SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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AMERICAN LEISURE FACILITIES MANAGEMENT CORP.,

Plaintiff,

-against-

JEREMY BRUTUS, NFC AMENITY MANAGEMENT, JEAN MARIE POTTER, JOHN DOES # 1 THROUGH 10 AND JANE DOES #1 THROUGH 10,

Defendants.

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NFC AMENITY MANAGEMENT,

Counterclaim-Plaintiff,

-and-

AMERICAN LEISURE FACILITIES MANAGEMENT CORPORATION AND GAIL HAMILTON,

Counterclaim-Defendant.

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DECISION AND ORDER

Index No.: 653640/2011
Mot. Seq. Nos. 008 -and- 009

Third Party Complaint
Index No.: 590181/2012

O. PETER SHERWOOD, J.:

I. BACKGROUND

Jeremy Brutus ("Brutus") is a former employee of American Leisure Facilities Management Corp. ("American Leisure"). He subsequently went to work for NFC Amenity Management ("NFC"), a competitor of American Leisure. American Leisure has asserted several claims, including: one for a Preliminary Injunction to bar Brutus' employment; breach of non-compete clauses in American Leisure's employment offer letter to Brutus ("Offer Letter") and in the American Leisure employee handbook ("Employee Handbook"); and tortious interference with a contract against Brutus, NFC, and its chief executive officer, Jean Marie Potter ("Potter" and collectively, "NFC Defendants").

NFC filed counterclaims alleging breach of contract and unfair competition against American Leisure and its Vice President of Operations and former NFC employee, Gail Hamilton ("Hamilton"

and collectively "Counterclaim Defendants"). In motion sequence number 008, NFC Defendants move for summary judgment dismissing the complaint. In motion sequence number 009, Counterclaim Defendants move for summary judgment dismissing the counterclaims. The facts set forth at sections II and IV are drawn from the parties' Commercial Division Rule 19-a Statements (NYSCEF Doc. Nos. 277, 344, 290, and 309).

II. FACTS UNDERLYING AMERICAN LEISURE'S CLAIMS

American Leisure and NFC design and operate spa, recreational, and sporting facilities. Brutus was employed by American Leisure from November, 2007, until November, 2011. In connection with his employment, Brutus received, signed, and returned an Offer Letter which contains a non-compete provision which states that:

> You covenant and agree that during your employment with American Leisure and for twelve (12) months after the termination of your employment with us, for any reason, you will not establish, own, manage, operate, control, be employed by, participate in, or in any manner become interest in, directly or indirectly, as an employee, owner partner, consultant, agent, stockholder or otherwise, any business that manages or provides any services to the Facility or to any other facilities or properties for whom American Leisure provides services during the term of your employment. In addition, during the twelve (12) months after the termination of your employment with us, for any reason, neither you, nor any business in which you shall be so interested, shall solicit, hire or employ any person who was an employee of American Leisure during the six (6) month period prior to the termination of your employment

(NYSCEF Doc. No. 249 at p.3). Brutus also received and signed an Employee Handbook which contained additional restrictive provisions (*see* NYSCEF Doc. No. 250). Further, Brutus signed a Confidentiality Agreement, requiring him to keep American Leisure's confidential or proprietary information (or that of its clients) confidential. The requirements imposed were not unique to Brutus' employment. American Leisure requires each of its employees to sign a confidentiality agreement, a restrictive covenant and an acknowledgment of receipt of the Employee Handbook (NYSCEF Doc. No. 344, ¶16).

During Brutus' tenure, American Leisure managed certain facilities at Peter Cooper Village/Stuyvesant Town ("PCV"), located in Manhattan, where Brutus held the title of Vice President of Operations/Executive Director. Brutus' duties included work at two PCV facilities,

Oval Fitness and Oval Amenities. The parties dispute the extent of Brutus' involvement with other American Leisure facilities and clients and his access to proprietary information, such as American Leisure's customer list.

On November 15, 2011, American Leisure terminated Brutus. American Leisure claims Brutus was fired for cause. Brutus argues that it was without cause. There is no contemporaneous documentary evidence that Brutus was terminated for cause. The record shows that American Leisure offered Brutus a severance agreement but he declined it. There is no dispute that Brutus was considering leaving American Leisure before he was terminated. Brutus testified that he had an offer of employment from NFC at the time he was terminated. Brutus commenced employment with NFC in December, 2011. At that time, NFC did not manage or provide services to PCV, although NFC had made a proposal to do so in August, 2011 (NYSCEF Doc. No. 344, ¶46). On December 6, 2011, Brutus informed American Leisure's CEO, Steven Kass ("Kass") that Brutus was going to work for NFC. At that point, Kass offered to re-employ him and told Brutus that he was precluded from working for NFC by the non-compete agreements (*id.*, ¶47; NYSCEF Doc. No. 313 at pp. 133, 134-5). American Leisure filed the Complaint in this action on December 28, 2011.

In 2013, NFC bid on the PCV project again, and in June, 2013, won the business. American Leisure claims Brutus used American Leisure's confidential information to help NFC get the contract. It alleges (1) breach of contract relating to the offer letter; (2) breach of contract of a disclosure agreement; (3) breach of contract of a restrictive covenant (in the Employee Handbook); (4) declaratory judgment that Brutus' employment with NFC breaches a contract; (5) tortious interference with a contract for soliciting American Leisure's clients; and (6) injunctive relief.

In motion sequence number 008, the NFC Defendants move for summary judgment on the grounds that (1) the restrictive covenant in the Offer Letter is not enforceable and does not bar Brutus' employment with NFC; (2) plaintiff has no evidence that Brutus breached the confidentiality agreement with American Leisure; (3) the restrictive covenant in the Employee Handbook is not enforceable; and (4) NFC did not procure a breach of any American Leisure contracts with its employees, vendors, or customers, a required element of tortious interference with contract. The NFC Defendants also request that American Leisure be sanctioned for engaging in frivolous litigation, specifically: maintaining the Third, Fourth and portions of the Sixth causes of action (all

based on the language in the Employee Handbook), after American Leisure had acknowledged that these claims were not viable, and pursuing, with no evidence, allegations that Brutus had actually solicited American Leisure's employees or clients.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see,* CPLR 3212 [b]; *Alvarez v Prospect Hosp.,* 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see, Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver,* 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]), and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "'[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

A. The Offer Letter Non-Compete Provision

Defendants argue that the non-compete clause of the Offer Letter is not enforceable, and that it was not breached. "Noncompete clauses in employment contracts are not favored and will only be enforced to the extent reasonable and necessary to protect valid business interests, and are not unduly harsh to the one restrained (*Morris v Schroder Capital Mgmt. Int'l*, 7 NY3d 616, 621 [2006], citing *BDO Seidman v Hirshberg*, 93 NY2d 382 [1999]; *Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [1977]; *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976]; see, also, 6A Corbin, Contracts, § 1394, at p 100). "[P]owerful considerations of public policy militate against sanctioning the loss of a man's livelihood" (*Purchasing Assoc. v Weitz*, 13 NY2d 267, 272). However, where an employee's services are "unique and extraordinary" and the covenant is reasonable, courts have found restrictive covenants enforceable (*Reed, Roberts Associates, Inc. v Strauman*, 40 NY2d 303, 308 [1976]). While the Court of Appeals has recognized the "employee choice" doctrine as an exception to the general disfavor of noncompete provisions, where an employee agrees to a restrictive covenant in exchange for post-employment benefits (*Post v Merrill Lynch, Pierce, Fenner & Smith*, 48 NY2d 84 [1979]), it is undisputed that Brutus declined all post-employment benefits. Thus, the employee choice doctrine does not apply.

Defendants argue that the non-compete provision in the Offer Letter is unenforceable because it is over-broad and more restrictive than necessary to protect American Leisure's legitimate interests. American Leisure maintains that it does not make contracts with its employees (NYSCEF Doc. No. 313, p. 64) but it requires all employees to sign broad non-compete and non-solicitation agreements which it asserts are enforceable contracts *(id.)*. The Offer Letter which Brutus was required to sign not only attempts to restrict Brutus from working for competitors that provide services to American Leisure clients to which Brutus was assigned, but also for all organizations anywhere in the world which were American Leisure clients at anytime during his employment, regardless of whether they were American Leisure clients when Brutus' employment terminated, and regardless of whether Brutus ever worked on those accounts.

American Leisure argues that the clause, which it apparently imposes on most or all of its employees, is reasonable and enforceable, based on Brutus' access to American Leisure's proprietary and confidential information and his "unique and extraordinary" skills (Opp. At 7). According to

American Leisure, these skills included formulating business plans for fitness businesses, developing budgets, and working with staff (*id.*). American Leisure emphasizes that "no one else at American Leisure possessed the same level of expertise about the PCV programs" (*id.*). It does not argue that the skills possessed by Brutus were unique or extraordinary in the field, just at American Leisure. American Leisure also argues that the clause only applies to PCV, and not to any other American Leisure clients (*id.*). However, the provision refers unambiguously to "the Facility [presumably PCV] and any other facilities or properties for whom American Leisure provides services..." (NYSCEF Doc. No. 249, p. 3). The non-competition provision is overly broad, but the court need not decide the motion on this basis.

The NFC defendants argue that the non-compete provision of the Offer Letter is unenforceable, since Brutus was terminated without cause. According to American Leisure, Brutus tendered his resignation on November 10, 2011. Brutus testified that Tom Johnson, the Chief Operating Officer of American Leisure convinced him to delay his resignation decision, and to think it over that weekend. A few days later, on November 14, 2011, Brutus was terminated (NYSCEF Doc. No. 248, p.64). He was offered a severance package, which he refused.

American Leisure claims that Brutus was terminated for cause. "Where the employer terminates the employment relationship without cause . . . his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability to impose a forfeiture. An employer should not be permitted to use offensively an anticompetition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers of his services" (*Post v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 NY2d 84, 89 [1979]). American Leisure claims that Brutus was fired because it had "concerns about his financial reports and [a derogatory] Facebook posting and interchange between he and PCV's property manager" (Opp. at 9). American Leisure cites deposition testimony to support the claim but has offered no contemporaneous record to confirm that testimony. These bald statements are insufficient to raise a triable issue of fact as to whether the termination was "for cause".

American Leisure asserts that by going to work for NFC, which subsequently provided services to PCV, Brutus breached the non-compete provision. However, American Leisure does not claim that PCV contracted with NFC for management services before November 15, 2012 (a year

after Brutus left). American Leisure asserts that NFC submitted a proposal to PCV for its business in August, 2011, which, it argues, constitutes "providing services." However, it is undisputed that NFC failed to get PCV's business in 2011, and that NFC submitted a new proposal in 2013, winning the contract in June of that year. Submitting a proposal for business is distinct from providing management services, and American Leisure has cited no law conflating the two. Accordingly, even if the non-compete provision of the Offer Letter was enforceable, the provision was not breached as a result of Brutus' employment by NFC.

B. The Confidentiality Agreement

The Confidentiality Agreement signed by Brutus provides that, after termination, Brutus has "an obligation to continue to treat as confidential and not use or disclose, publish or otherwise made available to the public or to any individual, firm or company any confidential and propriety [sic] information of American Leisure and/or its clients." NFC Defendants assert that American Leisure failed to offer any evidence that Brutus breached this agreement. In response, American Leisure points to (1) an e-mail from Brutus to Robert Cancel and Jean Potter (of NFC), which attached a price quote dated March, 2011, from Precor (a supplier of exercise machines) to PCV (NYSCEF Doc. No. 325); (2) e-mails between Cancel and Potter in August, 2011, mentioning their discussions with Brutus, in which Brutus offered to provide business tips and mentioned the possibility of bringing projects over from American Leisure (NYSCEF Doc. No. 321 and 322); (3) an e-mail dated June 14, 2012, from Brutus to Potter, attaching a proposal American Leisure had sent to the St. Tropez (NYSCEF Doc. No. 324); (4) a May, 2013, e-mail from David Angelin (of NFC) to Potter, mentioning a worksheet and budget obtained from Brutus, which he apparently obtained from an unspecified third party (NYSCEF Doc. No. 323); and (5) an October 31, 2013, e-mail from Brutus to Peter Davis, of Waterside Plaza, mentioning NFC's work at PCV and asking for the opportunity to meet (NYSCEF Doc. No. 328).

None of these documents create a triable issue of material fact as to whether Brutus used or disclosed confidential and proprietary information of American Leisure or its clients. Nothing about the Precor price quote suggests it is a confidential or proprietary American Leisure document. The August, 2011, e-mails indicate that Brutus had talked with representatives of NFC, but they do not show that Brutus offered confidential or proprietary information. The June, 2012, e-mail states that

the attachment, a proposal for the services American Leisure would provide, was given to Brutus by someone at the St. Tropez, a potential client. Nothing about the proposal indicates it was confidential or proprietary. The proposal outlines available services and programs, but the pricing was redacted before it was provided to Brutus. The May, 2013, e-mail describes, but does not attach, a budget and worksheet, and does not say who prepared it. The e-mail also states that Anglin of NFC got some information about a forecast by American Leisure, but nothing on the face of this document supports the allegation that Brutus was revealing American Leisure's (or its clients') confidential information. The October, 2013, e-mail merely seeks an opportunity to talk to Waterside Plaza and make a pitch. Nothing in this document supports the allegation that Brutus had revealed American Leisure's (or its clients') confidential information.

Having failed to point to admissible evidence supporting its allegations that Brutus had revealed American Leisure's (or its clients') confidential information, American Leisure has failed to raise a triable issue of material fact regarding its allegation that Brutus breached the Confidentiality Agreement.

C. The Employee Handbook Non-Compete Provision

Brutus received and signed the American Leisure Employee Handbook, which contained the following provision:

> Agreement Not to Compete. The Employee agrees that except as provided in this Agreement or unless otherwise agreed to by the parties hereto in writing, s(he) will not engage in any business activity in which Employer is involved (directly or indirectly) for a period of one (1) year from the date that the employee is no longer employed by the employer.
>
> Employee further agrees that for the one (1) year period set forth herein, s(he) will not contact, solicit (directly or indirectly) or perform services for any client of the Employer.
>
> Employee covenants not to directly or indirectly induce any clients of Employer to patronize any other business. Employee covenants not to assist any third party to contact or solicit any clients of Employer.

(NYSCEF Doc. No. 250, p. 10). This provision, which effectively bars former employees from engaging in their profession for a year after termination, is broader than the non-compete clause set forth in the Offer Letter.

NFC argues that summary judgment should be granted dismissing the breach of contract claim based on this language, because the Employee Handbook is not enforceable as a contract, and because the non-compete language is overbroad. NFC highlights another clause which states, in the section "A Word About This Handbook,"

> [t]he provision of this Employee Handbook are not intended to create contractual obligations with respect to any matters it covers. Nor is this Employee Handbook intended to create a contract guaranteeing that you will be employed for any specific time period

(*id.* at p. 11). Steven Kass, Chief Executive Officer of American Leisure, confirmed that all employees are required to sign non-compete and non-solicitation agreements, but that the company has no contracts with them (NYSCEF Doc. No. 252, pp. 64-65). Despite its disavowal of the existence of any contract between it and its employees, American Leisure argues that, because Brutus stated at his deposition that he believed the Employee Handbook created binding obligations, there is an issue of material fact as to whether the non-compete clause in the Employee Handbook constitutes an enforceable contract. In support of its position, American Leisure points to *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY2d 470 (2004) [stating the "familiar and eminently sensible proposition of law . . . that, when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms" in a matter regarding the termination of a lease] and *De Petris v Union Settlement Assn.* 86 NY2d 406 (1995) [confirming an employer's ability to fire an at-will employee where the employee claims an employee handbook limits that right]. The court agrees that the language of the Employee Handbook is clear and the testimony of Mr. Kass confirms that the Employee Handbook is not a binding contract. It is undisputed that Brutus was an "at-will" employee and that American Leisure was free to terminate him at anytime. However, Brutus is not seeking to get his job back. Rather, American Leisure is seeking to dictate whether and where Brutus may practice his chosen profession. This, American Leisure may not do. Accordingly, a breach of contract cause of action based on the Employee Handbook cannot stand because the handbook does not constitute evidence of a contract between American Leisure and its employees and, if it was a contract, it is not enforceable.

D. The Tortious Interference Claim

Dropping all reference to employee or vendor contracts, American Leisure claims that Brutus interfered with its contract with PCV. American Leisure argues that, to prove such interference, it is sufficient to show that PCV terminated its contract with American Leisure and hired NFC, and that the fact that there was no breach is not fatal to its claim (Opp. at 18). However, it is Hornbook law that "[t]here can be no action for inducing a breach of contract where it is established that the contract has not been broken. Thus, without a breach, a plaintiff cannot prevail on a claim alleging tortious interference with contractual relations" (NYJUR INTERFER § 17). This claim fails.

E. Defendants' Request for Sanctions for Frivolous Litigation

NFC Defendants argue that this litigation is frivolous because American Leisure has no evidence that Brutus committed any wrongdoing, and that American Leisure had agreed that its claims in counts III, IV and a portion of VI (claiming breach of the Employee Handbook and seeking declaratory relief) lacked merit. According to the NFC Defendants, American Leisure refused to drop these claims only because they had declined to agree to American Leisure's October, 2013, request for an extension of time.

The Administrative Rules of the Unified Court System provide that "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . , costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part" (22 N.Y.C.R.R. 130-1.1(a)). Frivolous conduct is defined as follows:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false

(*Id.* at 130-1.1[c]).

Counsel for American Leisure acknowledged, in an e-mail dated September 24, 2013, that they " agree with [defendants'] assessment of Count III (seeking relief breach of the non-compete provision in Employee Handbook) and Count IV (seeking declaratory relief enforcing the non-

compete provision)" and that part of Count VI which is based on the non-compete provision of the Employee Handbook, and that counsel would be amenable to the dismissal of those claims (NYSCEF Doc. No. 269). Subsequently, American Leisure's counsel changed position, stating "due to the procedural status of the case, I am not in a position to stipulate to the withdrawal of any claims prior to summary judgment" (E-mail from Smith to Grossman, dated September 26, 2013, NYSCEF Doc. No. 271). Defendants point out that the change of position occurred immediately after counsel declined to consent to an extension of time sought by plaintiff.

American Leisure claims that its prosecution of those claims was not frivolous, as it relied on arguments that the Employee Handbook was binding because Brutus believed it was. However, the Employee Handbook states otherwise and American Leisure's CEO stated flatly that the company does not make contracts with its employees (NYSCEF Doc. No. 252, pp. 64-65). Further, since the cases cited by American Leisure plainly do not support this legal theory, and as it acknowledged it was pressing these claims based on "the procedural status of the case" and not based on a good faith belief in the merit of the claims, the court finds that American Leisure continued to advance these claims after it became clear that the claims were without any reasonable basis in fact or law. Defendants shall be reimbursed by Plaintiff for all costs, including attorney fees, incurred after September 24, 2013, to defend against the causes of action noted above.

IV. FACTS RELATING TO THE COUNTERCLAIMS

Defendant Potter is the Chief Executive Officer of NFC. Before that, Potter was the Chief Operating Officer of The Fitness Company (TFC). Counterclaim-Defendant Hamilton also worked for TFC at that time, and was the head of a profitable section of TFC. NFC asserts that her reputation and experience were key strengths of her department. In the Fall of 2005, Potter and co-investors, including Hamilton, bought sections of TFC's business, including Hamilton's division. These investors incorporated TFC Partners (TFCP) to operate the business. All of the investors, including Hamilton, were employees of TFCP and had employment agreements (for Hamilton, the "Hamilton Agreement") with it. The Hamilton Agreement contained, inter alia, a no-employee-solicitation clause.

The Hamilton Agreement expired on Feb. 28, 2009. Accordingly, the one-year non-compete term expired on Feb. 28, 2010. The two-year non-solicitation provision expired on February 28,

2011. It appears that TFCP then became NFC. In or about May, 2010, Hamilton left NFC and joined American Leisure, without objection by NFC. Four clients subsequently left NFC and hired American Leisure. Certain NFC employees who worked at those clients' facilities also left NFC and went to American Leisure.

In this suit, NFC made three counterclaims: (1) breach of contract, specifically the non-solicit and confidentiality clauses of the Hamilton Agreement, (2) tortious interference with a contract and (3) unfair competition. In July, 2012, this court dismissed part of the breach of contract claim (based on breach of the confidentiality clause) and the entire tortious interference claim. Remaining, are a breach of contract claim asserting breach of the non-solicitation clause of the Hamilton Agreement and the unfair competition claim against Hamilton and American Leisure (the "Counterclaim Defendants"). In motion sequence number 009, the Counterclaim Defendants move for summary judgement on the remaining counterclaims asserted by NFC.

V. DISCUSSION OF COUNTERCLAIMS

Counterclaim Defendants argue that the non-solicitation clause of the Hamilton Agreement was unreasonable and invalid, and that NFC cannot show damages to support the breach of contract claim. Counterclaim Defendants also assert that NFC unreasonably delayed commencing suit on this claim. They contend that bringing the claim now is improper, and seek fees and costs. The question to be decided is whether the non-solicitation clause is reasonable (*see OTG Mgmg., LLC v Ron Stantinidis 823,* 40 Misc 3d 617, 620-22 [Sup Ct NY County 2013]; *Willis of New York, Inc. v DeFelice*, 299 AD2d 240, 241 [1st Dept 2002], *Renaissance Nutrition, Inc. v Jarrett,* 2012 WL 42171 at *5 [WD NY, 2012]).

Counterclaim Defendants point to the lack of allegations that the on-site managers alleged to have been recruited by Hamilton had proprietary or confidential information, or were unique employees, sufficient to warrant enforcement of a non-solicit provision. However, these are the requirements for non-compete provisions, not non-solicitation clauses. Two years is reasonable for a non-solicitation provision, under New York law, and NFC has a legitimate interest in protecting client relationships and customer goodwill which it developed, (*see Renaissance Nutrition*, 2012 WL 42171 at *4). Counterclaim Defendants do not claim that the non-solicitation provision was unduly burdensome, the standard for non-recruitment clauses *(see OTG Mgmt. LLC*, 40 Misc 3d at 622).

Instead, they argue that Hamilton was the key relationship employee, that the business followed her, and that the employees simply followed the business. Counterclaim Defendants also point out that while NFC asserts damages from the loss of the four clients, it does not attribute any damages specifically to the loss of those employees. NFC, however, argues that the recruitment of the on-site managers was part of why the customers made the move, and points to an e-mail from Hamilton to NFC's client, Citylights, dated July 8, 2010, which arguably suggests that Hamilton and American Leisure were trying to retain at the Citylights facility, Dana Eaves, an NFC employee (e-mail attached as Exhibit A to Grossman Aff.). Counterclaim Defendants acknowledge Citylights demanded that American Leisure promise that Dana Eaves and another NFC employee, Michael Hayden, would remain at Citylights if it contracted with American Leisure (NYSCEF Doc. No. 341, at 7). Thus, while Counterclaim Defendants argue that NFC has failed to show damages, NFC points to the loss of business from the four clients, arguing that Hamilton's recruitment of the on-site managers led to American Leisure signing NFC's clients' business. Whether Hamilton aided in the recruitment effort is a disputed question of fact.

Relying on *Lazer Inc. v Kesselring* (13 Misc 3d 427, 430, 2005 NY Slip Op. 25587, 1 [Sup Ct, Monroe Cty, 2005]), Counterclaim Defendants argue that a stand-alone non-recruitment clause which applies to non-competitors, "without proof that confidential information is at stake, is absolutely unenforceable under New York Law". This reliance is misplaced. In that case, the court ruled that the clause was not enforceable based on the conclusions that there was no competition, no confidential or proprietary information involved, no legitimate employer interests in the clause, and no issues of fact, not that such a clause could never be enforced under any circumstances *(see id.* at 434). The instant case is distinguishable. Here, NFC and American Leisure are direct competitors; there are issues of fact as to whether NFC's confidential and proprietary data, such as the contents of an NFC computer, were misused; and questions regarding NFC's legitimate interests in maintaining its client relationships and goodwill. Accordingly, the breach of contract claim based on the non-solicitation provision of the Hamilton Agreement cannot be resolved at this stage of the case.

Counterclaim Defendants also move for summary judgment on the unfair competition claim, asserting that there is no evidence that American Leisure or Hamilton misappropriated NFC's

confidential information or goodwill. A claim for unfair competition can be brought by an employer against a former employee in the absence of a restrictive covenant (*see e.g., Pearlgreen Corp. v Yau Chi Chu,* 8 AD3d 460, 460 [2nd Dept 2004]). Such a claim requires showing the bad faith misappropriation of an extensive commercial advantage (*LoPresti v Massachusetts Mut. Life Ins. Co.*, 30 AD3d 474, 476 [2nd Dept 2006]).

Here, NFC has sufficiently demonstrated that triable issues of fact exist concerning Counterclaim Defendants' alleged misappropriation of NFC's goodwill and proprietary information. Specifically, NFC has produced evidence of efforts to use NFC's employees, and Hamilton's use of NFC's documents (including keeping an NFC computer with NFC documents on it), to lure NFC clients to American Leisure. While Counterclaim Defendants assert that the goodwill really belonged to Hamilton, and not to NFC, that is an issue of fact. Counterclaim-Defendants also argue that Hamilton's knowledge of NFC's pricing and other information came from her recollections of her work with NFC, and not from retained confidential documents. That is also an issue of fact, as Hamilton admits having taken the NFC computer, and that the computer contained NFC budget information (NYSCEF Doc. No. 283, at 68:12-4). Some budget information made it into a proposal Hamilton provided to an NFC client (NYSCEF Doc. No. 330). Accordingly, Counterclaim Defendants' motion for summary judgment fails. Additionally, Counterclaim Defendants' request for fees and costs on this claim lacks merit and is denied.

VI. SUMMARY

Summary judgment must be granted to Defendants. Although there is strong evidence that the non-competition provision of the Offer Letter is uneforceable, the court need not decide the motion on that basis. There is no evidence of breach by Brutus of the non-compete clause of the Offer Letter, as NFC did not service PCV at anytime during the one-year non-compete period. Nor do the documents cited by the plaintiff provide any evidence of breach of the Confidentiality Agreement. Finally, the Employee Handbook does not create a binding contract, and cannot support a breach of contract claim. As to the tortious interference claim, plaintiff acknowledges that PCV did not breach any contract with American Leisure, and therefore the tortious interference with contract claim cannot stand. Accordingly, there is no basis for consideration of Injunctive Relief.

Defendants' request for sanctions related to the claims for tortious interference and breach of contract based on the Employee Handbook is meritorious. The record shows that American

Leisure was fully aware that these claims could not be supported in either fact or law, or on the basis of any reasonable extension of law.

There are issues of fact regarding the Counterclaims. For this reason, summary judgment on these claims must be denied and Counterclaim Defendants' request for costs and fees must also be denied. Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment (motion sequence 008) is granted in its entirety and the complaint is dismissed; and it is further

ORDERED that defendants' claim for sanctions relating to the Third (Breach of Employee Handbook restrictive covenant) and Fourth (Tortious Interference with Contract) causes of action and that portion of the Sixth Cause of Action which is based on an alleged breach of the Employee Handbook is granted and the matter is severed for a hearing on the amount of attorney fees to be paid to defendants; and it is further

ORDERED that the motion for summary judgment as to the counterclaims (motion sequence number 009) is denied; and it is further

ORDERED that counsel for the parties shall appear for a pre-trial scheduling conference on October 28, 2014 at 11:30 am.

This constitutes the decision and order of the court.

DATED: September 30, 2014

E N T E R,

O. PETER SHERWOOD
J.S.C.