judgment.

The Court's Decision

The court granted the motion.

In its decision, the court explained that Title VII makes it unlawful for an employer to discriminate against any employee who has opposed any unlawful employment practice. The court added that, to make out a prima facie retaliation case, a plaintiff must show that:

- The plaintiff was engaged in protected activity;
- The employer was aware of that activity;
- The employee suffered a materially adverse action; and
- There was a causal connection between the protected activity and that adverse action.

Similarly, the court noted that the NYCHLR prohibits "retaliat[ion] or discriminat[ion] in any manner against any person because such person has . . . opposed any practice forbidden under this chapter." To prevail on a retaliation claim under the NYCHRL, a plaintiff must show that the plaintiff took an action opposing the plaintiff's employer's discrimination and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from opposing the plaintiff's employer's discrimination.

The court then ruled that none of the three occasions on which the plaintiff contended that she engaged in protected activity actually constituted protected activity.

As the court explained, an employee's complaint "may qualify as protected activity" under Title VII as long as the employee had "a good faith, reasonable belief that the underlying challenged actions of the employer violated the law." Moreover, the court continued, even informal protests of discrimination could constitute protected activity, although an employee's "subjective good faith belief" was not enough; that belief must be "reasonable and characterized by objective good faith."

The court then ruled that none of the three instances cited by the plaintiff amounted to a complaint to her employer, concluding that her employer at no time could "reasonably have understood" that she was "oppos[ing] . . . conduct" prohibited by Title VII or the NYCHRL.

The court also decided that even if any of these three instances were protected activity, the plaintiff's retaliation claim would have to be dismissed for the plaintiff's failure to show that her statements caused an act of retaliation. The court noted that the most recent purportedly protected activity identified by the plaintiff occurred in July 2018 but that her employment was not terminated until six months after this conversation, in January 2019. Additionally, the court said, the previous communications the plaintiff contended were protected activity took place in April and November 2017, well over a year before the plaintiff was fired. In the court's view, this was "too long a temporal gap to establish causation."

Finally, the court ruled that the plaintiff's retaliation claim under the NYCHRL could not survive summary judgment, finding that the plaintiff could not show that her actions could have reasonably been understood as opposing unlawful discrimination, and that she also could not

show that any adverse conduct from her employer was caused by those actions.

The case is *Joyce v. Remark Holdings, Inc.*, No. 19cv6244 (DLC) (S.D.N.Y. Jan. 20, 2022).

PLAINTIFF'S ADA COMPLAINT AGAINST INDIVIDUAL SHOULD BE DISMISSED, FEDERAL COURT SAYS

Explaining that there is "no individual liability" under the Americans with Disabilities Act of 1990 ("ADA"), and that in any event the plaintiff's complaint was filed against an individual employed by a separate entity than the plaintiff's employer, a federal court in New York has decided that the defendant's motion to dismiss should be granted.

The Case

The plaintiff filed a lawsuit against the defendant, claiming discrimination based on race, color, gender, religion or national origin in violation of Title VII of the Civil Rights Act of 1964. The plaintiff alleged that he commenced employment with First Student on February 15, 2015, and that he disclosed his disability to his employer at the commencement of his employment. The plaintiff indicated that he was discriminated against on the basis of his disability and his employer's perception of him as being disabled.

The defendant moved to dismiss the plaintiff's complaint on the ground that she was an improper party and that the plaintiff failed to allege sufficient factual allegations to state a claim of employment discrimination. The defendant's memorandum of law argued that the defendant was employed by Company Health Medicine, a separate entity from the plaintiff's employer, First Student.

The plaintiff responded that the defendant had informed his supervisor that he had failed his required physical examination and had informed the Department of Transportation/Department of Motor Vehicles that he was not fit to drive a school bus.

The plaintiff submitted a form entitled "DOT EXAMINATION GUIDELINES FOR Anxiety" that was requested by the defendant and signed by the plaintiff's health care provider on August 16, 2016, indicating that the plaintiff had been diagnosed with anxiety on March 6, 2015 and had been prescribed medication and counseling. The form also indicated that the plaintiff experienced "prominent negative symptoms" of "Attentional difficulties" and "Memory, concentration problems" from July 15, 2016, to August 12, 2016. The plaintiff claimed that he was mistreated at First Student as a result of "false allegations" and that First

Student used the defendant to prevent his continued employment with First Student.

The Court's Decision

The court decided that the defendant's motion to dismiss should be granted.

In its decision, the court explained that it understood the plaintiff to be claiming employment discrimination on the basis of his actual or perceived disability in violation of the ADA.

The court noted that Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." The court added that, to state a claim of employment discrimination under the ADA, a plaintiff must plausibly allege that:

- The defendant is covered by the ADA;
- The plaintiff suffers from or is regarded as suffering from a disability within the meaning of the ADA;
- The plaintiff was qualified to perform the essential functions of the job, with or without reasonable accommodations; and
- The plaintiff suffered an adverse employment action because of his disability or perceived disability.

The court pointed out that the statute defines a covered entity to include an employer, employment agency, labor organization or joint labor-management committee – but that there is "no individual liability under the ADA."

The court reasoned that the plaintiff did not allege that the defendant – an individual employed by a separate entity than plaintiff's employer – was a covered entity subject to liability under the ADA. Accordingly, the court decided that the defendant's motion to dismiss should be granted.

The case is *Catania v. Weremblewski*, No. 19-CV-677JLS(Sr) (W.D.N.Y. Jan. 12, 2022).

FEDERAL COURT REMANDS EMPLOYMENT DISCRIMINATION SUIT TO STATE COURT

A federal district court in New York has remanded to state court a "garden-variety employment discrimination and retaliation" lawsuit that

the defendant had removed to the district court. The district court concluded that the plaintiff's complaint raised "no federal claim."

The Case

The plaintiff, Angelo Maher, filed a lawsuit in a state court in New York against his former employer, alleging that he was of Hispanic background, that he had been hired to work at a steakhouse owned and operated by the defendant, that in the course of his employment he was "routinely discriminated against due to his ethnic background," that he was terminated for speaking out against racially motivated treatment of non-Turkish employees, and that he was subjected to a hostile work environment, all in violation of the New York City Human Rights Law and New York State Human Rights Law. He sought damages in excess of $1 million.

The defendant removed the case to federal district court. The defendant's notice of removal asserted that the district court had subject matter jurisdiction based on the existence of a federal question. In particular, the defendant's notice of removal asserted that the defendant "expects this case to present issues under the Federal Arbitration Act. . . ." The defendant contended that the plaintiff's state law employment discrimination claims would be arbitrable but for a provision of New York law that barred mandatory arbitration of claims of discrimination "[e]xcept where inconsistent with federal law. . . ." In the defendant's opinion, the federal question was whether the New York law was preempted by or inconsistent with federal policies embodied in the Federal Arbitration Act.

To support its contention that the district court had jurisdiction, the defendant relied on a decision by the U.S. Court of Appeals for the Second Circuit in *Tantaros v. Fox News Network, LLC*, 12 F.4th 135, 147 (2d Cir. 2021), affirming the district court's denial of a motion to remand.

The District Court's Decision

The district court remanded the case to state court.

In its decision, the district court explained that the plaintiff in *Tantaros* sought a declaratory judgment that the New York law barred a pending arbitration of her sexual harassment claim. The majority held that the plaintiff's invocation of the specific New York law in her pleading necessarily presented a federal question whether the arbitration fell within the "where inconsistent with federal law" exception in the New York law.

The district court in the case brought by Maher then reasoned that the "key difference" between the case brought by Maher and the *Tantaros* case was that the federal question in *Tantaros* was presented on the face of the plaintiff's state law complaint. In contrast, the district court pointed

out, Maher did "not refer to arbitration" or the New York law "anywhere in his pleading." Rather, the district court added, Maher asserted "garden-variety employment discrimination and retaliation claims exclusively under state law" and it was the defendant that raised the prospect of arbitration and the prediction of the plaintiff's opposition to arbitration under the New York law.

The district court observed that the "well-pleaded complaint rule" required the federal question "to arise from the plaintiff's pleading and not an anticipated defense to that pleading." The district court concluded that because no federal claim was raised by Maher's initial pleading, it would remand the action to the state court from which it was removed for lack of subject matter jurisdiction.

The case is *Maher v. Nusret New York LLC*, No. 21-cv-10653 (PKC) (S.D.N.Y. Feb. 14, 2022).

NEW YORK TRIAL COURT REFUSES TO DISMISS CLAIMS AGAINST FORMER EMPLOYEE UNDER NON-COMPETE AGREEMENT AND FOR MISAPPROPRIATION OF CONFIDENTIAL INFORMATION

A trial court in New York has denied a former employee's motion to dismiss claims brought by her former employer under a non-compete agreement and for misappropriation of confidential information. Among other things, the court ruled that the former employee failed to refute her former employer's allegations that she breached an enforceable agreement.

The Case

In April 2018, Raisa Galinkin, a home health aide, entered into an employment agreement with Attentive Home Care Agency, Inc., a company that provided home health aides to clients who required assistance with activities of daily living. The agreement contained a non-compete clause.

According to the lawsuit that Attentive subsequently filed against Galinkin, Galinkin solicited and encouraged an Attentive client ("Client X") to terminate its relationship with Attentive and to receive benefits from another home care agency. Attentive further alleged that after Client X ended its relationship with Attentive, Galinkin terminated her employment with Attentive and began an employment relationship with that other home care agency.

Galinkin moved to dismiss the complaint, arguing among other things that the non-compete clause was unreasonable and unenforceable as a matter of law and public policy. She asserted that Attentive was an

unscrupulous business that used such non-compete and non-solicitation agreements to prevent their abused employees from leaving them.

Galinkin also argued that the provision of the non-compete that restricted her from providing services to prospective clients for two years following the end of her employment resulted in the loss of her livelihood. She argued that the covenant was unnecessary because she did not provide special, unique or extraordinary services; she was not in possession of trade secrets or confidential business information; and Attentive's client list was public information as the phone numbers of elderly people were available in the white pages. She also argued that the covenant was injurious to the public because it prevented elderly people from choosing their caregivers.

The Non-Compete Agreement

Section 3 of the non-compete agreement provided that during Galinkin's employment, and for one year following the termination thereof, she would not, on her own behalf or on behalf of any other person or entity, directly or indirectly:

a. solicit, invite, advise or encourage any employee, client, customer or patient of the Company, or any of its subsidiaries or affiliates, or any of their officers, directors, employees, agents, successors or assigns (collectively, the "Company Group") to terminate their relationship with the Company Group; or

b. hire any employee or prospective employee, or take on or provide services to any current or prospective client, customer or patient served by the Company Group that either (x) you had contact with, provided services to, were aware of, managed or supervised at any time during your employment or (y) was an employee, client, customer or patient of the Company Group at any time during the two-year period preceding your termination of employment. However, nothing in this paragraph is intended to prohibit you from engaging in general solicitations and advertisements that are not specifically directed at the Company Group's employees, clients, customers or patients.

The Court's Decision

The court denied Galinkin's motion to dismiss.

In its decision, the court rejected Galinkin's contention that the non-compete agreement restricted her from providing services to every

prospective client for two years following the end of her employment with Attentive, resulting in the loss of her livelihood. A "close reading of the agreement," the court said, indicated otherwise.

The court explained that the agreement prohibited Galinkin for a period of one year – not two years – from providing services "only to clients to whom she provided services while at Attentive." In essence, the court said, she was not barred from working as a home health aide to any other client nor was she barred from working in New York City immediately after the end of her employment with Attentive. Therefore, the court ruled, contrary to Galinkin's contention, "the non-compete agreement did not place any temporal or geographic restriction on Galinkin's ability to earn a living as a home health aide."

The court also stated that "an employer has a legitimate interest, as Attentive alleged here, in seeking to protect against misappropriation of its trade secrets or confidential customer lists." With respect to harm to the public, the court added, a restraint was harmful if it seriously impinged on the availability of a service or caused any significant dislocation in the market, or if it created a monopoly in those services. The court found that the defendant's argument that the covenant prevented the elderly from choosing their care providers was, without more, "insufficient."

According to the court, the non-compete provision was "not unduly burdensome on Galinkin" as it only restricted her from servicing Attentive's clients for one year and permitted her to provide services to other clients not connected with Attentive.

Therefore, the court concluded, Galinkin failed to refute Attentive's allegations that Galinkin breached an enforceable agreement.

Next, the court rejected Galinkin's motion to dismiss Attentive's claim for misappropriation of confidential information. The court reasoned that Attentive alleged that:

- Its client lists constituted confidential information that gave it a competitive edge and that was not readily available to the public and its competitors; and

- It had taken measures to maintain the secrecy of that information, including having all employees sign a non-compete agreement.

The court ruled that Attentive pled facts to demonstrate that its customer lists were a trade secret, as well as that Galinkin had solicited its customers using its client lists. Therefore, the court held, Attentive sufficiently alleged a claim for misappropriation of confidential information against Galinkin, and it denied her motion to dismiss that claim.

The case is *Attentive Home Care Agency, Inc. v. Galinkin*, No. 505842/2021 (N.Y. Sup. Ct. Kings Co. Jan. 13, 2022).

NEW YORK APPELLATE COURT FINDS THAT PLAINTIFF'S ALLEGED BREACH OF NON-COMPETE CLAUSES DID NOT EXCUSE DEFENDANT'S ALLEGED FAILURE TO PAY PROMISSORY NOTE

An appellate court in New York has ruled that a trial court erred when it determined that the plaintiff's alleged breach of covenants not to compete in an employment contract constituted a defense to the defendant's alleged default under a promissory note the defendant previously signed when she purchased business assets from the plaintiff.

The Case

In late 2016, the plaintiff and the defendant entered into a sales contract whereby the plaintiff agreed to sell the defendant the business assets related to her operation of an exclusive H & R Block franchise in the upstate New York town of Attica. To secure payment for the transfer of assets under the sales contract, the defendant executed a promissory note in the plaintiff's favor in the amount of $200,000, which was payable over 10 years in annual installments of $20,000, plus interest. The sales contract also provided that the $200,000 purchase price was paid "in consideration of the sale, transfer, assignment and delivery of the [p]urchased [a]ssets and the covenants made by [the plaintiff] under the [n]oncompetition [a]greement."

At the time of the closing on the sales contract, however, no noncompetition agreement was provided. Indeed, the only item attached to the sales contract at closing was the promissory note.

A few months after the parties closed on the sales contract, the plaintiff worked for the defendant as an hourly employee for several months, until the defendant terminated the plaintiff's employment. During that period, the plaintiff was employed by the defendant pursuant to a standard form "tax professional employment agreement." The employment agreement contained several covenants not to compete that, among other things, prohibited the plaintiff from performing outside tax preparation work while working for the defendant and for two years post-termination. However, nothing in the employment agreement referenced the sales contract, and nothing in the sales contract referenced the employment agreement.

Although the defendant paid the first installment due on the promissory note, she allegedly did not submit payment for any other installment. The plaintiff demanded payment, allegedly to no avail, and thereafter filed a lawsuit against the defendant.

In her complaint, the plaintiff alleged that the defendant had defaulted under the sales contract.

In her answer, the defendant contended that the plaintiff's breach of covenants not to compete absolved the defendant of her obligation to pay under the promissory note.

The trial court agreed with the defendant and determined that the plaintiff's alleged breach of covenants not to compete in the employment contract constituted a defense to the defendant's default under the promissory note because the sales contract and the employment agreement were inextricably intertwined such that the covenants not to compete in the employment agreement constituted the noncompetition agreement contemplated by, but not included in, the sales contract.

The dispute reached an appellate court.

The Appellate Court's Decision

In its decision, the appellate court ruled that the trial court erred when it determined that the plaintiff's alleged breach of the covenant not to compete in the employment contract constituted a defense to the defendant's default.

According to the appellate court, the sales contract and employment agreement were not inextricably intertwined such that the plaintiff's purported breach of the noncompetition covenants in the employment agreement constituted a defense to the defendant's default on the promissory note. The appellate court reasoned that the two agreements never referenced each other and did not incorporate any terms of the other. Indeed, the appellate court continued:

- Both agreements were executed at different times and for entirely different purposes;

- The sales contract never once mentioned that it was conditioned on the plaintiff being employed by the defendant or even contemplated such a scenario; and

- The plain terms of the promissory note indicated that it was "an unambiguous instrument containing an unconditional promise to pay, unadorned with any reference of the employment agreement."

Therefore, the appellate court concluded that, given the evidence establishing that the sales contract and the employment agreement were not inextricably intertwined, any purported breach of the covenant not to compete in the employment agreement was "not a defense" to the plaintiff's claim under the promissory note. Thus, any breach of the noncompete portions of the employment agreement by the plaintiff did not

raise an issue of fact with respect to whether the defendant had a defense to her default on the promissory note.

The case is *Saulsbury v. Durfee*, 201 A.D.3d 1318 (N.Y. 4th Dep't 2022).