Thursday, March 6, 2014

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WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials&TRIBULATIONS

When choice of law provision is not enforceable

Where Florida law is 'truly obnoxious' to New York public policy

In the beginning of February 2014, the Fourth Department rejected a Florida choice-of-law provision contained in an employment agreement because the Florida statute at issue was found to be "truly obnoxious" to New York public policy. In *Brown & Brown, Inc. v. Johnson*, __ NYS2d __, 2014 Slip Op 00822 (4th Dep't Feb. 7), the court applied New York rather than Florida law to interpret restrictive covenants in an employment agreement because the Florida statute at issue did not take into account whether the restrictive covenant in the employment agreement "impose[d] an undue hardship on the restrained employee."

By LAURA MYERS
Daily Record Columnist

The court noted that the Florida statute did not take into account that restricting an individual's employment in New York is "judicially disfavored" or that a court must take into account "powerful considerations of public policy that militate against sanctioning the loss of a person's livelihood," *Id*. (internal citations omitted).

The Plaintiffs, Brown & Brown, Inc. (BBI) and Brown & Brown of New York, Inc. (BBNY), a subsidiary of BBI, hired Theresa Johnson in December 2006 to perform actuarial analysis. Johnson was required to sign an employment agreement on her first day of work, which contained three restrictive covenants: 1) a non-solicitation of customers' covenant, 2) a confidentiality covenant, and 3) a non-inducement of employees' covenant.

The non-solicitation covenant stated that upon termination, Johnson was prohibited from soliciting or servicing any client of BBNY for a period of two years. The non-inducement covenant stated that upon termination, Johnson was prohibited from inducing any employees of her employer to leave the company for a period of two years. On Feb. 25, 2011, Johnson was terminated from her employment with plaintiffs, and shortly thereafter Johnson was hired by the Lawley Benefits Group, LLC.

In September 2011, BBI and BBNY filed a complaint against Johnson and her new employer, Lawley, in New York State Supreme Court, Erie County. The complaint contained claims against Johnson for breach of the restrictive covenants in her employment agreement, the misappropriation of trade secrets, and tortious interference with the plaintiffs existing and prospective business relations. The complaint also contained claims against Johnson's new employer, Lawley, for tortious interference with existing and prospective business relations and tortious interference with Johnson's employment agreement.

The defendants filed a motion for summary judgment seeking the dismissal of all claims in the plaintiffs' complaint. As a threshold matter, in support of their motion, the defendants argued that the choice-of-law provision in Johnson's employment agreement, which selected Florida law, was unenforceable because Florida did not "bear a reasonable relation" to the parties or the employment agreement at issue. The defendants also argued that Florida law should not be applied because its statutes regarding restrictive covenants were "obnoxious" to New York public policy.

The Supreme Court held that because the agreement: related to the employment of a New York resident, who was a licensed insurance broker in New York, Johnson received the agreement from her New York employer (BBNY) while in New York, and the agreement was signed in New York, Florida did not bear a "reasonable relation" to the agreement, Memorandum Decision, Index No. 605320/11, at 7, 9 (Sup Ct, Erie County, June 25, 2012).

Further, the court concluded that Florida law was in direct conflict with New York law regarding the enforcement of restrictive covenants in the employment agreement, *Id*. at 9-12. The

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court concluded that because an actual conflict of law existed between New York and Florida, the court must apply New York law, *Id*. at 12.

Applying New York law, the Supreme Court dismissed the plaintiffs' claims for breach of contract as it related to defendant Johnson's breach of the confidentiality provision and the employee non-inducement covenant, but did not dismiss plaintiffs' claim for breach of the non-solicitation covenant.

The court also dismissed plaintiffs' claims for the misappropriation of trade secrets and tortious interference with contractual relations. The plaintiffs filed a motion to reargue and were successful in having their breach of contract claim based on the employee non-inducement covenant reinstated.

The plaintiffs and defendants cross-appealed from the Supreme Court's initial decision as well as the court's decision on re-argument to reinstate the plaintiffs' contract claim for breach of the employee non-inducement covenant. In the Fourth Department's decision, it first addressed the Supreme Court's threshold determination that the Florida choice-of-law provision was unenforceable because Florida law did not "bear a reasonable relationship to the parties or the transaction," *Brown & Brown, Inc.* 2014 N.Y. Slip Op. 00822, at *2.

The Fourth Department reversed the Supreme Court's decision, holding that the plaintiffs had, in fact, provided adequate evidence that Florida had a "reasonable relationship to the parties or transaction." The Fourth Department noted that plaintiff BBI, the parent corporation of BBNY, is a Florida corporation, with its principal place of business in Florida.

It further observed that BBI was a party to the agreement, and that BBI "directed the sales strategies, set sales goals and provided promotional and educational materials for BBNY," *Id.* The Fourth Department acknowledged that plaintiffs provided evidence that Johnson's salary was administered in Florida and paid from a Florida bank account and that Johnson traveled to attend training sessions and meet with BBI employees in Florida. The Fourth Department concluded that these facts, when taken as a whole, supporting the finding that Florida law did, in fact, "bear[] a reasonable relationship to the parties or the transaction," *Id*. at *2 (internal citations omitted).

The Fourth Department then turned its attention to the second prong of the choice-of-law analysis, to determine whether the Florida law governing the restricting covenants at issue were "truly obnoxious," to New York public policy.

The Fourth Department observed that under New York law, "agreements that restrict an employee from competing with his or her employer upon termination of employment are judicially disfavored because powerful considerations of public policy ... militate against sanctioning the loss of a person's livelihood," *Id*. quoting, in part, *Reed, Roberts Assoc. v. Strauman*, 40 NY2d 303, 307, rearg denied 40 NY2d 918 (1976) (citations omitted).

New York therefore requires that a covenant, which tends to restrain a person's vocation must be "reasonably necessary to protect the legitimate interests of the employer and not unduly harsh or burdensome to the one restrained," *Brown & Brown, Inc.*, 2014 N.Y. Slip Op 00822, at *2 quoting *Post v. Merrill Lynch, Pierce, Fenner & Smith*, 48 N.Y.2d 84, 86-87, rearg denied 48 NY2d 975 (emphasis added).

New York courts have established a three-pronged test to determine whether a restrictive covenant is "reasonable," and should therefore be enforced. These include that the restraint: 1) is no greater than is required to protect a 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, 388-389 (1999). New York case law has established that where a covenant violates any one of the prongs, it will be deemed invalid, *Id*. at 389.

Florida law, by contrast, expressly prohibits courts from considering the hardship imposed upon an employee in evaluating the reasonableness of a restrictive covenant. Specifically Florida Statute §542.335(1)(g)(1) provides that "[i]n determining the enforceability of a restrictive covenant, a court ... [s]hall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought" (emphasis supplied). The statute also provides that a court considering the enforcement of a restrictive covenant must construe the covenant "in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement ... [and] shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract," *Id*. at §542.335(1)(h).

The Fourth Department concluded that the Florida law which prohibits courts from taking into account the hardship imposed on an individual against whom the covenant is being enforced, is "truly obnoxious" to New York public policy, *Brown & Brown, Inc.*, 2014 N.Y. Slip Op 00822, at *3. Therefore, the Fourth Department declined to enforce the choice-of-law provision, and instead applied New York law.

Based on the application of New York law, the Fourth Department found that the customer non-solicitation clause contained in

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plaintiffs' employment contract was overly broad. The court noted the agreement prohibited defendant Johnson from "soliciting, diverting, servicing, or accepting, either directly or indirectly, 'any insurance or bond business of any kind or character from any person, firm, corporation, or other entity that is a customer or account of the New York offices of [the plaintiffs]" for two years following the termination of Johnson's employment regardless of when Johnson established a relationship with those clients. The Fourth Department further concluded that because the non-solicitation covenant was overly broad, it was unenforceable and must be severed from the employment agreement. Plaintiffs' claim for breach of contract for defendant Johnson's alleged violation of the non-solicitation provision, was therefore dismissed.

In sum, the Fourth Department's decision in *Brown & Brown, Inc.* illustrates the limitations of an employer's ability to select the law that will govern its employment agreements. In reaching its decision, the Fourth Department noted that the Florida law at issue was similarly found to conflict with the public policy of the law of three other states, including Georgia, Illinois and Alabama, *Id.* at *3.

This case serves as a reminder to New York employers to carefully consider whether a choice-of-law provision is appropriate, and will stand up in litigation brought in New York courts.

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