

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

R&G BRENNER INCOME TAX
CONSULTANTS,

Plaintiff,

INDEX No. 016901/11

MOTION DATE: Dec. 21, 2011
Motion Sequence # 001

-against-

RICHARD GILMARTIN,

Defendant.

The following papers read on this motion:

Order to Show Cause..... X
Affidavit in Opposition..... XX
Affirmation in Support..... X
Emergency Affirmation in Support..... X
Reply Affirmation/Affidavit..... XX

Motion by plaintiff R & G Brenner Income Tax Consultants for a preliminary injunction is **granted** to the extent indicated below.

This is an action against a former employee to enforce a covenant not to compete. Plaintiff R & G Brenner Income Tax Consultants is engaged in the business of preparing tax returns, financial planning, and other services. R & G Brenner's principal office is in Valley Stream, and it maintains approximately 30 other offices in New York City and the surrounding area.

Defendant Richard Gilmartin worked for R & G Brenner as a tax return preparer from January 2006 through November 9, 2011. Gilmartin was primarily assigned to the M-1 office, which is located at 835 Second Avenue in Manhattan. According to Gilmartin, he was the only CPA employed by R & G Brenner and the only tax preparer authorized to represent clients at IRS audits.

Each year that Gilmartin was employed, he signed an annual "General Employee Tax Preparation Agreement," covering the "tax season," which runs from January 1 to April 30 each year. From 2009 to 2011, Gilmartin also worked for R & G Brenner during the "off season," or balance of the year, presumably according to the same terms and conditions set out in the general employee agreement.

In addition to the employee agreement, Gilmartin signed a "confidentiality non-solicit and non-compete agreement." In the non-compete agreement, the employee acknowledges that R & G Brenner "expends vast amounts of time, energy and monies in attracting, developing, and maintaining its clientele..." Thus, the employee agrees not to "solicit, contact, [or] meet with" any Brenner client for a period of two years after the termination of his employment. The employee also agrees not to own or be employed by an "income tax preparation office" within a three mile radius of the Brenner office where he worked, or within one mile if the office was located in New York City, for a period of two years after the termination of employment.

Gilmartin resigned from R & G Brenner on November 9, 2011. R & G Brenner alleges that prior to his departure Gilmartin downloaded confidential, proprietary information from Brenner's computer system, including presumably the names, addresses and phone numbers of Brenner clients.

This action was commenced on December 2, 2011. Plaintiff seeks a declaratory judgment that Gilmartin breached the restrictive covenant in the general tax preparation agreement and also a permanent injunction restraining Gilmartin from further breaches and "otherwise competing" with Brenner.

By order to show cause dated December 5, 2011, R & G Brenner seeks a preliminary injunction enjoining Gilmartin from possessing its records, specifically including those related to clients serviced by Gilmartin while he worked for Brenner. R & G Brenner also seeks to restrain Gilmartin from soliciting Brenner clients and otherwise competing with Brenner within the geographical and temporal limits of the restrictive covenant.

Nevertheless, in its affidavit in support of motion, plaintiff states that it does not challenge the location of Gilmartin's tax preparation office (Aff of Benjamin Brenner at ¶ 3). In the order to show cause, the court temporarily restrained defendant from keeping Brenner's records or soliciting its clients.

In opposition to the motion for the preliminary injunction, Gilmartin asserts that another Brenner tax preparer, Joseph Gallagher, has been charged with tax fraud in connection with his own returns. Gilmartin also asserts that Gallagher committed fraud in connection with partnership returns prepared for Brenner clients by claiming fictitious partnership losses. Although R & G Brenner fired Gallagher in May 2009, Gilmartin claims that Gallagher's misconduct was the reason for his resignation from Brenner. More to the point, Gilmartin asserts that he continues to represent hundreds of former R & G Brenner clients who had IRS audits pending. Gilmartin argues that requiring these clients to retain another tax preparer to represent them before the IRS would be prejudicial to those clients.

Non-compete clauses in employment contracts are not favored and will be enforced to the extent reasonable and necessary to protect valid business interests (*Morris v Schroeder Capital*, 7 NY3d 616, 620 [2006]). 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 (*BDO Seidman v Hirschberg*, 93 NY2d 382, 388 [1999]). A restrictive covenant will be subject to specific performance only to the extent that it is reasonable in time and area (Id).

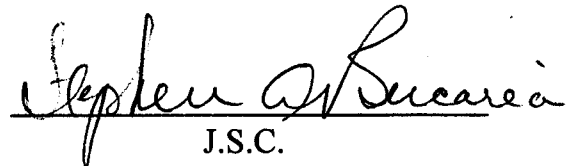
The tax preparation services offered by R & G Brenner do not appear to be unique. Nevertheless, because of Brenner's substantial advertising budget, and the tendency of taxpayers to use the same preparation service from year to year, Brenner has a valid business interest in the identity of its clients. Moreover, the one mile New York City radius and the two year temporal restriction appear to be reasonable. However, the court determines that it would be injurious to the public for R & G Brenner clients who are presently represented by Gilmartin before the IRS to be required to obtain other accountants.

Accordingly, plaintiff's motion for a preliminary injunction is **granted** only to the extent that defendant is preliminarily enjoined from soliciting any former R & G Brenner client who does not have an IRS audit pending. Additionally, defendant is preliminarily restrained from keeping or maintaining any R & G Brenner business records, whether in electronic format or otherwise, except to the extent necessary to defend pending IRS audits with respect to former R & G Brenner clients.

A Preliminary Conference has been scheduled for March 23, 2012 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Dated **FEB 21 2012**


J.S.C.

ENTERED
FEB 23 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE