To commence the statutory time for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CINDY HOFFMAN, D.O., P.C.,

Plaintiff,

-against-

CAROLINE RAFTOPOL,

Defendant.

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DECISION and ORDER
Sequence No. 1
Index No. 64581/2017

RUDERMAN, J.

The following papers were considered in connection with plaintiff's motion for a preliminary injunction, based on a non-compete provision of an employment agreement, enjoining defendant for two years from working for any Hudson Dermatology, P.C. location situated within a 15-mile radius of any of plaintiff's offices:

Papers	Numbered
Order to Show Cause, Affirmation, Exhibits A, and Memorandum of Law	1
Affirmation and Affidavit in Opposition, and Memorandum of Law	2
Reply Affirmation, Exhibit A, and Memorandum of Law in Reply	3

This matter requires consideration of how existing case law regarding the enforcement of non-compete clauses, in the "learned professions" and in the field of business, applies to a physician's assistant.

Dr. Cindy Hoffman is a board certified dermatologist who is the owner and chief executive officer of plaintiff Cindy Hoffman, D.O., P.C., which has offices in Yorktown Heights,

Carmel, and Hyde Park, New York, through which it provides dermatological care to patients. On July 5, 2012, plaintiff hired defendant Caroline Raftopol, then a newly-licensed physician's assistant, at a base salary of $70,000, to work at the company's three offices. The letter agreement defendant was required to sign contains a non-compete clause providing that defendant would not, for two years after the date of the termination of her employment for any reason, join or be employed by a competitor of plaintiff. A separate term sheet stated that the restriction would apply in a fifteen-mile radius of any of plaintiff's three offices. In addition, a September 2014 renewal of the letter agreement added a term requiring defendant to give six months' notice prior to resigning.

In November 2016 defendant gave six months' notice that her last day would be May 31, 2017, and terminated her employment as of that date. On Thursday, September 7, 2017, plaintiff learned that defendant was working for Hudson Dermatology, several offices of which are within fifteen miles of plaintiff's offices. For example, Hudson Dermatology's Somers office is within fifteen miles of the Hoffman Carmel office, and the Hudson Dermatology Poughkeepsie office is within fifteen miles of the Hoffman Hyde Park office.

Plaintiff commenced this action for injunctive relief and money damages, and moved by order to show cause for a preliminary injunction. When the parties appeared in court regarding plaintiff's proposed temporary restraining order, they agreed that pending decision on the motion, defendant "will not solicit clients of plaintiff's practice and will work only in the Fishkill office of Hudson Dermatology," and that language was incorporated as a term of the order to show cause.

In opposition to plaintiff's motion, defendant states that her job at plaintiff was her first

position as a physician's assistant, after she received her license four months earlier. She was given the letter agreement to sign as a prerequisite to employment; there was no negotiation of its terms. She states that in September 2017 she was offered a position with Hudson Dermatology, and when she informed them of the letter agreement with plaintiff, she was assigned to its Fishkill office. However, she works only 1-2 days per week at that office. She states that the restriction on the locations where she can work is causing a financial strain on her ability to pay her expenses.

Prior to submission of this motion, plaintiff's counsel sent a letter to the court reporting that defendant was seen at the Somers office of Hudson Dermatology, accusing her of violating the agreed-upon temporary restraining order; defendant's attorney responded immediately that she was there for a training session. Defendant's affidavit in opposition further attests that she was not at the Somers office to work with patients but for a training session, for which she was not paid.

Also among the accusations of the complaint are the assertion that defendant now works with Dr. Ross Zeltzer of Hudson Dermatology, who plaintiff says is also a physician with the Hoffman practice. The materials submitted by defendant in opposition clarify that Dr. Ross Zeltser is a physician/owner of Hudson Dermatology who also provides services for plaintiff. Defendant questions the logic of plaintiff seeking to enforce a non-compete clause against her, a physician's assistant, based on her alleged knowledge of patients and company practices, while Zeltser, a physician, who actually treats plaintiff's patients, works at the same competing dermatology practice from which plaintiff seeks to prohibit defendant from working.

Analysis

"A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts upon the moving papers. The burden of proof is on the movant to demonstrate a likelihood of success on the merits, the prospect of irreparable injury if the relief is withheld, and a balancing of the equities in the movant's favor" (*Gagnon Bus Co. v Vallo Transp., Ltd.*, 13 AD3d 334, 335 [2d Dept 2004] [internal citation omitted]).

"The modern, prevailing common-law standard of reasonableness for employee agreements not to compete applies a three-pronged test. 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 Hirshberg*, 93 NY2d 382, 388–89 [1999]). Restating the rule, restrictive covenants can be enforced "'if reasonably limited as to time, geographic area, and scope, are necessary to protect the employer's interests, not harmful to the public, and not unduly burdensome" (*Ricca v Ouzounian*, 51 AD3d 997, 998 [2d Dept 2008]).

Plaintiff emphasizes that "[c]ovenants restricting a professional, and in particular a physician, from competing with a former employer or associate are common and generally acceptable" (*see Gelder Med. Grp. v Webber*, 41 NY2d 680, 683 [1977], citing *Karpinski v Ingrasci*, 28 NY2d 45, 47-49 [1971]). With regard to the history of enforcing restrictive covenants against professionals, the Court in *BDO Seidman* explained that "This Court's rationale for giving wider latitude to covenants between members of a learned profession [was] because their services are unique or extraordinary (93 NY2d at 390, citing *Reed, Roberts Assocs.*

v Strauman, 40 NY2d 303, 308 [1976] [discussing the principle that "injunctive relief may be available where an employee's services are unique or extraordinary and the covenant is reasonable . . . has been interpreted to reach agreements between members of the learned professions"]).

If we consider in a vacuum the question of whether a two-year, fifteen-mile restriction is reasonable, such time and geographic limitations have been approved in other cases. Plaintiff points out that *Gelder Med. Grp. v Webber* (41 NY2d at 683) upheld a five year and thirty mile restriction as against a physician.

The more difficult question is whether the restriction, imposed on a physician's assistant, protects the legitimate interest of the employer. The line of cases involving physicians emphasizes that covenants between members of a learned profession are appropriate because their services are unique or extraordinary (*BDO Seidman*, 93 NY2d at 390, citing *Reed, Roberts,* 40 NY2d at 308). It is far from clear, on this record, that a physician's assistant who earns a base salary of $70,000 and who works under, and at the direction of, a physician, provides the type of unique services contemplated by the "learned profession" cases concerning physicians.

Moreover, the factual assertions on which plaintiff relies, namely, that defendant built a relationship with plaintiff's clients and obtained trade secrets with regard to plaintiff's specialized dermatology treatment – an assertion which defendant denies – is in many ways more like the commercial cases considering restrictions based on a business employee's claimed possession of client lists and trade secrets (*see e.g. Columbia Ribbon & Carbon Mfg. Co.*, 42 NY2d 496 [1977]; *Leo Silfen, Inc. v Cream*, 29 NY2d 387 [1972]).

> "Since there are 'powerful considerations of public policy which militate against sanctioning the loss of a [person]'s livelihood,' restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored by the law. Such covenants will be enforced only if reasonably limited temporally and geographically, *and then 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 NY2d at 499 [internal citations omitted] [emphasis added]).

To establish that enforcement of the restrictive covenant is necessary to protect it from unfair competition stemming from use or disclosure of trade secrets or confidential customer lists, plaintiff relies on the somewhat tautological argument that since it demanded that defendant agree to the non-compete clause, it necessarily has a valid basis for claiming that an employee would obtain unique and specialized knowledge. Plaintiff asserts, without specifics, that defendant was privy to information regarding plaintiff's specialized dermatology treatment. In any case, even assuming that assertion to be true, the acknowledged fact that Dr. Ross Zeltser, a physician/owner of Hudson Dermatology, also provides services for plaintiff, tends to indicate that Hudson Dermatology may already be privy to any information defendant could bring to it from plaintiff's practice. Plaintiff's claim that it has a legitimate interest in preventing defendant from taking employment with a competitor within 15 miles of its offices finds little support in the submissions on this motion.

The question of whether a preliminary injunction enforcing the restrictive covenant would impose undue hardship on defendant must also be addressed. Its consideration requires recognizing the applicability here of the "powerful considerations of public policy which militate against sanctioning the loss of a [person]'s livelihood" *(Karpinski v Ingrasci*, 28 NY2d at 49).

Defendant has asserted that enforcement of the geographical restriction effectively precludes her from working for a dermatology practice in lower Dutchess County, all of Putnam County and northern Westchester County, and has resulted in her being unable to work enough hours to pay her expenses. In response, plaintiff suggests that she can look elsewhere for employment, particularly since she lives in Mount Vernon, New York. However, the record contains no information regarding the job market for a person with defendant's skills and experience.[1]

In view of the foregoing, plaintiff has not established a likelihood of success on the merits. As to the balancing of the equities, plaintiff relies on a broad and unsupported assertion in both its memoranda of law that absent an injunction preventing defendant from taking employment within the 15-mile radius, it will "have difficulty meeting operating expenses, servicing all the patients who depend on its services, and may very well harm its entire business in each locale." Ultimately, plaintiff has not successfully established that defendant has either the knowledge or the power to impact the profitability of plaintiff's business.

Plaintiff expresses concern about the theoretical possibility that defendant could help plaintiff's competitor to affirmatively poach clients. The general rule is that "where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the employee from soliciting his employer's customers" *(Leo Silfen, Inc. v. Cream*, 29 NY2d at 392 [citations omitted]), and if the customers are not so ascertainable, solicitation of the employer's customers by the former employee will be enjoined "only to the

[1] An assertion in a footnote to the reply memorandum of law, that while defendant was employed by plaintiff she was offered jobs closer to her home, has no evidentiary value.

extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of . . . confidential customer lists" (*Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 NY2d at 499). Assuming that the identity of plaintiff's customers, or patients, are not ascertainable, plaintiff's concern can largely be addressed by the continued imposition of the initially agreed-upon restriction against affirmatively soliciting plaintiff's patients, to which restriction defendant does not offer any objection. Defendant states in her affidavit in opposition, "I understand that I cannot solicit patients of Hoffman PC and will continue to abide by that restriction, but the restriction on what offices I can perform services for Hudson Derm's clients is causing a financial strain."

Accordingly, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is granted only to the extent that defendant is enjoined from affirmatively soliciting clients of plaintiff's practice for a period of two years from the date of termination of her employment with plaintiff, and is otherwise denied, and it is further

ORDERED that the parties are directed to appear on Monday, March 12, 2018, at 9:30 a.m., in the Preliminary Conference Part, Westchester County Supreme Court, 111 Dr. Martin Luther King Boulevard, White Plains, New York.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 10, 2018

Terry Jane Ruderman
HON. TERRY JANE RUDERMAN, J.S.C.