IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN KOZLOVICH,

Plaintiff,

v.

S. ABRAHAM & SONS, INC.,

Defendant.

OPINION AND ORDER

04-C-910-C

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Plaintiff John Kozlovich is a former sales representative of defendant S. Abraham & Sons, Inc., who alleges that he is having trouble finding a new job because of a non-competition agreement that he signed with defendant. He has moved for summary judgment, seeking a declaration from this court that defendant's non-competition agreement is unreasonable and therefore unenforceable under Wis. Stat. § 103.465. Defendant opposes the motion, arguing that plaintiff has not shown that he is interested in applying exclusively for jobs with companies that are in competition with defendant and therefore has not shown the existence of an actual controversy, as required under the Declaratory Judgment Act. 28 U.S.C. § 2201(a).

I agree with defendant that plaintiff's showing is meager but unlike defendant, I

conclude that it is sufficient to show the existence of an actual controversy. Plaintiff has been denied one job by a competing employer because of his allegedly invalid non-competition agreement. I am not persuaded that a former employee needs to demonstrate the unwillingness of every company in a particular field to hire him before he can challenge the legality of a non-competition agreement. Plaintiff has lost one job opportunity because of the agreement; this is sufficient to show that he has suffered an injury. On the merits of the complaint, I find that the non-competition agreement is invalid under Wis. Stat. § 103.465 because it imposes an overly broad restriction on the territory within which plaintiff could compete with defendant and restricts plaintiff unreasonably from taking any job in any capacity with a competitor.

The Declaratory Judgment Act, under which plaintiff is seeking relief, is a procedural statute that does not confer federal question jurisdiction under 28 U.S.C. § 1331. Plaintiff is not raising a federal claim; if jurisdiction exists, it must be under the diversity statute, 28 U.S.C. § 1332. Plaintiff proposes as fact that he is a "resident" of Wisconsin and that defendant is incorporated in Michigan and has its principal place of business there. He leaves out the crucial allegation that he is a *citizen* of Wisconsin. Section 1332(a) requires diversity of *citizenship,* not residency. However, defendant alleges in its Notice of Removal that plaintiff is a resident and a citizen of Wisconsin and plaintiff has not objected to that characterization. Therefore, I find that diversity jurisdiction is present.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff John Kozlovich is a Wisconsin resident who worked for defendant S. Abraham & Sons, Inc. as a sales representative from April 1992 until October 2004, with a brief interruption between 1994 and 1996. Defendant is a Michigan corporation with its principal place of business in Grand Rapids, Michigan. Defendant is a wholesale distributor of grocery, food service, refrigerated and frozen foods, candy, tobacco, health and beauty care, general merchandise and store supplies, operating in Indiana, Illinois, Kentucky, Michigan, Minnesota, Missouri, Ohio and Wisconsin.

During his employment with defendant, plaintiff executed two non-compete agreements; one in May 1993 and the other in July 1996. The 1996 non-compete agreement states:

> 1. Confidentiality. The Confidential Information and any other information which the Employee knows or should reasonably know is regarded as confidential by the Employer, shall not during or after the Employee's employment be disclosed to any third persons or entities in any manner whatsoever (except in service to the Employer) or used by the Employee for personal benefit or to the detriment of the Employer including, but not limited to, the solicitation of the Employee's customers or potential customers. Upon the termination of the Employee's employment for any reason, the Employee shall return all samples and documents of any nature whatsoever

containing Confidential Information and shall not retain any copies, abstracts, or notes from any such documents.

2. Restricted Area. The parties acknowledge that the "Restricted Area" for purposes of this Agreement shall consist of the states of Michigan, Indiana, Ohio, Wisconsin, Pennsylvania, Kentucky, and Illinois, together with such other or further geographical areas in which the Employer hereafter conducts its business at any time during the term of the Employee's employment.

3. Restrictive Covenant. During the course of the Employee's employment and for a period of two (2) years thereafter, the Employee shall not:

(1) Conduct, or have any ownership interest in or perform services directly or indirectly for, any other person or entity engaged in a like or competing business or a business which could reasonably be regarded as being actually or potentially competing with that of the Employer (a "Competitor"), where such Competitor conducts or intends to conduct business in the Restricted Area;

(2) Hire or assist in or influence the hiring of any other employee of the Employer for or on behalf of a Competitor; or

(3) Solicit or attempt to sell to or service customers of the Employer for or on behalf of a Competitor.

If any court or other adjudicative body determines that the duration and/or the geographical scope of this restrictive covenant is unreasonable to such a degree that the covenant would be rendered unenforceable thereby, it is the intention of the parties that this restrictive covenant shall be enforced for the maximum duration and the maximum geographical scope as is deemed reasonable by such court or other adjudicative body.

In deciding whether to enforce a non-competition agreement against a former employee, it is defendant's practice to evaluate the likelihood that the employee would divulge confidential information to persons or entities outside the employ of defendant and

the potential cost of such a disclosure. It is defendant's custom and practice to consider what job position the employee had and then determine whether that employee had any employment agreement with defendant, such as a non-competition agreement. Defendant would be likely to file a lawsuit against a former employee who had executed a non-competition agreement if that employee worked for a competitor, had learned confidential information from defendant and used that information or called defendant's customers while working for the competitor.

During his employment with defendant, plaintiff solicited customers only in Wisconsin. Plaintiff also worked in the state of Minnesota for a brief time when he assisted another sales representative. Plaintiff was made privy to confidential information in the form of customer lists, contact persons, marketing strategies and planned customer upgrades, all of which is considered confidential by defendant and is treated and maintained as confidential by a limited number of employees, usually those who have signed confidentiality or non-competition agreements.

After plaintiff ended his employment with defendant, he did not attempt to solicit any of his former customers that he serviced while working for defendant and he did not attempt to entice those customers to follow him to any new employer. As a result, defendant decided not to file any lawsuit against plaintiff.

Plaintiff believes that he is qualified to work as a sales representative in a field

different from the one that defendant serves. Since he ended his employment with defendant on October 1, 2004, one competitor of defendant, Eby Brown Company, LLC has told him it would not employ him because of his non-competition agreement. Plaintiff has made three attempts to find work in fields different from that of defendant. He applied to Bakalars Sausage Company in November 2004, to a company specializing in industrial lighting in December 2004 and to Wausau Steel in January 2005. The industrial lighting company expressed interest in hiring plaintiff, but he never replied to the invitation to interview. Wausau Steel has not responded to plaintiff's application. Since October 2004, plaintiff has not sent out any résumés to businesses operating in the same field as defendant.

OPINION

A. Declaratory Judgment Act

The Declaratory Judgment Act requires an "actual controversy." Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 239-40 (1937). An actual controversy requires an injury in fact (or an imminent risk of incurring one) that is fairly traceable to the actions of the defendant and likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 55, 560-61 (1992). Defendant argues that plaintiff has not sustained any injury and is not immediately in danger of sustaining such an injury. In making this argument, defendant overlooks the injury that plaintiff suffered when Eby Brown told him it would not

consider him for employment because of the non-competition agreement. It ignores as well the limited nature of its representation that it does not intend to sue plaintiff at the present time. Defendant has not disavowed any interest in suing plaintiff under any circumstances. Indeed, it has said only that it will refrain from suing if defendant does not obtain work with a competitor, does not use the confidential information it has learned from defendant and does not solicit defendant's customers. In other words, if plaintiff persuades a competitor to hire him before two years is up, defendant would be likely to file a lawsuit against him unless defendant can confirm that plaintiff has refrained from calling any of defendant's customers and using any confidential information. In the meantime, the threat of a lawsuit looms over plaintiff and any employer that might want to hire plaintiff to work in a competing business.

Defendant argues that plaintiff has failed to show that he is seeking a job in the same industry as defendant and that the agreement has kept from obtaining such a job. This argument is refuted by plaintiff's unsuccessful attempt to obtain employment with defendant's competitor, Eby Brown. The non-competition agreement acts as a restraint on plaintiff's freedom to seek employment in the field in which he may have the most experience and greatest opportunity to work. It is no remedy for the employee's injury to say that he is free to work in a non-competing industry when his agreement with defendant bars him from considering an entire field of work.

B. Non-competition Agreement

"[C]ovenants not to compete are generally disfavored in the law." Equity Enterprises, Inc. v. Milosch, 247 Wis. 2d 172, 183, 633 N.W.2d. 662, 668 (Ct. App. 2001). "Wisconsin law favors the mobility of workers; therefore, a contract that operates to restrict trade or competition is prima facie suspect and will be liberally construed in favor of the employee." Mutual Service Casualty Ins. Co. v. Brass, 242 Wis. 2d 733, 738, 625 N.W.2d 648, 652 (Ct. App. 2001). (Although the parties' agreement contains a forum selection clause providing that it is to be decided under Michigan law and that venue is to be in Kent County, Michigan, neither party has challenged venue or the application of Wisconsin law. Therefore, I consider both issues waived. Salton, Inc. v. Phillips Domestic Appliances and Personal Care, 391 F.3d 871, 881 (7th Cir. 2004) (forum selection clauses subject to waiver))). It appears that defendant recognizes its inability to defend the non-competition agreement because it has made no effort to muster any arguments in support of the agreement. Its brief in opposition to plaintiff's motion for summary judgment is confined to its contention that no case or controversy exists.

Wis. Stat. § 103.465 limits restrictions in non-competition agreements to those that are reasonably necessary for the protection of the employee and provides that "[a]ny such restrictive covenant imposing an unreasonable restraint is illegal, void and unenforceable

even as to any part of the covenant or performance that would be a reasonable restraint." Under Wisconsin law, "the validity of a restrictive covenant is to be established by examination of the particular circumstances which surround it." Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton, 101 Wis. 2d 460, 468, 304 N.W.2d 752, 756 (1981). In some cases, this requires a trial to determine the nature and extent of the employee's job duties and the reasonableness of the restrictions of the non-competition agreement in light of those duties. No trial is necessary in this case, however. It is undisputed that plaintiff's carried out the duties of a sales representative within the state of Wisconsin (and briefly in Minnesota). No obvious reason exists for restricting him from working in six or more other states during the next eighteen months of the agreement's duration. Defendant has proposed no facts that would suggest that plaintiff had any contacts in those states while he was employed by defendant or that there is any other reason why plaintiff should be restricted from working in such a large geographical area. In itself, this overly broad restriction makes the non-competition agreement unreasonable under Wis. Stat. § 103.465.

The agreement is overly broad in another respect as well. It prohibits plaintiff from having any ownership in any other entity "engaged in a like or competing business or a business which could reasonably be regarded as being actually or potentially competing with that of" defendant and from performing services directly or indirectly for such an entity, without any exceptions. In Brass, 2001 WI App 92,at ¶ 15, 242 Wis. 2d at 743-44, 625

N.W.2d at 654-55, the Wisconsin Court of Appeals considered the validity of a provision in a non-competition agreement prohibiting the employee from being in any way connected with the property, casualty, health, or life insurance business as representative or employee. The court held the restriction overly broad and unreasonable because it prohibited the employee from accepting any type of employment with a competitor, whether as a claims adjustor or as a janitor.

Applying Wisconsin law to the non-competition agreement between the parties, I conclude that the agreement is unreasonable with respect to the territorial restrictions it imposes and the ban on employment opportunities. Therefore, it is invalid in its entirety.

ORDER

IT IS ORDERED that plaintiff John Kozlovich's motion for summary judgment is GRANTED. FURTHER, IT IS DECLARED that the non-competition agreement he entered into with defendant S. Abraham & Sons, Inc. in 1996 is invalid and unenforceable against plaintiff. The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 5th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge