

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

FINANCIAL ADVISORY CORP.,
a Michigan corporation,

Plaintiff,

Case No. 14-08806-CKB

vs.

HON. CHRISTOPHER P. YATES

JEFFREY JANSON,

Defendant.

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OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION

This case involves the most obvious breach of an employment agreement that the Court has ever seen. In a nutshell, Defendant Jeffrey Janson spent the last several weeks of his lengthy tenure with Plaintiff Financial Advisory Corp. (“FAC”) setting up a new job with a competitor and taking the steps necessary to ensure that many of his clients followed him to his new employer. As a result, more than 25 clients accounting for tens of millions of dollars in assets under management promptly moved their portfolios to Janson’s new employer, Summit Wealth Partners, Inc. (“Summit”), almost as soon as Janson himself made the transition to Summit. Now, the Court must decide how best to address Janson’s breach of his employment agreement with FAC.

I. Factual Background

For nearly twenty years, Defendant Janson worked for Plaintiff FAC as a financial planner. Although Janson had executed an employment agreement at the outset of his tenure with FAC, he signed a new employment agreement on June 5, 2007, see Hearing Exhibit 1, and then he signed a restrictive stock transfer agreement on April 30, 2008, in conjunction with his purchase of FAC stock

at the behest of FAC's principal, Paul Anthes. Both of those agreements contained some restrictive covenants. The employment agreement not only bound Janson to "devote his full time, best efforts, and skill to all duties arising out of the employment" with FAC, see Hearing Exhibit 1, § 1, but also barred him from undertaking many of the actions that occurred shortly before he left FAC and after he departed. For example, the employment agreement provided that Janson would "not undertake the planning or organization of any business activity competitive with the work he performs for the Company[.]" *i.e.*, FAC. See id., § 8. The employment agreement precluded Janson from taking such items as "client lists, the contents of all client files or other information concerning clients" from FAC. See id., § 10. The employment agreement also contained a "covenant not to compete" stating that, for two years after his departure from FAC, Janson would "not contact any current or former clients of" FAC. See id., § 11(b). Finally, the employment agreement obligated Janson "to provide [FAC] with 60 days' written notice of termination when circumstances permit[.]" See id., § 13(c). Janson flagrantly violated every single one of those obligations.

To his credit, Defendant Janson admitted under oath that he committed most of the breaches alleged by Plaintiff FAC. That is, Janson conceded that he took client information from FAC, that he advised FAC clients about his move to Summit, that he worked with Summit on scripted answers for FAC clients, that he orchestrated his move to Summit while still employed by FAC, and that he gave FAC no prior notice of his plans to leave FAC in order to take a position at Summit. Moreover, Janson apparently furnished a wealth of documents to FAC during the initial phase of this litigation, thereby enabling FAC to document all of the breaches that the Court has described. As a result, the Court must choose the appropriate form of relief to address the flagrant breaches in light of Janson's eventual cooperation in establishing all that he did to his former employer.

II. Legal Analysis

In requesting injunctive relief, Plaintiff FAC must shoulder “the burden of establishing that a preliminary injunction should be issued[.]” See MCR 3.310(A)(4). An injunction “represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity.” Davis v Detroit Financial Review Team, 296 Mich App 568, 613 (2012). Our Court of Appeals “has identified four factors to consider in determining whether to grant a preliminary injunction.” Id. Those four factors are as follows:

(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

Davis, 296 Mich App at 613. In analyzing these four considerations, the Court must bear in mind that injunctive relief is only appropriate if “there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.” Id. at 614.

A. Likelihood of Success on the Merits.

Plaintiff FAC manifestly has established a likelihood of success on the merits. Indeed, as the Court has observed, Defendant Janson admitted that he took client information from FAC, advised FAC clients about his move to Summit, worked with Summit on scripted answers for FAC clients, orchestrated his move to Summit while still employed by FAC, and gave FAC no prior notice of his plans to leave FAC in order to take a position at Summit. These actions violated a whole collection of provisions in Janson’s employment agreement, including the obligation of loyalty, see Hearing Exhibit, § 8, the ban on taking company property, see id., § 10, the covenant not to compete, see id.,

§ 11(b), and the termination-upon-notice provision. See id., § 13(c). Although the Court recognizes that Janson had good reasons to feel disgruntled in his employment at FAC, his discontent did not liberate him from the pellucid terms of his employment agreement. “Agreements not to compete are permissible under Michigan law as long as they are reasonable.” Thermatool Corp v Borzym, 227 Mich App 366, 372 (1998); see also MCL 445.774a(1). The employment agreement here passes the test of reasonableness. Indeed, the employment agreement afforded Janson the freedom to work in his chosen industry anywhere outside “a 100-mile radius of the City of Grand Rapids” as long as he did “not contact any current or former clients of” FAC. See Hearing Exhibit 1, § 11(a) & (b). In an industry where client loyalty gives financial planners extraordinary sway over their employers’ client bases, the modest restrictions in Janson’s employment agreement seem perfectly justifiable. Indeed, under Michigan law, noncompetition agreements can be used to prevent employees from exploiting their good will by taking clients from their former employer to their new employer. E.g., Rooyakker & Sitz, PLLC v Plante & Moran, 276 Mich App 146, 158 (2007); St Clair Medical, PC v Borgiel, 270 Mich App 260, 266 (2006). Thus, FAC’s success on the merits of its claim against Janson for breach of his employment agreement appears inevitable.

B. Irreparable Harm.

Under settled Michigan law, “a party need[s] to make a particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction.” Michigan Coalition of State Employee Unions v Civil Service Comm’n, 465 Mich 212, 225 (2001). “The mere apprehension of future injury or damage cannot be the basis for injunctive relief.” Pontiac Fire Fighters Union Local 376 v City of Pontiac, 482 Mich 1, 9 (2008). Moreover, “relative deterioration of competitive

position does not in itself suffice to establish irreparable injury.” Thermatool Corp, 227 Mich App at 377. But in this case, almost as soon as Defendant Janson moved from Plaintiff FAC to Summit, approximately 25 of Janson’s FAC clients migrated to Summit. This loss of business – coupled with the prospect of significant additional erosion of FAC’s client base – supports a finding of irreparable harm. See Performance Unlimited, Inc v Questar Publishers, Inc, 52 F3d 1373, 1382 (6th Cir 1995).

C. Balance of Harm to the Opposing Parties.

In assessing the relative harm to the opposing parties in the presence or absence of injunctive relief, see Davis, 296 Mich App at 613, the Court recognizes that broad injunctive relief prohibiting Defendant Janson from contacting any former client of FAC would probably cost Janson his job at Summit, even though the clients who have already left FAC probably would not return to FAC if they could no longer deal with Janson at Summit. Therefore, the balance of harm tips decidedly in favor of allowing Janson to maintain contact with his current client base at Summit. In contrast, any further erosion of the FAC client base seems unnecessary to enable Janson to remain employed with Summit, but such erosion could devastate FAC. Consequently, the balance of harm militates against allowing Janson to contact clients who still remain in the FAC fold.

D. Potential Harm to the Public Interest.

In considering potential harm to the public interest, the Court must take into account the right of Plaintiff FAC’s clients to move their business elsewhere following Defendant Janson’s departure. No investment agency enjoys a guarantee of agency-client relationships in perpetuity. Accordingly, the Court lacks the authority to enter any injunctive order that unduly restricts the options of FAC’s clients to shop around as they see fit. But the Court can restrict the ability of Janson to reach out to

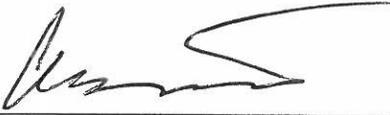
the remaining FAC clients. Indeed, such a restriction may constitute the only method of protecting the legitimate business interests of FAC. Thus, the Court must strike a balance between restricting Janson's actions and enabling FAC's clients to pursue their own business preferences.

III. Conclusion

The Court's decision to impose a carefully tailored injunction in this case springs from two competing concerns. On one hand, Defendant Janson blatantly violated his employment agreement in the course of leaving Plaintiff FAC for Summit and taking many FAC clients with him. On the other hand, those clients seem satisfied and well-served at Summit, so they appear unlikely to return to FAC even if the Court cuts off communications between those clients and Janson. In addition, Janson's conduct since the initiation of this litigation suggests that Janson will abide by the terms of any injunctive order entered by the Court. Therefore, for all of the reasons stated in this opinion, **IT IS ORDERED that Defendant Jeffrey Janson is prohibited and enjoined from retaining, using, or disclosing any client information he obtained in his capacity as an employee of FAC. IT IS FURTHER ORDERED that Defendant Jeffrey Janson is prohibited and enjoined from having contact with any current client of FAC until July 29, 2016, or until further order of the Court, whichever comes first. IT IS FURTHER ORDERED that the temporary restraining order entered on September 22, 2014, is hereby dissolved.**

IT IS SO ORDERED.

Dated: October 21, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge