Bell & Co., P.C. v Rosen
2012 NY Slip Op 33263(U)
November 8, 2012
Supreme Court, New York County
Docket Number: 652017/12
Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

BELL + COMPANY, P.C.

-v-

MARC D. ROSEN, et al

INDEX NO. 652017/12

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by plaintiff for a preliminary injunction is GRANTED per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: November 8, 2012

J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

BELL & COMPANY, P.C.,	:	
	:	
Plaintiff,	:	Index No. 652017/12
	:	
-against-	:	DECISION AND ORDER
	:	
MARC D. ROSEN and CAMEO WEALTH & CREATIVE MANAGEMENT, INC.,	:	Motion Sequence No. 001
	:	
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

Plaintiff Bell & Company, P.C. (Bell) moves by order to show cause (1) enjoining defendant Marc D. Rosen (Rosen) from continuing to violate the terms of a nonsolicitation and nonrepresentation clause contained in an employment agreement between Rosen and Bell, dated July 1, 1998; (2) enjoining Rosen's new employer, defendant Cameo Wealth & Creative Management, Inc. (Cameo) from participating in or aiding and abetting the breach; (3) enjoining both defendants from undertaking or continuing the representation of any Bell clients during the pendency of this action; and (4) requiring defendants to notify all Bell clients contacted by them of the terms of the injunction.

Background

Complaint

The complaint alleges as follows: Bell provides a wide range of financial services to individuals and business entities. Rosen is a certified public accountant. Cameo is in the business of providing tax, accounting, and other financial services to individuals and business entities.

In July 1998, Bell hired Rosen, who had no clients of his own, as a full-time employee to provide accounting services to Bell clients. Rosen entered into an employment agreement with Bell, dated July 1, 1998 (Employment Agreement), which permitted either Bell or Rosen to terminate the Employment Agreement. However, for a two-year period after the termination of Rosen's employment, without Bell's prior written consent, Rosen could not solicit business from, or directly or indirectly undertake the representation of, any person or entity who was a Bell client during the twelve-month period preceding Rosen's termination (Bell Clients).

The Employment Agreement provided an exception for clients that Rosen introduced to Bell, or were introduced through Rosen's contacts, provided that such clients were included on a list of "Employee Referrals" acknowledged by both Rosen and Bell (Rosen Clients). The Employment Agreement also contained a confidentiality provision that prohibited Rosen's disclosure, use, or exploitation of any confidential information, including, but not limited to, trade secrets and customer lists. In the Employment Agreement, Rosen acknowledged that the breach of the restrictive covenant would cause Bell irreparable injury, entitling Bell to specific performance, injunctive, or other equitable relief to enforce its rights.

On April 23, 2012, Rosen notified Bell that he was voluntarily terminating his employment to go into business for himself. Rosen's last day of employment was May 18, 2012. Immediately upon leaving Bell's employ, Rosen became associated with Cameo, and began providing for Cameo the same services that he previously provided for Bell. Rosen immediately began soliciting Bell Clients, seeking to induce them to leave Bell and use Rosen and Cameo for their financial services needs without Bell's prior written consent. Allegedly, the Bell Clients wrongfully solicited were not Rosen Clients, and were not included on any list of employee

referrals that both Rosen and Bell acknowledged. On May 30, 2012, counsel for Bell wrote to Rosen, demanding that he cease and desist from any further violations of the Employment Agreement, which Rosen has refused to do.

The complaint contains four causes of action. The first cause of action is against Rosen for breach of contract for soliciting business from Bell Clients, and undertaking their representation, thereby causing Bell irreparable harm.

The second cause of action is against Rosen for breach of the covenant not to compete, which, allegedly, is reasonable in scope, does not impose an unreasonable burden upon him, does not cause harm to the general public, and is reasonably necessary for Bell's protection.

The third cause of action is against Cameo for tortious interference with contractual relations for intentionally procuring the breach of the Employment Agreement.

The fourth cause of action is against Rosen and Cameo for tortious interference with business relationships. Allegedly, Rosen and Cameo used wrongful means to interfere with Bell's relationship with its clients, and Bell's opportunity to continue to work with those clients. But for the interference, Bell's relationship with its clients would have continued.

Bell seeks (1) a permanent injunction enjoining Rosen, directly or through Cameo, and Cameo, from violating the terms of the Employment Agreement, from soliciting Bell clients, and from undertaking the representation of Bell Clients; (2) an order directing specific performance of the terms of the Employment Agreement; (3) damages for defendants' breach and tortious acts to the extent not inconsistent with Bell's claim for equitable relief; (4) an award of attorney's fees as provided for in the Employment Agreement; and (5) an award of costs and disbursements.

Rosen Answer

Rosen contends that he was terminated without cause, thereby obligating Bell to pay him his base salary earned through the date of termination, plus base salary for two months or one week for each full year of employment, whichever is greater. Rosen contends that the breach renders the restrictive covenant unenforceable. The Employment Agreement provides:

> "Upon any termination of the Employee Without Cause, the Company shall pay Employee his (her) base salary earned through the date of such termination, plus base salary for two months or one week for each full year of employment, whichever is greater."

The answer further alleges that, having become a partner in 2000, Rosen is entitled to 15% of the profits. In December 2005, Rosen was promised additional compensation based on the revenue generated from clients that he introduced to the firm, or clients introduced to the firm "through a contact." Rosen was promised 10% of the gross revenues from Rosen Clients.

On April 23, 2012, Rosen discussed with Evan Bell (Evan), Bell's president, his desire to end his relationship with Bell. Evan requested that Rosen remain with Bell for six months. Rosen agreed to that he would stay until July 15, 2012. On May 21, 2012, however, Bell terminated Rosen's employment, without providing a reason for his termination, except to state that they should just "rip the band-aid off." Bell provided no notice to Rosen, nor did it pay him severance. Bell has not paid Rosen his compensation based on the revenue generated from Rosen Clients. Since Rosen's termination, Rosen Clients have desired to continue their relationship with Rosen.

The answer contains three counterclaims, two of which allege breach of contract, and the other unjust enrichment.

Affidavit of Evan Bell

According to the affidavit of Evan Bell, immediately after Rosen voluntarily terminated his employment on May 18, 2012 (having given notice on April 23, 2012), he became associated with Cameo. From the speed with which Rosen and Cameo acted, it is apparent that Rosen had already worked out the details of his employment with Cameo (including their plan to poach clients). Evan believes that Rosen is now performing the same services for Cameo that he previously provided for Bell. Days after he left Bell, Rosen, aided and abetted by his employer Cameo, sought Bell Clients, in some instances successfully, in violation of the Employment Agreement.

Bell claims that Rosen has wrongfully solicited and undertaken the representation of at least the following Bell Clients: (1) Edward Pavlick: (2) Robert F. Reale; (3) Helmut Lang; (4) David Horn; (5) Marc Straus; (6) Barbara E. Straus; (7) Barbara M. Taylor; (8) Laura Belgray; (9) Michael Stern; (10) Barney Schauble; (11) Henry Bourne; (12) Abraham R. Cary; (13) Gary Goldberg; (14) Jeffrey Horn; (15) John Muller and Ernabel DeMillo; and (16) Robert Spitalnik. There are other Bell Clients whom Rosen and Cameo have solicited or may solicit who have not left Bell for Cameo (listed in the Schedule annexed as Exhibit B to the Affidavit of Evan Bell). All of these were Bell Clients, and none of them were introduced to Bell by Rosen or his contacts, or were ever included on a list of employee referrals, acknowledged by Rosen and Bell, as required by the Employment Agreement if Rosen wanted to claim them as his.

Evan states further that many of the letters from former Bell Clients are on Cameo's letterhead, indicating that they were terminating their relationship with Bell and taking their business to Rosen and Cameo. In response to the cease and desist letter, Rosen's attorney did not

deny that his client had solicited and undertaken the representation of Bell Clients. Instead, he claimed the Employment Agreement was unenforceable, because Bell had breached it.

Affidavit of Marc Rosen

In his opposition affidavit, Rosen states that he began working for Bell on October 21, 1996, not in 1998, and that he began as a Senior Staff Accountant. In exchange for agreeing to provisions regarding "Non-Competition/Non-Interference" and "Non-Disclosure of Confidential Information," the Employment Agreement granted him additional job protections that he did not previously have as an at-will employee, subject to termination at any time, with or without notice, and without severance pay. The noncompete provision of the Employment Agreement restricts his solicitation or representation of any Bell Client that was a client within the 12 months preceding the termination of the Employment Agreement unless it was a Rosen Client.

In 2000, he became a partner of Bell. It was determined that he would be a 15% partner, Liza de Leon would be a 25% partner, and Evan would be a 60% partner. Each year Evan, Liza, and he drew the same salary and draw from Bell. At the end of the year, any profits would be distributed based on the agreed-upon percentages. Over the next several years, he accumulated a significant number of Rosen Clients. Around December 2005, it was decided among the partners that he should receive additional compensation for clients that he brought to the firm. Instead of changing the partnership percentages, he would receive bonuses based on revenues as reflected by charts included as exhibits to his affidavit. To track his bonuses, they generated annual charts listing Rosen Clients under a column headed "MDR" (Marc D. Rosen). He was paid a 10% bonus on the entire revenue generated from the Rosen Clients in the MDR category.

Rosen states further that on April 23, 2012, he approached Evan and told him of his intention to dissociate from the firm. He wanted to assure a smooth transition. Because he had worked with Evan for the prior 16 years, he anticipated that they would agree to a fair division of clients. He also wanted to make sure that he transitioned off of the accounts that he worked on that would be staying at Bell, and that he would be available to provide guidance and assistance regarding those accounts. They agreed that he would stay for a transition period, and that he would continue to work with Bell for another three months, through July 15, 2012.

On May 18, 2012, Rosen had a bicycle accident, and ended up in the hospital with a broken collarbone. Without his knowledge or consent, Evan sent a letter dated May 18, 2012 to all the firm's clients (including Rosen Clients) informing them that Rosen would no longer be associated with the firm, effective May 21, 2012. On May 19, 2012, Rosen sent an e-mail to Evan, Liza, and Evan's secretary telling them that he will be in a sling for six weeks because he injured his shoulder. By telephone on May 21, 2012, Evan informed him that he was terminating the partnership immediately, and May 18, 2012 was to be considered his last day. Rosen now believes that Evan sought to lead him astray and steal the Rosen Clients, because Evan sent a letter to all clients without his knowledge.

Rosen contends further that none of the enumerated reasons in the Employment Agreement justifying a termination "for cause" existed. Bell breached the Employment Agreement by failing to give him two weeks notice prior to his termination, and his severance pay. He was not provided with the job protections which he was promised in exchange for his agreement to the noncompete clause.

After his abrupt termination, Cameo, his intended new employer, permitted him to advance his start date. Rosen denies conspiring in any way with Cameo to steal clients from Bell. Instead, he had planned on working with Evan to coordinate file transfers in a peaceful manner. If a Rosen Client wanted him to continue the representation, he had the client sign a letter notifying Bell that the client was terminating its relationship with Bell, and permitting the transfer of files. He states that he attempted in good faith to resolve with Bell any concern they had with the clients Rosen had solicited and retained.

Cameo Opposition Affidavit

Craig A. Manzino, a principal of Cameo, submitted an affidavit stating that Cameo first learned about the Employment Agreement when it received the letter dated May 30, 2012, from Bell's counsel. Rosen was not scheduled to begin his relationship with Cameo until July 16, 2012, and he was not paid, nor did he receive any compensation from Cameo for work performed. Manzino contends that Cameo did not conspire with him to violate the Employment Agreement. He argues that the request to enjoin Cameo from any alleged breach of the Employment Agreement, including the representation of any Bell Clients, is unwarranted because it has not done so, nor will it do so.

Discussion

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; CPLR 6301). Bell has satisfied these requirements.

Bell has demonstrated a likelihood of success on the merits. Rosen does not argue that the restrictive covenant, in and of itself, is unenforceable. Indeed, restrictive covenants that are "temporally and geographically reasonable and necessary to protect plaintiff's legitimate business interests" are enforceable (*see Delta Enter. Corp. v Cohen*, 93 AD3d 411, 412 [1st Dept 2012]).

The restrictive covenant provides:

> "3. Non-Competition/Non-Interference. The Employee, for a period of two years commencing with the termination, for any reason, without prior written consent of Company of this Agreement, shall refrain from any solicitation of the business of any person or entity who or which was a client of the Company at any time during the twelve-month period preceding the termination date of this Agreement, and shall not, for the aforesaid two-year period, directly or indirectly, undertake the representation of any such person or entity. In the case of a client introduced to the firm by Employee, or through contacts of Employee (hereinafter referred to as 'Employee Referrals'), the Employee is free to solicit and undertake the representation of that client, and is not required to obtain any consent of the Company. A list of such Employee Referrals shall be created and will be added to this Agreement each time Employee introduces said client to Company. Both Employee and Company shall acknowledge, in writing, the addition for it to be valid, and that client to be considered an Employee Referral."

The restrictive covenant at issue is reasonable, because it is limited to a two-year period, and it applies only to Bell Clients, not to any other clients, whether potential or realized (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-89 [1999] ["A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public"]). An "'employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment'" (*Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004], quoting *BDO Seidman v Hirshberg*, 93 NY2d at 392).

The restrictive covenant does not prevent Rosen from working for Cameo; it only prevents him "from any solicitation of the business of any person or entity who or which was a client of the Company at any time during the twelve-month period preceding the termination date of this Agreement, and shall not, for the aforesaid two-year period, directly or indirectly, undertake the representation of any such person or entity."

Nevertheless, Rosen argues that the restrictive covenant is not enforceable, because Bell breached the Employment Agreement by terminating his employment without cause, and failing to pay him severance pay pursuant to Section 5(d) of the Employment Agreement.

"[W]hen a party benefiting from a restrictive covenant in a contract breaches that contract, the covenant is not valid and enforceable against the other party, because the benefiting party was responsible for the breach" (*Elite Promotional Mktg., Inc. v Stumacher*, 8 AD3d 525, 531 [2d Dept 2004] [internal quotation marks and citation omitted]; *DeCapua v Dine–A–Mate, Inc.*, 292 AD2d 489, 491 [2d Dept 2002]). Here, however, the restrictive covenant is enforceable, because Bell did not breach the Employment Agreement.

Bell persuasively asserts that it did not terminate Rosen, either for cause or without cause. On April 23, 2012, it was Rosen who announced that he was voluntarily terminating his employment with Bell. Hence, Rosen's argument that Bell breached the Employment Agreement by failing to give him two weeks notice prior to his termination is unavailing. Rosen states that he "wanted to ensure a smooth transition," and that he and Evan agreed that Rosen would stay for another three months "for a transition period"; i.e., until July 15, 2012. Thus, based on Rosen's own version of what transpired, after he announced that he was leaving Bell, the parties entered into an arrangement providing for a smooth transition. To ensure this, Rosen agreed to remain

for an additional three months. That Bell may have breached that agreement by ending the arrangement in May does not render it in breach of the Employment Agreement. Indeed, Rosen's counterclaims to recover monies that may be owed under that arrangement remain viable.

Moreover, Bell also established a likelihood of success on its claim that Rosen is seeking to represent Bell Clients. The Employment Agreement anticipated the possibility of a dispute as to whether clients are Bell Clients or Rosen Clients, and thus it contained the following provision:

> "A list of such Employee Referrals shall be created and will be added to this Agreement each time Employee introduces said client to Company. Both Employee and Company shall acknowledge, in writing, the addition for it to be valid, and that client to be considered an Employee Referral."

Rosen failed to submit evidence that satisfies this requirement, i.e., a list of Rosen Clients that Rosen and Bell acknowledged in a writing, and which would be added to the Employment Agreement each time Rosen introduced a client to Bell. There is no statement on the exhibits that Rosen submitted (Exhibits 3 and 4), and upon which Rosen largely relies, that identifies the clients named therein as Rosen Clients. The only identification of the clients is the caption at the top of the first column: "Bell & Company Client." It appears that these exhibits pertain to the awarding of bonuses, which arrangement is not part of the Employment Agreement. Rosen himself states that to "track my bonuses, we generated annual charts." Bell claims that Rosen's bonuses were determined in part by revenues obtained from accounts that he worked on, or for which he was the main contact, and there is no evidence submitted by Rosen indicating otherwise. The initials at the bottom of Exhibit 3 appear to validate the dollar amount

of the bonuses, not the acknowledgment of Rosen Clients, as required by the Employment Agreement.

It should be noted that, although Bell has demonstrated a likelihood of success as to the issue of the origin of the clients, a preliminary injunction does not constitute law of the case and it is not a determination on the merits or a final adjudication, and Rosen can still prevail on this issue (*J.A Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 402 [1986]; *Coinmach Corp. v Fordham Hill Owners Corp.*, 3 AD3d 312, 314 [1st Dept 2004]).

As for the second requirement for a preliminary injunction, soliciting Bell's clients could cause irreparable harm, because it would be difficult to quantify the loss of business from those clients (*Crown It Services, Inc. v Koval-Olsen*, 11 AD3d at 266; *Willis of N.Y. v DeFelice*, 299 AD2d 240, 242 [1st Dept 2002]). Not only is there the loss of business from the Bell Clients, but there is also the loss of potential business from new clients referred by the Bell Clients that will have gone over to Cameo (Affidavit of Evan Bell, ¶ 30). Thus, contrary to Rosen's assertion, ascertaining damages is not merely a matter of calculating revenues based on a review of each client's prior year's business.

The balancing of equities favors Bell in that the record indicates that the restrictive covenant was "freely bargained for as part of a negotiated contract" (*Chernoff Diamond & Co. v Fitzmaruice, Inc.*, 234 AD2d 200, 203 [1st Dept 1996]). According to Rosen, in "exchange for agreeing to the provisions regarding 'Non-Disclosure of Confidential Information,' the Agreement granted me additional job protections that I did not have prior to signing the Agreement" (Affidavit of Marc Rosen, ¶ 9).

Rosen argues that the clients left Bell on their own free will, and they cannot be compelled to return to Bell. That argument is beside the point, because that is not the purpose of the restrictive covenant. The purpose is to prohibit Rosen from appropriating clients with whom he has developed a relationship through his employment with Bell and through the use of Bell's resources. His agreement to the restrictive covenant is evidence of that understanding. Although these clients cannot be compelled to remain with Bell, Rosen and Cameo can decline their request to be taken as clients during the two-year restrictive period if, by so doing, it would violate the restrictive covenant and the preliminary injunction that this court is issuing.

Finally, Cameo's request that it not be enjoined, because it has not participated, and will not participate, in any breach, is denied. Although the complaint contains two causes of action against Cameo for tortious interference with contractual and business relations, enjoining Cameo is warranted because of the potential for irreparable harm.

Accordingly, it is

ORDERED that the motion by plaintiff Bell & Company, P.C. is granted; and it is further

ORDERED that due deliberation having been had, and it appearing to this court that a cause of action exists in favor of plaintiff Bell & Company, P.C. and against defendants Marc D. Rosen and Cameo Wealth & Creative Management, Inc. and that plaintiff is entitled to a preliminary injunction on the ground that these defendants threaten or are about to do, or are doing or procuring or suffering to be done, an act in violation of plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, plaintiff has demanded and would be entitled to a judgment restraining defendants from the commission or continuance of an

act, which, if committed or continued during the pendency of the action, would produce injury to plaintiff; and it is further

ORDERED that the undertaking is fixed in the sum of $ 125,000 conditioned that plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to defendants all damages and costs that may be sustained by reason of this injunction; and it is further

ORDERED that defendants Marc D. Rosen and Cameo Wealth & Creative Management, Inc., their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under its supervision or control or otherwise, any of the following acts:

> (1) violating the terms of the nonsolicitation and nonrepresentation clause contained in the Employment Agreement between Marc D. Rosen and Bell & Company, P.C. , dated July 1, 1998;
>
> (2) enjoining Marc D. Rosen's new employer, defendant Cameo Wealth & Creative Management, Inc., from participating in or aiding and abetting the violation of the nonsolicitation and nonrepresentation clause contained in the Employment Agreement;
>
> (3) enjoining both defendants from undertaking or continuing the representation of any Bell Clients during the pendency of this action; and
>
> (4) requiring defendants to notify all Bell Clients contacted by them of the terms of the injunction.

; and it is further

ORDERED that counsel are directed to appear for a Preliminary Conference in Room 218, 60 Centre Street, on December 19, 2012, at 10 a.m.

Dated: November 8, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.