SCAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

ELITE PROMOTIONAL MARKETING, INC.
and CREDIT CARD PROMOTIONS, INC.,

Plaintiffs,

Index No. 1474/99

- against -

JAN STUMACHER, RHINA INTERNATIONAL DIRECT, INC., JOSEPH CORVEA, ALL WORLD PROMOTIONS, INC. and BERNIE BENSON,

Defendants.

----------X

RHINA INTERNATIONAL DIRECT, INC.,

Plaintiff,

Index No. 7428/99

- against -

HOWARD HOROWITZ, BRETT WHITON, CREDIT CARD PROMOTIONS, INC. and ELITE PROMOTIONAL MARKETING, INC.,

Defendants.

----------X

Counsel for Rhina International Direct, Inc. and Jan Stumacher:

Kirkpatrick & Lockhart, LLP
599 Lexington Avenue
New York, NY 10022

Counsel for Elite Promotional Marketing, Inc., Credit Card Promotions, Inc., Howard Horowitz and Brett Whiton:

Ettelman & Hochheiser, P.C.
The Garden City Center
100 Quentin Roosevelt Boulevard – Suite 511
Garden City, NY 11530

Present: Hon. LEONARD B. AUSTIN, J.S.C.

DECISION AFTER TRIAL

BACKGROUND

Rhina International Direct, Inc. ("Rhina"), Credit Card Promotions, Inc. ("CCP") and Elite Promotional Marketing Inc. ("Elite"), are New York Corporations which specialize in the business of supplying promotional credit card services to banks and other credit card issuers. These services include the solicitation of credit card applications at colleges, universities and sporting events through a strategy known as "tabling." In this marketing strategy, tables are set up and manned by "field representatives" who provide free promotional items while attempting to solicit credit card applications. Field representatives generally work as non-exclusive, independent contractors for companies such as CCP, Elite and Rhina. Credit card marketers are compensated based upon the number of properly competed applications which they obtain.

Promotional marketers who lack the expertise or contacts to conduct their own solicitation programs will occasionally entrust the management of a solicitation program to an independent contractor such as CCP, a corporation which was specifically created to conduct solicitation programs as an independent contractor.

Howard Horowitz ("Horowitz") is the sole shareholder and president of CCP and Elite. He possesses extensive experience in the field of promotional marketing for

credit card issuers and, in particular, the practice of actually soliciting card applications through tabling and other marketing strategies. Co-defendant, Brett Whiton, is director of marketing for CCP and Elite.

In mid -1998, Rhina through its president, Jan Stumacher ("Stumacher"), retained CCP, as an independent contractor, to conduct a nationwide credit card solicitation program at various college campuses for the Fall, 1998 semester on behalf of Rhina's client, GTE Card Services ("GTE"). In August and October of 1998, the parties executed documents collectively entitled "Authorization to Proceed," containing various key terms by which the contract would be governed, including the price to be paid for each completed application obtained by CCP.

On June 9, 1998, and in conjunction with the GTE subcontract, Horowitz and Whiton, individually and on behalf of CCP, entered into a so-called "confidentiality/nonsolicitatation agreement," pursuant to which both agreed, that neither they nor CCP would disclose facts relating to the contract or "solicit any of Rhina's clients during [their] association with Rhina and for a period of five years after termination for any reasons". The June 9 agreement further provided that "[t]he current recognized client of Rhina is *GTE Card Services*. This restriction also applies to any new or future clients of Rhina that are disclosed [ ] in writing." (Emphasis added.)

According to Schumacher, he later revealed to Horowitz that another credit card issuer, "Private Issue" was also a Rhina client. Since the parties apparently did not

intend to prohibit CCP from soliciting Private Issue at that juncture, they executed a written "waiver" of the June 9 agreement. The executed waiver permitted CCP to solicit business from Private Issue. However, inasmuch as Rhina itself obtained substantial business from Private Issue (which it then subcontracted out to CCP), the parties later agreed to reinstate the June 9 prohibition against solicitation with respect to Private Issue.

By letters dated October 8 and 9, 1998, the parties reconfirmed their June 9 nonsolicitation agreement to the extent that CCP then agreed that it would not "solicit or accept business from Private Issue or **any affiliate of Private Issue** * * * in accord with the terms of the [June 9] Confidentiality/Nonsolictation Agreement". (Emphasis added). Notably, the underlying June 9 agreement made no mention of extending the scope of the nonsolicitation provision to "affiliates" of identified clients, although, according to Schumacher, it was common knowledge that Discover Card was an affiliate of Private Issue.

It is undisputed that Horowitz had maintained a prior business relationship with Discover Card before CCP entered into the Rhina subcontract. Although Rhina also claims that it maintained a relationship with Discover Card prior to the execution of the subcontract, it did not perform college tabling services for cards issued by that entity. CCP thereafter performed the GTE subcontract and collected substantial numbers of applications through its tabling solicitations.

It is undisputed that in December, 1998, Horowitz and Whiton met with representatives of Discover Card for the purpose of expanding their business with that entity, and informed these representatives that CCP had "managed" the GTE program.

When Stumacher learned about the Discover Card meeting, he orally terminated the CCP subcontract and withheld payment of some $300,000 in invoices billed by CCP in connection with the GTE solicitation program. The payments were withheld based upon the claimed existence of a "set off" for lost profits allegedly attributable to CCP's solicitation of business from Discover Card – an alleged affiliate of Private Issue.

According to Horowitz, however, prior to canceling the subcontract, Stumacher had concocted a scheme to eliminate CCP from the GTE job by recruiting, among others, CCP employee Joseph Corvea and independent contractor Bernie Benson, so that Rhina would possess the technical expertise to perform the tabling program itself. After Rhina terminated the CCP subcontract in December, 1998, it continued to do business with GTE until June, 2000. Notably, both Corvea and independent contractor Bernie Benson signed two year, noncompetiton/nonsolicitation agreements with CCP and Elite in March and September, 1998 respectively. Both men became employees of Rhina in December, 1998.

In early 1999, American Student Listing ("ASL") solicited and obtained business from GTE. ASL lacked the experience and ability to conduct on site tabling. Thereafter, ASL entered into a contract with Elite pursuant to which Elite solicited credit

card applications for ASL on GTE's behalf. Although Horowitz attended a meeting at GTE's offices with ASL's president, Martin Lerner, the meeting occurred only after ASL had already obtained an agreement with GTE.

Thereafter, Plaintiffs Elite and CCP commenced Action No 1 (Index No. 1474/99) against Stumacher, Rhina, Benson, Corvea, and Corvea's company, All World Promotions, Inc, ("All World") alleging, among other things, misappropriation of trade secrets, unfair competition and breach of the restrictive covenants contained in the Corvea/Benson agreements.

Rhina subsequently commenced Action No. 2 (Index No. 99/7428) against Elite, CCP, Horowitz and Whiton alleging breach of the June and October, 1998 solicitation agreements. The two actions were consolidated for joint trial. By decision and order dated April 9, 2002, this Curt granted summary judgment dismissing the action as to named Defendants Corvea, Benson and All World Promotions, Inc.

RELEVANT DOCUMENTS

The agreement between Rhina and CCP whereby CCP solicited credit card applications for GTE was never reduced to a single writing. The operative documents are the Confidentiality/Non-Solicitation Agreement signed by Howard Horowitz dated June 8, 1998, the Confidentiality/Non-Solicitation Agreement signed by Brett Whitton dated June 8, 1998, the Authorization to Proceed dated August 21, 1998, the modification of the Authorization to Proceed dated October 1, 1998, and the

modifications to the Confidentiality/Non-Solicitation Agreement by letters dated October 8, 1998 and October 9, 1998.

The Authorization to Proceed dated August 21, 1998 makes very clear that the parties have not reached a full, formal agreement in that it provides, "The parties have reached agreement on many of the terms and conditions of the proposed business arrangement described and desire to resolve the remaining outstanding issues and document the arrangement in a formal definitive contract to be executed on or before October 31, 1998." The Authorization to proceed then sets forth the terms of CCP's compensation, the number of applications CCP is to solicit, the compensation CCP is to receive for each application solicited, the manner in which CCP is to bill and be paid for its services and the services to be furnished by Rhina in connection with the tabling campaign. The Authorization to Proceed further provided that agreement would end on October 31, 1998 or upon 30 days written notice of either party to the other terminating the agreement.

The October 1, 1998 modification agreement amended the August 21, 1998 Authorization to Proceed by changing the terms of the compensation to be paid to CCP, increasing the number of applications to be solicited by CCP and by extending the length of the terms of the Authorization to Proceed until the end of the Fall Semester, 1998 or until CCP had solicited 247,000 applications, which ever occurred first. The Fall Semester 1998 ended on December 31, 1998.

The Confidentiality/Non-Solicitation Agreements prohibited CCP, Horowitz and Whitton from using any information confidential obtained from Rhina in connection with the GTE contract and prohibited CCP, Horowitz and Whitton from soliciting directly or indirectly any of Rhina's disclosed clients for advertising program during the contract with Rhina or for a period of five (5) years after the termination of the contract.

CCP submitted invoices for the solicitation of credit card applications which Rhina concededly did not pay. The outstanding balance due is $305,933.00. The authorization to Proceed obligated Rhina to pay the amount due within 30 days of the receipt of the invoice unless Rhina determined that the invoice or the supporting documentation was incomplete or inaccurate.

The agreement between CCP and Rhina was to expire at the end of the Fall, 1998 semester which was defined as December 31, 1998. However, Stumacher asserts that he terminated the contract orally on December 8, 1998 when he learned that Horowitz had been soliciting business from Discover Card.

CCP completed its work for Rhine prior to December 8, 1998, but did not forward its final invoices to Rhina for payment until January 7, 1999. Rhina refused to pay these invoices asserting that CCP, Horowitz and Whitton had violated the Confidentiality/Non-Compete Agreement by soliciting business from Discover Card. The Court has previously, by decision and order dated April 9, 2002, concluded that the

solicitation of business by CCP, Horowitz and Whitton from Discover Card did not constitute a violation of the Confidentiality/Non-Compete Agreement.

By agreement dated April 1, 1999, ASL was retained by GTE as a marketing representative to solicit applications for its College Visa cards. ASL retained Elite to perform its on site tabling.

Elite solicited 305,203 applications for GTE credit cards in connection with its contract with ASL for which it was paid $7.25 per application.

Rhina asserts that the solicitation of business and the performance by Elite of the contract with ASL constitutes a violation fo the Confidentiality/Non-Compete Agreement for which it is entitled to damages or a set-off of the money allegedly due to CCP. Rhina alternatively seeks a set-off for money paid directly to persons who solicited credit card applications on behalf of CCP.

CCP asserts that it could solicit GTE work either directly or indirectly because Rhina had violated its agreement with CCP.

DISCUSSION

Contracts signed at separate times are generally viewed as separate agreements "unless the history and subject matter show them to be unified." Ripley v. Internat'l Railway of Central America, 8 N.Y.2d 430 (1960). Whether the parties intend to treat agreements executed at different times as a single agreement or as mutually dependent agreements is a question of fact. When determining if the agreements are

to be viewed as separate or as one agreement, the primary consideration is the intent of the parties viewed by the circumstances surrounding the transaction. Rudman v. Cowles Communications, Inc., 30 N.Y.2d 1 (1972); and Nancy Neale Ent., Inc. v. Eventful Ent., Inc., 260 A.D. 2d 453 (2nd Dept.1999). In making this determination, the Court should consider whether the agreements were part of the same transaction and if the parties, for practical purposes were the same. Nancy Neale Ent., Inc. v. Eventful Ent., Inc., *id.*

A reading of the Confidentiality/Non-Solicitation Agreements, the Authorizations to Proceed and the letter agreement modifying same demonstrate that it was the intent of the parties that they be read as one overall agreement. These agreements were all signed as part of one transaction whereby Rhina retained the services of CCP to solicit credit card applications for GTE. The Authorization to Proceed dated August 21, 1998, clearly states that the parties were to enter into a full, formal contract regarding the parties' relationship. Furthermore, the Confidentiality/Non-Solicitation Agreements indicate that they are being signed in connection with CCP being retained to engage in campus tabling activities. Therefore, the various documents signed by the parties should be viewed as a single agreement. The Confidentiality/Non-Solicitation agreement makes no sense if it is not read in conjunction with the Authorization to Proceed. There would be no purpose and no consideration for the Confidentiality/Non-

Solicitation agreement if it is not read as one agreement in conjunction with the Authorization to Proceed.

Under the terms of the agreement, Rhina was to be billed weekly. Payment was due within 30 days of receipt of the of receipt of the invoice unless Rhina determined that the invoice or the related documentation (transmittal forms and applications) were incomplete or inaccurate. Payment could be withheld only as to the disputed amount. Payment of the undisputed amount was to be made in accordance with the terms of the agreement.

The Authorization to Proceed also provided that the agreement could be cancelled by either party upon 30 days written notice to the other party of its intent to cancel the contract. Rhina cancelled the contract orally. However, the agreement terminated by its own terms, as of the end of the Fall 1998 Semester; December 31, 1998.

Where an agreement is clear and unambiguous on its face, it must be enforced in accordance with the plain meaning of its terms. Greenfield v. Philles Records, Inc., 98 N.Y.2d 562 (2002); and W.W.W. Assoc. v. Giancontieri, 77 N.Y. 2d 157 (1990). See also, Gassman v. Rothkin, 275 A.D. 2d 731 (2nd Dept. 2000). In this case, the agreement is clear and unambiguous on its face; CCP was to be paid within 30 days of submission of its invoices. There is no claim that the applications or invoices were incomplete and/or inaccurate. In addition, the contract could be terminated only by

written notice. Therefore, Rhina breached the contract it had with CCP in that it did not pay invoices within 30 days and did not cancel the contract in writing.

Restrictive covenants are disfavored and will be enforced to the extent that they are limited temporally and geographically and to the extent necessary to protect the trade secrets and confidential customer information. BDO Seidman v. Hirshberg, 93 N.Y.2d 382 (1999); Steipleman Coverage Corp. v. Raifman, 258 A.D.2d 515 (2nd Dept. 1999). Such covenants will be enforced only to protect against the misappropriation of trade secrets or confidential customer lists or to protect from competition by a former employee whose services are unique or extraordinary. Reed Roberts Associates, Inc. v. Strauman, 40 N.Y.2d 303 (1976). See also, Michael I. Weintraub, M.D., P.C. v. Schwartz, 131 A.D.2d 663 (2nd Dept.1987). The ready availability of the information which Rhina claims to be a trade secret negates the enforceability of the confidentially agreement. See, Frederic M. Reed & Co., Inc. v. Irvine Realty Grp., Inc., 281 A.D. 2d 352 (1st Dept. 2001). This is especially true when the testimony revealed that CCP and Elite had a long standing, prior relationship with Private Issue/Discover Card.

Additionally, a party who has breached the contract cannot enforce the provisions of a restrictive covenant contained in that contract. Cornell v. T.V. Development Corp., 17 N.Y.2d 69 (1966). See also, DeCapua v. Dine-A_Mate, Inc., 292 A.D.2d 489 (2nd Dept. 2001); and Michael I. Weintraub, M.D., P.C. v. Schwartz, *supra*.

Rhina breached its contract with CCP by failing to pay the invoiced amounts when they became due and payable. These invoices were submitted for payment on January 7, 1999. Therefore, payment of these invoices was due no later than February 6, 1999, which is thirty (30) days after these invoices were submitted.

Rhina's contention that it did not pay these invoices because CCP breached its contract with Rhina by soliciting business from GTE with ASL is without merit. ASL did not begin soliciting business from GTE until February, 1999, which is after Rhina had breached its contract with CCP. Horowitz did not become involved in the negotiation and solicitation or business by ASL with GTE until after Rhina had failed to timely pay the final invoices submitted by CCP. Therefore, by the time Horowitz became involved in the negotiations between ASL and GTE, Rhina was in default under the terms of its contract with CCP. Since Rhina was in default under the terms of the contract with CCP, enforcement of the Confidentially/Non-Solicitation agreement is denied.

In addition, Rhina signed an agreement with GTE whereby Rhina was retained as a nonexclusive marketing agent for the GTE College Visa credit cards. The information necessary to permit Rhina to conduct this marketing campaign was furnished to it by GTE. This information was made available by GTE to all of the marketing representatives it retained to perform similar services.

In order for client information to be considered confidential, the customers must not be known in the trade and must have been secured and developed through the

expenditure of significant time and money. See, e.g., Leo Silfin, Inc. v. Cream, 29 N.Y.2d 387 (1972). See also, Laro Maintenance Corp. v. Culkin, 255 A.D. 2d 560 (2nd Dept. 1998); and Town & Country House & Home Service, Inc. v. Newberry, 3 N.Y. 2d 554 (1958). The information provided by Rhina to CCP to perform the contract does not meet this test. The information was not secured or developed by Rhina through the expenditure of significant time or money. Such information was provided to Rhina by GTE in order to permit Rhina to engage in a marketing campaign on behalf of GTE. It was not developed by Rhina through the expenditure of time or money. This information was not proprietary to Rhina. See, Atmospherics, Ltd. v. Hansen, 269 A.D. 2d 343 (2nd Dept. 2000).

Since the Court has concluded that Rhina was in breach of its contract with CCP, the Confidentiality/Non-Compete Agreement is unenforceable. Rhina may not recover any damages for CCP, Elite or Horowitz alleged breach of that agreement. The sole cause of action which went to trial in Action No. 2 was the cause of action alleging that Rhina breached its contract with CCP. Therefore, the judgment in this action shall be solely in favor of CCP and against Rhina. Although Elite is named as a Plaintiff, it seeks no recovery in the remaining cause of action.

While Stumacher and All World Promotions, Inc. remain as Defendants, the sole cause of action upon which recovery is obtained does not warrant recovery against these Defendants. Furthermore, the evidence establishes that Stumacher was acting

solely in his capacity as President of Rhina in connection with these transactions. He did not personally guarantee Rhina's performance and was not a party in his individual capacity to the breached contract.

The parties in their Stipulated Facts agree that the sum of $305,933.00 is due and owing from Rhina to CCP and in closing arguments conceded that this amount was due as of February 7, 1999. This amount is due and owing under the sole remaining cause of action in Action No. 1, breach of contract by Rhina of its contract with CCP. CCP is entitled to judgment against Rhina in the sum of $305,933.00 with interest from February 7, 1999 in Action No. 1. Action No. 2 must be dismissed.

Settle judgment on ten (10) days notice.

Dated: Mineola, NY
March 3, 2003

Hon. LEONARD B. AUSTIN, J.S.C.