SHORT FORM ORDER

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INDEX
NO.: 25256-09

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 6-2-11; 9-6-11
SUBMITTED: 6-16-11; 9-29-11
MOTION NO.: 006-MotD
007-MG

M.H. MANDELBAUM ORTHOTIC & PROSTHETIC SERVICES, INC. and MARTIN H. MANDELBAUM,

Plaintiffs,

-against-

MARC WERNER,

Defendant.

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Upon the following papers numbered 1-46 read on this motion to compel and seeking a preliminary injunction ; Notice of Motion and supporting papers 1-10; 19-32 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11-16; 33 ; Replying Affidavits and supporting papers 17-18; 39-43 ; Other Plaintiffs' memorandum of law 44-45; Defendants' memorandum of law 46; it is,

ORDERED that the defendant's motion (006) to compel a further examination before trial of the plaintiff is granted to the extent set forth below; and it is further

ORDERED that the plaintiffs' motion (007) for a preliminary injunction is granted to the extent that it is referred to trial.

In this breach of contract action, plaintiffs M.H. Mandelbaum Orthotic & Prosthetic Services, Inc., and Martin H. Mandelbaum seek to enjoin defendant Marc Werner from continued breach of certain non-solicitation and non-competition covenants. The record reveals that the plaintiffs have provided prosthetic and orthotic services to patients throughout Long Island in a shop located at 116 Oakland Avenue in Port Jefferson since 1987. Sometime in 1991, the plaintiffs hired the defendant Marc Werner directly out of college. The plaintiffs allege that they provided training to Marc Werner and paid for his certifications in orthotics and prosthetics. Marc Werner began to provide services to the plaintiffs' pre-existing patients. On or about December 15, 2004,

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the plaintiffs offered to Marc Werner a 5% interest in the corporation. Marc Werner signed a Stockholders Agreement that specified that while he owned the shares and for two years thereafter, he would neither compete with the plaintiffs, nor solicit their patients, referral sources, or employees.

By letter dated March 18, 2009, Marc Werner stated that his resignation would be effective on March 20, 2009, and gave notice to the plaintiffs that he wished to sell his shares to his father, defendant Carl Werner, for $30,000.00. According to the Shareholders Agreement, the corporation had the first option to purchase Marc Werner's shares, and Mandelbaum had the second option to purchase the shares prior to any sale to a third party. The Corporation made a counter offer of $20,000.00, which was rejected by Marc Werner. Thereafter, Mandelbaum declined to exercise his option to purchase the shares. While Marc Werner left the corporation to start his own business, Carl Werner was unable to obtain stock certificates from the plaintiffs. The plaintiffs allege in the complaint that they subsequently learned that the defendant was soliciting the plaintiffs' patients, referral sources and employees in violation of the Shareholder Agreement. The instant action was commenced on June 15, 2009. Issue has not been joined.

According to Section 5 of the Shareholders Agreement, if Marc Werner decided to sell his shares, and received a bona fide offer from a third party, he was required to give the corporation the first option to buy his shares and, Mandelbaum the second option to purchase his shares. If the corporation and Mandelbaum decline to exercise their option to purchase, Marc Werner would be free for the next ninety days to sell to a third party, provided the purchaser or assignee of Marc Werner's shares agrees to be bound by the same terms of this Agreement as Marc Werner.

Section 14 of the Shareholders Agreement, Covenant Not To Compete, provided that Marc Werner agreed that as long as he owns shares and for two years thereafter, he would not, directly or indirectly, for his own account or the account of any third party, engage, invest, . . ., in any activity or business venture which is performed or conducted anywhere within a fifteen (15) mile radius of any facility or business location of the corporation as long as he holds his shares and for two years thereafter. Marc Werner also agreed not to solicit any employee of the corporation, or obtain referrals from businesses, physicians, hospitals, or clinics during the three year period prior to the sale of his shares. Marc Werner further agreed to refrain from taking any customer or referral list, or confidential information used by the corporation during his employment.

Before the Court are three related actions: an action captioned *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. and Martin H, Mandelbaum v Marc Werner*, Index Number 25256/09 (Action #1), an action captioned *Carl Werner v M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. and Martin H. Mandelbaum*, Index Number 22370/10 (Action #2), and the instant action (Action #3). After the parties had several opportunities to conference the matters with the Court, the parties agreed to participate in a framed issue hearing in order to determine whether Carl Werner is a 5% shareholder pursuant to the Shareholder Agreement, which was conducted on October 26, 2011. The parties submitted post-hearing briefs on March 2, 2012. Upon consideration of the pleadings, the testimony of Mandelbaum and Carl Werner, and the post hearing briefs, the Court determined that the transfer of shares between Marc Werner and Carl Werner was invalid, inasmuch as Carl Werner was not able to fulfill Section 5 (f) of the

Shareholders Agreement, which provided that the purchaser of the shares "agrees to be bound by the same terms of this Agreement as [Marc] Werner" (**Preferred Mortg. Brokers, Inc. v Byfield**, 282 AD2d 589; **Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.**, 86 NY2d 685).

Turning to the instant action, the amended complaint alleges in the first cause of action that Marc Werner breached the Shareholders Agreement and seeks damages. The complaint alleges in the second cause of action that Marc Werner made defamatory statements to third parties and seeks damages. The complaint alleges in the third cause of action that Marc Werner solicited business from the plaintiffs' patients that had an adverse effect on the plaintiffs' patient and business relationships and seeks punitive damages. The complaint alleges in the fourth cause of action that Marc Werner intentionally converted electronic data containing company lectures, referral sources and patient lists without plaintiffs' permission. The complaint alleges in the fifth cause of action that Marc Werner's actions irreparably harmed the plaintiffs to the point where a permanent injunction is requested.

Procedurally, in the instant action, by Order dated January 14, 2010 (Baisley, J.), the Court denied the plaintiffs' motion for a preliminary injunction on the ground that the plaintiffs failed to meet the high threshold of proof required for the issuance of a preliminary injunction inasmuch as the affidavits submitted by the plaintiffs were conclusory and speculative which relied upon hearsay statements.

Turning to the pending motions, Marc Werner now moves for an order compelling the plaintiff Martin Mandelbaum to submit to a further deposition to respond to questions to which the plaintiff's counsel instructed the plaintiff not to answer. The plaintiffs move for an order granting a preliminary injunction.

In support of his motion, Marc Werner contends that the plaintiffs' counsel failed to provide any of the limited grounds enumerated in 22 NYCRR 221.2 which allow the attorney to direct the client not to answer a question in a deposition. The Court finds that the questions at issue were designed to elicit information which was material and necessary to the defendant's defense of this action (*see* CPLR 3101 [a]; **Allen v Crowell-Collier Publishing Co.**, 21 NY2d 403, 406-407), and the directions not to answer them were not otherwise authorized by 22 NYCRR 221.2 (**Parker v Ollivierre**, 60 AD3d 1023). Accordingly, the plaintiff is directed to submit to a further deposition to respond solely to the questions asked at the prior deposition within thirty days of service of a copy of this order with notice of entry.

In support of their motion for a preliminary injunction, the plaintiffs submit, *inter alia*, the pleadings, a copy of the Agreement, the personal affidavit of the plaintiff Martin H. Mandelbaum, a copy of portions of Marc Werner's deposition transcript, and the pleadings.

Martin Mandelbaum avers in his affidavit that the reason that an injunction is necessary is that Marc Werner set up his own competing practice, took one or more employees of the corporation to his new competing practice, solicited patients and referral sources to his new competing practice, and made misrepresentations and false and disparaging statements to patients and employees of the corporation regarding Mandelbaum. In addition, Mandelbaum states that

Marc Werner misappropriated the corporation's electronic files containing, in part, company lectures, referral sources, and patient lists containing private health information for use in his new competing practice.

In opposition, Marc Werner submits, *inter alia*, his personal affidavit, a copy of the Shareholders Agreement, and an agreement by Carl Werner to be bound by the Shareholders Agreement. Marc Werner avers in his affidavit that on December 15, 2004, he executed a Shareholders Agreement with the plaintiffs and became a 5% shareholder in the plaintiffs practice. On March 18, 2009, he gave written notice of his resignation and notified the plaintiffs that he received an offer from Carl Werner to purchase his 5% interest in the practice for $30,000.00. He further states that Carl Werner was willing to be bound by the terms of the Shareholders Agreement and executed an Adherence Agreement. Marc Werner states that he provided the corporation and Mandelbaum the first and second options to purchase his 5% interest in the practice. However, they declined on April 7, 2009 and April 23, 2009. On June 23, 2009, Marc Werner sold his shares to Carl Werner. Since that time, Marc Werner states that he has started his own practice and has been in business for over two years. He has not been an employee of the practice, nor taken a distribution or shared in the profits of the practice as a shareholder since the pay period ending on April 9, 2009. Inasmuch as the time period covered by the Agreement has expired, the plaintiffs are not entitled to an injunction.

Restrictive covenants relating to employment are disfavored at law, but such covenants will be enforced if reasonably limited in time and scope, to the extent necessary to protect the employer (**Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.**, 42 NY2d 496). An employee's use or disclosure of trade secrets or confidential customer lists will be enjoined as will competition from an employee whose services were special, unique, or extraordinary (**Reed, Roberts Associates, Inc. v Strauman**, 40 NY2d 303). Restrictive covenants in the employment context are carefully scrutinized, and are disfavored since there are "powerful considerations of public policy which militate against sanctioning the loss" of a person's livelihood (**Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.**, *supra* at 499 [citation and internal quotation marks omitted]; *see* **Reed, Roberts Associates, Inc. v Strauman**, *supra* at 307). Here, the Court finds that Marc Werner's services were special, in that he was required to obtain special certificates and affiliations prior to becoming proficient in the field of prosthetics and orthotics. In addition, the restrictions as to time and distance are not unduly burdensome. Therefore, the covenant is reasonable and enforceable.

The party seeking a preliminary injunction must establish (1) a likelihood of success on the merits, (2) the movant will suffer irreparable harm in the absence of an injunction and (3) a balancing of the equities favors the granting of an injunction (**Aetna Ins. Co. v Capasso**, 75 NY2d 860; **Doe v Axelrod**, 73 NY2d 748; **Olabi v Mayfield**, 8 AD3d 459). The party seeking the preliminary injunction must present evidence establishing the likelihood of success on the merits (**Ying Fung Moy v Hohi Umeki**, 10 AD3d 604; **Terrell v Terrell**, 279 AD2d 301). "Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction" (*Id.*). As for the element of irreparable harm, the key determinant is whether or not that harm may be compensated by money damages if the motion is not granted (**WHG CS, LLC v LSREF Summer REO Trust 2009**, 79 AD3d 629; **EdCia Corp. v McCormack**, 44 AD3d 991).

Here, there are issues of fact regarding whether they will succeed on the merits, and whether they are entitled to an injunction. Therefore, these issues shall be determined at trial.

Accordingly, Marc Werner's motion for a second deposition of the plaintiff is granted and the plaintiffs' motion for a preliminary injunction is referred to trial.

DATED: May 30, 2012

HON. ELIZABETH HAZLITT EMERSON

J. S.C.