COMMERCIAL LITIGATION

Courts Narrow Non-Compete Agreements to Protect Legitimate Business Interests Only

By Jeffrey Basso

There has been an aggressive push over the past couple of years by state legislators around the country and the federal government to enact legislation prohibiting or limiting the use of non-compete agreements by employers. One such bill, entitled the Workplace Mobility Act, was introduced in the U.S. Senate in late April 2018 and seeks to, among other things, prevent employers from "enter[ing] into, enforc[ing], or threaten[ing] to enforce a covenant not to compete with any employee of such employer, who in any workweek is engaged in commerce or in the production of goods for commerce." Locally, the New York City legislature introduced a bill in 2017 that seeks to prohibit the use of non-compete agreements for "low-wage employees," and would require employers to notify potential employees of any requirement to enter into a covenant not to compete *prior* to hiring the employee.

With potentially impactful legislation looming, courts continue to be highly critical of non-compete agreements. A recent decision from the Supreme Court in Westchester County illustrates the courts' focus on ensuring that non-compete provisions are narrowly tailored to serve only the company's legitimate business interests.

In *Cindy Hoffman, D.O., P.C. v. Raftopol* (J. Ruderman), the court dealt with a familiar scenario of the enforcement of a non-compete agreement in the medical field. The "curveball" in this case, however, is that the court was not dealing with a physician leaving a practice to compete elsewhere, but rather a physician's assistant who left to work for a competitor. Defendant, Caroline Raftopol ("Raftopol"), a physician's assistant, was hired in 2012 by plaintiff Cindy Hoffman, D.O., P.C. ("Hoffman P.C."), a dermatology practice with three locations in Westchester, Dutchess, and Putnam counties. Upon hiring, Raftopol was required to sign a non-compete agreement that prohibited her from being employed by a competitor within 15 miles of any Hoffman P.C. location for two years following the end of her employment. Raftopol ultimately resigned from her position in May 2017 and, in Sept. 2017, Hoffman P.C. learned that Raftopol was working for a competitor within the geographic restriction set forth in the non-compete agreement. Litigation ensued with Hoffman P.C. seeking a preliminary injunction to prevent Raftopol's further employment with the competitor.

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On its face, the court found the duration and geographic scopes of the non-compete restrictions to be reasonable and noted that other courts had upheld similar restrictive covenants. However, the court also noted that such cases typically dealt with physicians working for competitors and, under such circumstances, courts have given wider latitude to restrictive covenants because they involve a professional of a learned profession whose services were considered to be "unique and extraordinary." Thus, the question in *Hoffman* became whether a restrictive covenant that would otherwise be reasonable against a physician was reasonable to protect Hoffman P.C.'s legitimate business interests against a physician's assistant.

Hoffman P.C. argued the restrictions were reasonable against Raftopol because she built a relationship with patients and obtained trade secrets from Hoffman P.C. Under those circumstances, the court noted that the restrictive covenant must be tailored "only to the extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of trade secrets or confidential customer lists." *Columbia Ribbon & Carbon Mfg. v. A-1-A Corp.*, 42 N.Y.2d 496 (1977). In this regard, the court found that there was little support in the record that Hoffman P.C. had any legitimate interest in preventing Raftopol from working with a competitor within 15 miles of Hoffman P.C.'s offices. Specifically, the court held that Hoffman P.C. had not established that Raftopol had either the knowledge or power to impact the company's profitability. There was also no support in the record for Hoffman P.C.'s contention that Raftopol could find similar employment outside of the restrictive area.

With respect to Hoffman P.C.'s concern that Raftopol could solicit patients whose information was otherwise unascertainable, Raftopol conceded that she would not solicit Hoffman P.C. patients but that the restrictions regarding employment with a competitor were causing her severe financial strain. Given Raftopol's concession regarding solicitation, the court ordered that Hoffman P.C.'s motion for a preliminary injunction was denied with the exception that Raftopol could not solicit Hoffman P.C.'s patients for the duration of the two-year period.

In this case, the court was able to narrow down the overly broad restrictive covenant to what was the actual, legitimate business interest of the employer which, in this case, was the solicitation of patients. The court tailored a restriction that suited the employer's needs while not preventing the former employee from employment. While this court was amenable to crafting a tailored restriction, many courts will simply deny the motion for a preliminary injunction in its entirety if the restrictive covenants are too overreaching. With that in mind, when these agreements are being drafted, it is critical for businesses to focus on what the business is really concerned about if this employee leaves the company — and it cannot be anything and everything involving the business. With the continuing push to prohibit or limit these agreements, employers need to adapt and tailor their restrictive covenants to what is truly important to the business.

Note: Jeffrey Basso, an attorney at Campolo, Middleton & McCormick, LLP, represents business owners, corporations, corporate officers, shareholders, and investors in a variety of litigation matters in state and federal court involving business and contractual disputes. Contact Jeff at jbasso@cmmllp.com.

LGBTQ

For Pride Month — An LGBTQ Year in Review

By Honorable Chris Ann Kelley and Christopher J. Chimeri

As we near the close of the second year (as "years" are measured for bar association committees) of the LGBTQ Law Committee's presence in the SCBA, we wanted to describe our experience thus far and share with our readers what is to come. As a brief aside, June was chosen universally for LGBTQ Pride Month to commemorate the Stonewall riots, which occurred at the end of June 1969, which is often recognized as the true "start" of the quest for equal treatment of LGBTQ individuals.

In the committee's inaugural year (2016-2017), we enjoyed several successful events, including the Transcend Legal "Lunch and Learn" CLE program at the Cohalan Courthouse, well-attended monthly meetings, and, in recognition of Pride Month, a first-of-its-kind splendidly attended celebration of diversity in our county with many members of the bench and bar, as well as private and public-sector staff, attending the LGBTQ Pride: Celebrating Diversity event on June 1, 2017. The event was standing-room only, and as this year's upcoming event draws near (more on this below), we expect even more spectacular attendance and supporting celebration of diversity.

Chris Ann Kelley

Christopher Chimeri

Following, we had the pleasure of consulting with friends and colleagues in our neighboring County of Nassau, as the Nassau County Bar Association welcomed the inclusion of an LGBTQ Committee, largely initiated by the bar association's incoming President-Elect Elena Karabatos, a partner in Schlissel Ostrow Karabatos, PLLC, co-chairing with Joseph Milizio, managing partner of Vishnick, McGovern & Milizio LLP with offices in Lake Success, Manhattan and New Jersey. Both committees recently enjoyed a well-attended mixer event that Honu, in Huntington, was very kind to host and provide complimentary appetizers and a beautiful space to socialize and foster ideas for future growth and collaboration.

Also, this year (2017-2018), the committee enjoyed increased participation with its growing membership, as well as tremendous support from the Suffolk Academy of Law in presenting CLE programs. Among those CLE programs was an innovative and informative program surrounding gender identity and the issues encountered by this subset of clients presented in partnership with Charlie Arrowood of Transcend Legal and Suffolk County's own Catherine E. Miller, a private practitioner and highly skilled attorney for children in both Family and Supreme Court. In addition, on June 6, 2018, as part of Pride Month,

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Bench Briefs (Continued from page 4)

tiff from relitigating issues herein already decided by this court and the Second Department. Moreover, the court stated that plaintiff's claims were bared by the statute of limitations, being that the judgment was entered on November 24, 2009, over eight years ago. Finally, the court concluded that plaintiff's claim to suspend the license of the defendant law firm failed to state a cause of action and was subject to dismissal under CPLR §3211(a)(7).

Honorable David T. Reilly

Motion to dismiss for failure to name a necessary party denied; defendant had not sufficiently articulated any theory of liability which would make Ms. Green a necessary party.

In *Amityville Mobile Home Civic Association, Brenda Brnic, Laurie Nevins, for themselves and the membership of the Amityville Mobile Home Civic Association v. William V. Rapp and Arthur Morrison*, Index No.: 14610/2015, decided on May 1, 2018, the court denied the defendant's application to dismiss the complaint for failure to name a necessary party. The court noted that the action sounded in breach of contract and legal malpractice.

Defendant filed the instant motion which sought dismissal of the complaint for failure to join a necessary party. Specifically, the defendant should have had Shelby D. Green, Esq. added as a party defendant inasmuch as she apparently took part in a litigation involving the plaintiff herein. Plaintiff opposed the motion and directed the court to deposition testimony wherein defendant testified that he was not involved in the litigation wherein Ms. Green was counsel to one of the parties. The court found that inasmuch as defendant had not sufficiently articulated any theory of liability which would make Ms. Green a necessary party, joinder was inappropriate.

Motion to dismiss denied; preliminary conference order not signed by a justice of the court.

In *Donaldo Villatoro v. Muhammad Babar Butt and Muhammad A. Butt*, Index No.: 6311/2016, decided on Feb. 2, 2018, the court denied the defendants' motion to dismiss for plaintiff's failure to appear for an examination before trial. The court noted that the action was to recover money damages for personal injuries allegedly sustained in a motor vehicle accident, which occurred on July 17, 2015.

According to the defendant, the parties entered into a preliminary conference order, which called for all depositions to take place on July 13, 2016. In denying the motion, the court reasoned that the defendant submitted a copy of a preliminary conference order which was not signed by a justice of the court. Therefore, the court concluded that it could not be said that the plaintiff was in violation of a court order. The court found that in the unopposed allegation by defendant that plaintiff was clearly frustrating the discovery process, and accordingly, directed plaintiff to appear for a deposition.

Honorable Thomas F. Whelan

Motion for summary judgment granted; failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned.

In *Wells Fargo Bank, NA v. John Shea, Lisa Miller, Sunrise Credit Corp., Clerk of the Suffolk County District Court, Capital One bank USA NA, First Financial Investment Fund, III, LLC, Barrister Reporting Service, Inc., Clerk of the Riverhead Town Justice Court, FFPM Carmel Holding, LLC Huntington Hospital Assoc., Teachers Federal Credit Union, Bryan L. Salamone, PC, Brookhaven Memorial Hospital, United States of America, Robert F. Casola, New York State Affordable Housing Corporation, subsidiary of the New York State Housing Finance Agency, People of the State of New York o/b/o University Hospital I/P SUNY at Stony Brook, "John Doe #1" to "John Doe #10," the last 10 names being fictitious and unknown to plaintiff, the person or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint*, Index No.: 14214/2012, decided on Jan. 22, 2018, the court granted plaintiff's motion for summary judgment. The court noted that the instant action was to foreclose a mortgage on real property located in Nesconset.

The defendant defaulted on Jan. 1, 2010. The action was commenced on May 7, 2012. Foreclosure conferences were held with court personnel until Sept. 19, 2014. Once released from the settlement part, plaintiff moved for summary judgment. The defendant, over various adjournments, cross moved to dismiss or for additional discovery. In granting the motion for summary judgment in favor of the plaintiff and denying the defendant's cross motion to dismiss or for additional discovery, the court stated that affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal. Where a defendant fails to oppose some, or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists. In addition, the court concluded that failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without efficacy. The court specifically addressed the first, seventeenth, eighteenth, twentieth and twenty-first affirmative defenses and the first, second and fifth counterclaims and thereafter, the motion for summary judgment was granted.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6 percent of her class. She is a partner at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation, immigration, and trusts and estate matters.

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the Suffolk Academy of Law presents a CLE featuring Charlie Arrowood, Esq. on handling name changes for Trans individuals in a "how to" format for the purpose of teaching practitioners how to handle the matters and to demonstrate in what ways such a matter may present differently than other name change proceedings, as well as very important recent changes in labor and employment law and the Federal Courts' Circuit split on Title VII and its applicability to discrimination against LGBTQ workers, which will be done by Saul D. Zabell, one of the lawyers in the *Zarda v. Altitude Express* case, regarding which I previously wrote in this column.

In addition, former Family Law Professor at Touro Law School, Lewis Silverman, and I will discuss the continued evolution of Family Court standing in custody and visitation cases and the definition of parentage in the wake of the 2016 NYS Court of Appeals case, In the *Matter of Brooke S.B.* and several subsequent and even more progressive cases. This trend itself is cause for celebration.

Statewide, Richard C. Failla LGBTQ Commission of the New York Courts has participated in a growing number of organized educational LGBTQ Pride Month events in Manhattan, Central Islip, Ithaca, Utica, Rochester, Buffalo, and Batavia. This comes in conjunction with Commission Member Honorable Paul G. Feinman having been nominated by Governor Andrew M. Cuomo and confirmed as the first openly gay judge in the history of the New York Court of Appeals in June 2017.

Culminating the year, in recognition of Pride Month, the Honorable C. Randall Hinrichs, Suffolk County District Administrative Judge, the LGBTQ Law Committee of the Suffolk County Bar Association, and the Richard C. Failla LGBTQ Commission of the New York Courts hosted the second annual Pride celebration (mentioned above) entitled: The Faces of LGBTQ Pride in Suffolk County on Wednesday, June 13, 2018 at the John P. Cohalan, Jr. Court Complex. At the celebration, we heard from several of our court officers, court members and lawyers. The program was a welcome departure from the usual "lectures" and CLE programs in favor of a celebration honoring the diverse and highly personal experiences of many of our own. Turnout was standing room only.

As a reminder, those interested in getting on our emailing list or joining our committee should email Chris Chimeri at CJC@QCLaw.com or Jane LaCova at the SCBA directly, at Jane@SCBA.org. There is no requirement that members identify as LGBTQ – rather, we welcome all members of our legal community.

Note: Christopher J. Chimeri is a partner with Quatela Chimeri PLLC, with offices in Hauppauge and Mineola, and he focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBT Law Committee. From 2014-2018, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star."