

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

IAS INVESTCO, INC.,

Plaintiff,

Case No. 18-10886-CBB

vs.

HON. CHRISTOPHER P. YATES

BRANDON COHEN; BRANDEN
HARTZELL; and WWK WARRANTY
AND ADMINISTRATION COMPANY,
LLC,

Defendants.

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OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION

Defendants Brandon Cohen and Branden Hartzell left their employment with Plaintiff IAS InvestCo, Inc. (“IAS”) essentially against their will, but IAS cushioned the blow of their departures by entering into severance agreements with both men that enabled them to stay with IAS for a period of time in exchange for continuing pay and reasonably generous severance benefits. The contracts that Cohen and Hartzell signed with IAS contained restrictive covenants such as non-solicitation and non-disclosure provisions that bound both men after they left IAS, so their move to Defendant WWK Warranty and Administration Company, LLC (“WWK”) proved to be bumpier than they had hoped. Specifically, IAS filed this lawsuit against Cohen, Hartzell, and WWK seeking injunctive relief and damages for alleged breaches of their restrictive covenants. The Court issued a temporary restraining order (“TRO”) on December 7, 2018, which was extended, but ultimately expired. Then IAS asked for a preliminary injunction, so the Court held a hearing on January 23, 2019, and shall now provide IAS with relatively modest injunctive relief.

I. Factual Background

In January of 2018, Plaintiff IAS completed the acquisition of a company called Great Lakes Marketing Services, Inc., including the subsidiary for which Defendants Cohen and Hartzell worked. As a result, Cohen and Hartzell became employees of IAS, but that relationship did not last for long. During their short tenure with IAS, however, Cohen and Hartzell signed contracts called confidential information agreements, which included noncompetition agreements for the duration of their tenures with IAS, non-solicitation provisions that extended one year beyond the dates of their terminations, and non-disclosure requirements that lasted in perpetuity. See IAS's Brief in Support of Motion for Temporary Restraining Order, Show Cause Order, and Preliminary Injunction, Exhibits 1 & 2.

Several months after Defendants Cohen and Hartzell started working for IAS, they were told that their positions with the company would soon be eliminated. But IAS offered both men retention packages to ease their departures from the company. Specifically, IAS offered Cohen and Hartzell stay bonuses, extended benefits, and severance payments. See IAS's Brief in Support of Motion for Temporary Restraining Order, Show Cause Order, and Preliminary Injunction, Exhibits 3 & 4. The letters offering those incentives reminded Cohen and Hartzell of their restrictive covenants under the confidential information agreements, see id., so both men fully understood their obligations to IAS. Indeed, in July of 2018, after termination of their employment with IAS,¹ Cohen and Hartzell signed a "general release" that referred to the earlier agreements. See IAS's Brief in Support of Motion for Temporary Restraining Order, Show Cause Order, and Preliminary Injunction, Exhibits 5 & 6.

¹ On July 24, 2018, Defendant Hartzell formally acknowledged that his employment with IAS "has been terminated effective July 20, 2018." See IAS's Brief in Support of Motion for Temporary Restraining Order, Show Cause Order, and Preliminary Injunction, Exhibit 5. Similarly, on July 28, 2018, Defendant Cohen formally acknowledged that his employment with IAS "has been terminated effective July 26, 2018." See id., Exhibit 6.

After their terminations by Plaintiff IAS, Defendants Cohen and Hartzell became affiliated with Defendant WWK. Cohen assumed the position of chief operating officer, and Hartzell became a manager. WWK was formed as an Oklahoma limited liability company in April 2018, see Hearing Exhibit A (Affidavit of Willard W. Reynolds, ¶ 2), and WWK is controlled by three members, none of whom is a defendant in the instant case. See id. (Affidavit of Willard W. Reynolds, ¶ 3). By their own admission, the members of WWK formed the company to sell a product called a vehicle service contract (“VSC”), which is the same product that IAS sells to its own customers.² See id. (Affidavit of Willard W. Reynolds, ¶¶ 5-6). WWK therefore competes with IAS for the sale of VSCs. Indeed, WWK “has provided and still provides” VSCs to automobile dealerships owned and operated by the members of WWK. See id. (Affidavit of Willard W. Reynolds, ¶ 5).

In response, Defendant WWK not only denies pre-suit knowledge of the restrictive covenants that bind Defendants Cohen and Hartzell, see Hearing Exhibit A (Affidavit of Willard W. Reynolds, ¶ 9), but also defines itself as a venture that handles “a substantial portion of the VSC business” of its members’ automobile dealerships. See id. (Affidavit of Willard W. Reynolds, ¶¶ 10, 12). In fact, WWK only has two customers: (1) the collection of automobile dealerships owned by two members of WWK; and (2) Drivewise, Inc. (“Drivewise”), which is owned and run by Cheryl Wiesenberg. See Hearing Exhibit C (Affidavit of Cheryl Wiesenberg). Because of its small number of customers, WWK has only three employees – Cohen, Hartzell, and Scott Comar, who played a role in creating

² Plaintiff IAS offers three types of warranty products: “(i) Vehicle Service Contracts, which provide coverage for mechanical problems, (ii) Gap Contracts, which provide coverage in the event a vehicle experiences a total loss and the amount due on the loan exceeds the value of the vehicle as covered by the insurer, and (iii) Ancillary Contracts, which include, among other things, anti-theft coverage, dent & ding coverage, tire & wheel coverage, and windshield coverage.” See Hearing Exhibit 1 (Affidavit of Douglas Guziec, ¶ 4).

WWK and subsequently recruited Cohen to join WWK after he “was released from his employment with IAS.” See Hearing Exhibit B (Affidavit of Scott Comar, ¶¶ 4, 6). Cohen, in turn, hired Hartzell “after Mr. Hartzell was released from his duties at IAS.” See id. (Affidavit of Scott Comar, ¶ 10).

The record is not clear on what precipitated this suit,³ but it appears that Plaintiff IAS became concerned when Drivewise moved its business to Defendant WWK. In any event, IAS filed suit on December 7, 2018, and obtained an *ex parte* TRO, albeit on terms that did not preclude Defendants Cohen, Hartzell, and WWK from “[s]elling, providing, or accepting any request to provide services in competition with IAS.” See Temporary Restraining Order and Order to Show Cause (proposed language deleted by Court). The Court extended the TRO at IAS’s request on December 20, 2018, and conducted a hearing on January 23, 2019, to decide whether to issue a preliminary injunction. Having carefully considered the record developed by the parties, the Court now can render a ruling on IAS’s motion for preliminary injunctive relief.

II. Legal Analysis

Although the Court has issued opinions concerning restrictive covenants in dozens of cases, this case presents an interesting twist – it is governed by Texas law. See IAS’s Brief in Support of Motion for Temporary Restraining Order, Show Cause Order, and Preliminary Injunction, Exhibits 1 & 2 (Confidential Information Agreement, § 9.1). Fortunately, the Court has the benefit of a recent decision from the Supreme Court of Texas that explains how Texas law treats restrictive covenants. See Marsh USA Inc v Cook, 354 SW3d 764 (Tex 2011). Consequently, the Court shall rely heavily upon the analysis set forth in that landmark decision.

³ Neither side presented any live testimony, so the Court was unable to ask the questions that would provide the information necessary for a thorough understanding of this dispute.

According to Texas law, the “purpose of a temporary injunction is to preserve the status quo regarding the subject matter of the litigation pending trial on the merits.” See Cooper Valves, LLC v Valvtechnologies, Inc., 531 SW3d 254, 262 (Tex App 2017). “To obtain a temporary injunction, an applicant . . . must plead and prove that it (1) has a cause of action against the opposing party; (2) has a probable right to the relief sought; and (3) faces probable, imminent, and irreparable injury in the interim.”⁴ Id. Accordingly, the Court shall first consider whether Plaintiff IAS has “a probable right to relief” on a viable cause of action against each defendant. If IAS has made that showing, the Court then shall address whether IAS “faces probable, imminent, and irreparable injury” if the Court does not provide preliminary injunctive relief.

A. Probable Right to Relief.

“[B]oth noncompetition covenants and nonsolicitation covenants like those in the [contracts that Defendants Cohen and Hartzell signed] are governed by the Covenants Not to Compete Act[.]” Cooper Valves, 531 SW3d at 263, which is a part of the Texas Free Enterprise and Antitrust Act of 1983. See Marsh USA, 354 SW3d at 768, citing Tex Bus & Com Code §§ 15.50-15.52. Under that Act, a “noncompetition agreement is enforceable if it is reasonable in time, scope and geography and, as a threshold matter, ‘if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made.’” Marsh USA, 354 SW3d at 771, quoting Tex Bus & Com Code § 15.50(a). To determine whether an agreement is enforceable under the Act, the Court must “engage in a two-step inquiry[.]” Marsh USA, 354 SW3d at 771. First, the Court must “determine whether there is

⁴ Michigan law prescribes similar (although not identical) requirements for the issuance of preliminary injunctive relief. See Davis v Detroit Financial Review Team, 296 Mich App 568, 613-614 (2012). In this case, the slight difference between the requirements prescribed by Texas law and those prescribed by Michigan law does not alter the outcome of the Court’s analysis.

an ‘otherwise enforceable agreement’ between the parties, then [the Court must] determine whether the covenant is ‘ancillary to or part of’ that agreement.” Id. The Court shall undertake that analysis, and then turn to whether the restrictive covenants are reasonable in time, scope, and geography.

“The ‘otherwise enforceable agreement’ requirement is satisfied when the covenant is ‘part of an agreement that contained mutual non-illusory promises.’” Marsh USA, 354 SW3d at 773. The “Confidential Information Agreement” that Defendants Cohen and Hartzell signed at the inception of their employment with Plaintiff IAS satisfied that requirement. The prefatory language set forth in that agreement makes clear that the restrictive covenants were made “[i]n consideration of [each of the defendants’] employment or engagement” by IAS and its “disclosure of certain Confidential Information.” See IAS’s Brief in Support of Motion for Temporary Restraining Order, Show Cause Order, and Preliminary Injunction, Exhibits 1 & 2. The law in Texas provides that employment and future access to confidential information both rise to the level of non-illusory promises sufficient to create an “otherwise enforceable agreement.” E.g., Neurodiagnostic Tex, LLC v Pierce, 506 SW3d 153, 164 (Tex App 2016) (compensation for employment); Mann Frankfort Stein & Lipp Advisors, Inc v Fielding, 289 SW3d 844, 850 (Tex 2009) (promise of access to confidential information). As a result, the Court concludes that IAS has established an “otherwise enforceable agreement.”

The Texas Act further “requires that a covenant not to compete be ancillary to an otherwise enforceable agreement.” Marsh USA, 354 SW3d at 775, citing Tex Bus & Com Code § 15.50(a). That is, “the covenant not to compete must be ancillary to (supplementary) or part of (one of several units of which something is composed) an otherwise enforceable agreement.” Id. “Consideration for a noncompete that is reasonably related to an interest worthy of protection, such as trade secrets, confidential information or goodwill, satisfies the statutory nexus[.]” Id. The consideration that the

Court identified in the previous paragraph, *i.e.*, compensation and access to confidential information, “is reasonably related to an interest worthy of protection,” so it “satisfies the statutory nexus[.]” Id. Indeed, the Supreme Court of Texas identified confidential information and goodwill as interests that are “worthy of protection,” see id., so the Court concludes that IAS has met the necessary threshold, at least with respect to Defendants Cohen and Hartzell.

There remains, however, the task of weighing whether the particular restrictive covenants that apply to Defendants Cohen and Hartzell are “reasonable in time, scope and geography[.]” See Marsh USA, 354 SW3d at 771. Manifestly, they are reasonable. The noncompetition restriction applied only while Cohen and Hartzell were employed by Plaintiff IAS, see IAS’s Brief in Support of Motion for Temporary Restraining Order, Show Cause Order, and Preliminary Injunction, Exhibits 1 & 2 (Confidential Information Agreement, § 5.1), so it fell away as soon as Cohen and Hartzell left IAS. The non-solicitation restriction lasts for just one year from the date of each man’s termination, see id. (Confidential Information Agreement, § 5.2), so its duration is eminently reasonable. It simply prohibits Cohen and Hartzell from soliciting actual customers and “current employee[s]” of IAS, see id., so its scope is perfectly reasonable. And although it contains no geographic restriction, IAS runs a nationwide business, so no geographic restriction is appropriate. Finally, the contract prohibits the defendants from disclosing only the confidential information of IAS gained during their employment with the company, see id. (Confidential Information Agreement, § 2.1), which precisely fits IAS’s need for protection. In sum, the Court finds that IAS’s restrictive covenants are enforceable.

But in order to obtain a preliminary injunction, Plaintiff IAS must do more than merely show that the restrictive covenants imposed upon Defendants Cohen and Hartzell are valid. IAS must also establish a “probable right to the relief sought” because the defendants have breached the obligations

imposed by the enforceable restrictive covenants. See Cooper Valves, 531 SW3d at 262. Therein lies the principal problem for IAS. An existing relationship between Cohen and Drivewise prompted Drivewise's election to move the lion's share of its gap-waiver and gap-insurance business to WWK, see Hearing Exhibit C (Affidavit of Cheryl Wiesenber, ¶ 10), but Drivewise has made clear that it has no desire to engage in any additional commerce with IAS. Id. (Affidavit of Cheryl Wiesenber, ¶ 12). Thus, enjoining future business between WWK and Drivewise will simply cut off the stream of revenue that would otherwise be available to IAS as damages. And with regard to the confidential information of IAS, the defendants have disclaimed any retention or use of that type of information, see Hearing Exhibit A (Affidavit of Willard R. Reynolds, ¶¶ 13-14, 16-17), and IAS has furnished no proof of misuse of its confidential information other than forms from WWK that look similar to IAS forms. Accordingly, IAS's "probable right to relief" is limited to the loss of a single customer that will never return to IAS and the potentially improper use of some common forms.

Before closing the discussion of Plaintiff IAS's "probable right to the relief sought[,]” Cooper Valves, 531 SW3d at 262, the Court must note that no evidence whatsoever establishes a likelihood of success on any claim against WWK. By all accounts, WWK did not sign an agreement containing restrictive covenants, and the State of Texas does not seem to subscribe to the view in Michigan that a non-signatory can be held liable and enjoined under restrictive covenants if the non-signatory acted and conspired with somebody subject to restrictive covenants. See Owens v Hatler, 373 Mich 289, 292 (1964). As a result, IAS has set forth claims against WWK exclusively for tortious interference with contractual rights and business expectancies. “[M]erely inducing a contract obligor to do what it has a right to do is not actionable interference[,]” Lazer Spot, Inc v Hiring Partners, Inc, 387 SW3d 40, 51 (Tex App 2012), so accepting business from Drivewise cannot support a claim against WWK

for tortious interference with business relationships or expectancies. Beyond that, IAS's claim for tortious interference with its contracts with Cohen and Hartzell falls flat on the current record. Such a claim requires proof "that the alleged act of interference was willful and intentional," see id. at 52 n22, so IAS must show that WWK "was more than a willing participant – the defendant must have knowingly induced [Cohen or Hartzell] to breach [their] obligations under a contract." Id. But here, WWK has disclaimed any knowledge of the restrictive covenants imposed upon Cohen and Hartzell until this lawsuit was filed. See Hearing Exhibit A (Affidavit of Willard W. Reynolds, ¶ 9). Absent any evidence to the contrary at this juncture, the Court must conclude that IAS has failed to establish a "probable right to the relief sought" against WWK. See Cooper Valves, 531 SW3d at 262.

B. Probable, Imminent, and Irreparable Injury.

Plaintiff IAS is not entitled to a preliminary injunction unless IAS "faces probable, imminent, and irreparable injury" prior to trial without such relief. "The party seeking injunctive relief bears the burden to demonstrate irreparable injury." See Lifeguard Benefit Services, Inc v Direct Medical Network Solutions, Inc, 308 SW3d 102, 111 (Tex App 2010). "A party proves irreparable injury for injunction purposes by proving that damages would not adequately compensate the injured party or cannot be measured by any certain pecuniary standard." Id. Pursuant to Texas law, "[a]n injunction is a proper remedy to protect confidential information." Orbison v Ma-Tex Rope Co, Inc, 553 SW3d 17, 33 (Tex App 2018). Likewise, loss of business, coupled with the prospect of catastrophic erosion of a customer base, can support a finding of irreparable harm. Performance Unlimited, Inc v Questar Publishers, Inc, 52 F3d 1373, 1382 (6th Cir 1995). Here, however, IAS has had only limited success in proving each of those forms of probable, imminent, and irreparable injury.

With respect to confidential information, Plaintiff IAS has simply established that Defendant WWK has used forms similar to those Defendants Cohen and Hartzell used when they worked for IAS. But Texas law requires the Court to employ specificity in defining the confidential information that is off limits pursuant to an injunction, see Cooper Valves, 531 SW3d at 266, and the Court must proceed from its recognition that IAS has shown, at most, probable, imminent, and irreparable injury with respect to the use of forms by Cohen and Hartzell at WWK. Similarly, although IAS has shown that Drivewise followed Cohen to WWK, the Court cannot fashion an injunction that addresses that loss of one customer without making the problem worse by cutting off the revenue stream generated by Drivewise. The loss of a single customer does not constitute a true threat of probable, imminent, and irreparable injury to IAS. Moreover, the Court has no basis to prohibit WWK from dispatching Scott Comar – as opposed to Cohen or Hartzell – to solicit clients of IAS. Thus, although the Court concludes that IAS faces some very limited probable, imminent, and irreparable injury, that potential harm does not justify sweeping injunctive relief.

III. Conclusion

For the reasons stated in this opinion, IT IS ORDERED that Defendants Brandon Cohen and Branden Hartzell (but **not** Defendant WWK) are prohibited and enjoined from using forms prepared by Plaintiff IAS in their work. IT IS FURTHER ORDERED that Brandon Cohen (but **not** Branden Hartzell or WWK) is prohibited and enjoined from soliciting customers of IAS until July 16, 2019.⁵ Of course, Defendant Hartzell remains bound by his restrictive covenants as a matter of contract law,

⁵ This injunctive order applies to Defendant Cohen – but not to Defendant Hartzell – because the record reflects that Cohen was the moving force behind Drivewise’s decision to do business with Defendant WWK. Therefore, Plaintiff IAS has shown a likelihood of success on the non-solicitation component of its claim for breach of contract against Cohen, but not against Hartzell.

but any future transgressions by Hartzell would merely subject him to liability for breach of contract, as opposed to sanctions for contempt of court. For its part, WWK may use any of its employees other than Cohen and Hartzell to solicit business from IAS's customers without placing itself in jeopardy of committing tortious interference with business opportunities of IAS or the contractual obligations of Cohen and Hartzell, so long as neither Cohen nor Hartzell plays any role, either direct or indirect, in the solicitation.

IT IS SO ORDERED.

Dated: February 5, 2019



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge