

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

OMNEX ENGINEERING AND MANAGEMENT, INC.,

Plaintiff,

v

Case No. 2015-150187-CB
Hon. Wendy Potts

NICK YAMBURA,

Defendant.

OPINION AND ORDER RE:
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

At a session of Court
Held in Pontiac, Michigan On
DEC 30 2015

This matter is before the Court on Plaintiff's Motion for Preliminary Injunction to Enforce Employment Agreement.

By way of background, Defendant Nick Yambura was hired by Plaintiff Omnex Engineering and Management, Inc. as its Director of Sales, commencing January 31, 2014. On that date, Defendant executed an Employment Agreement that contained a provision prohibiting him from competing with Plaintiff or soliciting Plaintiff's current clients for a period of one year following termination. Specifically, the non-competition provision provides that "during Employee's employment and for a period of one year following termination, Employee shall not own, manage, operate, control, be employed by, participate in, or be connected with any company whose business activity is competitive with OMNEX's business activities at the time of termination; shall not solicit any current clients of OMNEX or perform services similar to those

offered as an OMNEX employee; and shall not use any Work For Hire, Copyright Materials, Technology Materials, or Confidential Information which Employee created, had access to or acquired knowledge of by employment with OMNEX, for Employee's benefit, or for a competitor's benefit." The non-competition provision also prohibits Defendant from working for Plaintiff's clients in a similar capacity for a period of three years.

On September 2, 2015, Plaintiff notified Defendant that his employment would be terminated, effective September 16, 2015. Plaintiff now claims that Defendant formed Daetec Group, LLC (Daetec) on September 1, 2015 and thereafter, engaged in direct competition with Plaintiff. Through Daetec, Defendant allegedly contacted and solicited business from Plaintiff's customers in violation of his Employment Agreement. As a result, Plaintiff is seeking injunctive relief against Defendant.

When determining whether to grant injunctive relief, a Court must consider: (1) whether the applicant will suffer irreparable injury if the injunction is not granted; (2) the likelihood that the applicant will succeed on the merits; (3) whether harm to the applicant in the absence of relief outweighs the harm to the opposing party if the injunction is granted; and (4) the harm to the public if the injunction issues. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998).

Irreparable Injury

While in the employ of Daetec, Defendant allegedly contacted and solicited business from Omnex customers in violation of the non-competition provision in his Employment Agreement. Plaintiff submits the Affidavit of Michael Sinclair, Plaintiff's Office Manager, to support its assertion that Defendant contacted one of Omnex's contractors, Miroslav Kupec, on at least one occasion to solicit his consulting services on behalf of Daetec. In addition, Michael

Sinclair contends that Defendant contacted and solicited business from Plaintiff's customers, namely O'Sullivan Films, McGard LLC, Pittsburgh Glass Works, ULC, and SGS North America, Inc., following his termination from Omnex.

Michael Sinclair also indicated in his Affidavit that Defendant submitted work proposals or bids in October 2015 to Plaintiff's existing customers, Hitachi Cable America, Textron, and Kautex, for services that were in direct competition to those services offered by Plaintiff. It is Plaintiff's understanding that Kautex will no longer utilize Omnex services on account of statements made by Defendant. Consequently, Plaintiff argues that it has lost at least one customer as a result of Defendant's breach of his obligations under the Employment Agreement. Plaintiff claims further that its business relationships with other customers have also been jeopardized on account of Defendant's actions.

In consideration of the parties' respective arguments and the Affidavit of Michael Sinclair, Plaintiff has demonstrated that it is likely to suffer irreparable harm if Defendant is not enjoined from soliciting Plaintiff's customers, which could potentially subject Plaintiff to additional loss of customer goodwill in the near future. "The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute. Similarly, the loss of fair competition that results from the breach of a non-competition covenant is likely to irreparably harm an employer." *Basicomputer Corp. v Scott*, 973 F.2d 507, 512 (6th Cir. 1992).

In terms of direct competition with Plaintiff, Defendant indicates that he no longer works for Daetec, but currently operates a business where he teaches and advises other businesses in the implementation of business operations standards as well as business specific standards developed

and owned by third-parties. The Court observes from the Employment Agreement that Omnex's business activities include, but are not limited to, training in the areas of business operating systems, process review and standardization, and ISO 9000, GM, Ford, and Chrysler standards compliance. The Court concurs with Plaintiff's position that Defendant, through his current business venture, appears to be directly competing with Plaintiff's business activities in violation of the non-competition provision in the Employment Agreement. As such, the Court finds that Plaintiff has satisfied the irreparable harm element to warrant injunctive relief.

Likelihood of Success on Merits

Plaintiff asserts, and the Court agrees, that it is likely to prevail on the merits of its claim that Defendant breached the non-competition provision within the Employment Agreement. The Affidavit of Michael Sinclair supports Plaintiff's contention that Defendant solicited its contractor and customers in violation of the non-competition provision. Moreover, Defendant's veracity has been called into question by Jennifer Moore, the sole member of Daetec, who maintains in her Affidavit that Defendant was merely an independent contractor for the company and not the Vice President of Client Relations as misrepresented by Defendant on his LinkedIn page.

The Court is mindful of the fact that the subject non-competition provision within the Employment Agreement does not identify a clear geographical scope as required by statute. MCL 445.774a(1) provides that "an employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and

the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.”

Accordingly, the Court relies on the Court of Appeals’ endorsement of a reasonable, 100 mile geographical scope. *Coates v Bastian Bros., Inc.*, 276 Mich App 498, 507-08; 741 NW2d 539 (2007). The Court shall reform Defendant’s non-competition provision within the subject Employment Agreement by limiting the geographical scope to one hundred (100) miles of any business location of Plaintiff. The Court’s reformation of the non-competition provision as to geographical scope subsequently renders the Employment Agreement reasonable in its protection of Plaintiff’s competitive business interests.

Weight of Harm

Should the Court award Plaintiff the requested injunctive relief, Defendant’s business activities may be severely restricted to comply with the non-competition provision. However, Plaintiff stands to lose customer good will if Defendant is not enjoined from competing with Plaintiff or from soliciting Plaintiff’s current clients as agreed upon in the Employment Agreement. The Court finds that the weight of harm to Defendant if the injunction is granted does not outweigh the harm to Plaintiff in the absence of relief.

Potential Harm to the Public

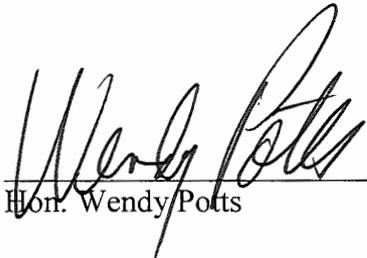
The public has no apparent interest in this private dispute and would not be adversely affected by an injunctive order.

For the reasons stated herein, the Court shall grant Plaintiff's Motion for Preliminary Injunction to Enforce Employment Agreement. The parties must confer on the form of the order and attempt to come to an agreement within seven days. If the parties cannot agree, Plaintiff may e-file a proposed order.

IT IS SO ORDERED.

Dated:

DEC 30 2015



Hon. Wendy Potts