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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

VALLEY TECHNOLOGIES LTD., plaintiff,	)	Jeff N. Grubb for the plaintiff
- and -	)	Amanda E. Verhaeghe for the defendants
GORD MATTES, CHRIS MAGEL AND DETECT AIR TECHNOLOGIES LTD., defendants.	)	JUDGMENT DELIVERED: November 23, 2022

McCARTHY J.

[1] At the hearing on October 27, 2022, I heard submissions and rendered a decision with respect to two preliminary matters. The first was whether I was prepared to grant leave pursuant to Court of King's Bench Rule ("KBR") 39.02(2) for the filing of an affidavit by the plaintiff, after cross-examination of the deponent. After hearing submissions of counsel I declined to grant leave and ruled that the evidence contained in the late affidavit was not admissible on the injunction motion.

[2] Secondly, I heard submissions and ruled on the defendants' motion to strike portions of the plaintiff's affidavit material. I struck two paragraphs of affidavit material filed by the plaintiff and admitted all of the remaining portions which were

subject to the motion to strike. I provided my ruling and my reasons for decision on both preliminary matters orally on October 27, 2022, prior to hearing submissions on the plaintiff's motion for injunctive relief.

[3] This is now my decision on the injunction motion.

[4] The plaintiff in this case seeks an order that the defendants be:

(a) prohibited from carrying on any activity or business which is substantially the same as, or in competition with the plaintiff's business, within the province of Manitoba, until December 30, 2022, or alternatively until the end of February 28, 2023;

(b) prohibited from soliciting or offering further business services or products to any of the plaintiff's customers;

(c) prohibited from soliciting any of the current employees of the plaintiff to leave the employee of the plaintiff;

(d) prohibited from using in any way, and required to return to the plaintiff without retaining any copies, electronic or otherwise, any of the plaintiff's confidential or proprietary information; and

(e) required to preserve all computers, servers, drives, USB sticks, telephones and other electronic devices in their possession and control and used in relation to the business of detect Valley Technologies Inc.

[5] The plaintiff argues that the basis for this injunctive relief is threefold. First it is based upon a restrictive covenant contained in a Share Purchase Agreement

executed by the defendant, Gord Mattes ("Gord"), on September 29, 2017 (the "SPA"). Second, it is based upon the breach of fiduciary obligations to the plaintiff owed by both individual defendants. And finally, it is based upon the breach of the common law duties of good faith, loyalty and confidentiality owed by every employee to an employer.

[6] Both counsel agree that the applicable considerations as to whether an injunction is just are set out in ***RJR-McDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 ("***RJR-McDonald***") as follows:

i. whether the applicant has established a serious question to be tried;

ii. whether the applicant has established that it will suffer irreparable harm if the relief is denied; and

iii. whether the balance of convenience favours the granting of the injunction.

SERIOUS QUESTION TO BE TRIED

[7] With respect to whether an injunction is appropriate with respect to a breach of the restrictive covenant contained in the SPA entered into by Gord on the sale of the business, the parties agree that the standard to be applied is whether the plaintiff has established that there is a serious issue to be tried.

[8] The plaintiff argues that the specific issue to be determined is whether the plaintiff has established that there is a serious issue to be tried with respect to whether the restrictive covenant is valid and whether there has been a breach of the terms of the covenant in the SPA.

[9] The defendant argues, however, that even if the covenant is determined to be enforceable and a breach is found, the restrictive covenant in this contract is now expired. Therefore, the only way that injunctive relief is just and appropriate with respect to that covenant is if the plaintiff has established that there is a serious issue to be tried with respect to whether the court would extend the term of that covenant. I agree with the defendants' submission on this issue.

[10] At trial the court will consider whether the restrictive covenant was reasonable, and therefore, enforceable. And if it is enforceable, then the court will determine whether the plaintiff has established that the covenant was breached. If so, damages will flow from that breach. In my view the plaintiff has established that there is a triable issue with respect to both validity and breach of the SPA. However, in this case the five-year term of the covenant expired in late September 2022. Therefore, injunctive relief would be available with respect to this contractual term only if I determine that there is a serious issue to be tried with respect to whether the court can, or should, extend this term of the contractual arrangements.

[11] The plaintiff relies upon ***Apotex Fermentation Inc. v. Novopharm Ltd***. (1998), 129 Man.R. (2d) 161, 1998 CanLII 4886 (MBCA), for the proposition that it would be appropriate for the court to extend the term of the restrictive covenant in the SPA by a period of time equivalent to any period of breach.

[12] In my view, this case, which involved an extension imposed by the court for contravention of a *court ordered* restriction, has little application to private

contractual arrangements between two parties on the sale of a business. In my view, the general principle that courts are loathe to interfere with the rights of parties to enter into binding contractual terms would likely apply to this case. I would expect that the court would likely decline to interfere with the bargain struck between the parties to the SPA in this case by extending the agreed upon period of the restrictive covenant (see ***City Wide Towing and Recovery Service Ltd. v. Poole***, 2020 ABCA 305). I therefore find that the plaintiff has not established a serious issue to be tried with respect to this issue.

[13] Further, even if I am wrong about whether this issue rises to the level of a serious issue to be tried, I am also not prepared to grant injunctive relief relating to the terms of the SPA based upon the weighing of the balance of convenience as set out below.

[14] The second issue raised with respect to the defendant Gord, is whether the plaintiff has established that there is a serious question to be tried with respect to whether Gord owed a fiduciary duty to the plaintiff when he terminated his services to it in February 2022 and, if so, whether he breached that duty.

[15] At this stage in the proceedings it is not my role to make the determination as to whether a fiduciary duty existed, or was breached. Rather it is to determine whether there is a serious issue to be tried with respect to this claim.

[16] Having examined all of the evidence I find that the plaintiff has not established a serious issue to be tried with respect to the defendant Gord being a fiduciary.

[17] First, I agree with the submission of the defendants that Article 10.6 of the SPA likely precludes the imposition of fiduciary obligations on Gord.

[18] However, even if the court finds that a fiduciary duty could be imposed, in my view there would be no basis on the facts before the court upon which to do so. At the time of establishing his new business, Gord had been working on an independent contractor basis approximately two days per week for the plaintiff. His role was primarily to train and assist employees of Valley. In the year prior to Gord deciding to terminate his services, his work for Valley had been discontinued altogether by the company due to the Covid-19 pandemic and a decrease in work. Gord provided no services to the plaintiff for a period of approximately one year. Eventually he approached the General Manager of the plaintiff, Shiku Patel, and asked if he could come back and do some work because he was bored. His offer was accepted, but only after he agreed to a decrease in pay. Further, in July of 2021 there was a further sale and amalgamation of the plaintiff corporation and a second share purchase agreement was entered into with respect to that transaction. Notably Gord was not listed in that document as an employee or independent contractor of Valley. These facts do not, in my view, support the plaintiff's assertion that he was the face of the business, or that he was in any way a key man. Even though while working he had access to confidential corporate information, his overall role with the company could not, in my view, be construed to be a fiduciary one. In fact, the evidence suggests that he was considered dispensable to the business.

[19] While the plaintiff need only establish that there is a serious issue to be tried, which is not intended to be an onerous threshold, I am not satisfied that the plaintiff has provided any persuasive basis upon which Gord could be held to have owed fiduciary obligations to Valley at the time that he terminated his services.

[20] With respect to the common law obligations of good faith, loyalty and confidentiality, independent contractors have been found to owe such obligations (see ***South Eye Centre Incorporated v. Shelton et al.***, 2017 MBQB 185).

[21] In this case, I am satisfied that given Gord's role as a former owner who retained access to the entire accounting and client database systems of Valley, he likely owed obligations to the plaintiff not to improperly take or disclose confidential information. Such a duty does not extend to restricting the person from competing with the company.

[22] The next question is whether there is sufficient evidence to establish that there is a serious issue to be tried with respect to any breach of these common law obligations. On this point I find that there is not. There is no evidence that suggests to me that Gord did anything improper vis-à-vis his duties of loyalty and good faith. There is no evidence that he took confidential information and is using it in his business. Or that he took any steps to harm the plaintiff on his way out the door. He was entitled, subject to his contractual obligations under the SPA, to leave and to establish a business using his personal experience and knowledge of the industry. There is certainly no breach of a duty in acting as a seller or

distributor of Honeywell products as alleged. There is no evidence that the plaintiff had an exclusive distributor arrangement with Honeywell that Gord interfered with.

[23] I therefore find that there is no basis upon which to impose injunctive prohibitions on the activities of Gord based upon his role or conduct with the plaintiff. I will address the issue of whether any prohibitions should be imposed based upon his association with the defendant, Chris Magel ("Chris"), after I deal with the allegations against Chris.

[24] With respect to Chris the parties agree that the standard to be applied to the issue of whether Chris was bound by enforceable contractual covenants, and whether he breached those covenants, is strong *prima facie* case based upon the fact that restrictive covenants are *prima facie* unenforceable in an employee/ employer relationship. I agree that the higher standard is appropriate in these circumstances.

[25] With respect to the issue of whether Chris owed or breached a fiduciary or common law duty the parties do not agree. The plaintiff submits that the standard to be applied is whether the plaintiff has established that there is a serious issue to be tried, and the defendants submit that because it is an employer/employee relationship, the correct standard is a strong *prima facie* case.

[26] With respect to this issue, I agree with the submissions of the plaintiff, based upon the case law provided, that the applicable standard is whether the plaintiff has established that there is a serious issue to be tried.

[27] Looking first at the issue of whether Chris was bound by and breached any contractual restrictions, while not conceded by the plaintiff, it was also not strenuously argued that Chris was bound by any contractual restrictive covenants at the time of leaving the plaintiff.

[28] The argument was more forcefully made that Chris should be restricted by virtue of an alleged conspiracy with Gord to compete with the plaintiff in contravention of Gord's contractual obligations under the SPA.

[29] Chris was not a party to the SPA in this case having never been an owner of the company that was sold to the plaintiff. The only evidence with respect to Chris being personally bound by a restrictive covenant as an employee of the plaintiff is an unsigned copy of an employment contract between the plaintiff and Chris containing restrictive provisions.

[30] Chris denies ever having signed a written contract with the plaintiff, and there was no evidence produced of any witnesses to the negotiation and execution of the terms of a written agreement. There was also no evidence to suggest that there were any verbal covenants negotiated, or agreed upon, with Chris. Therefore, given the higher standard to establish such obligations, and in light of the presumption that such agreements are *prima facie* unenforceable, I find that it is unlikely that the plaintiff would be able to discharge its burden of rebutting that presumption. I therefore find that there are no contractual terms with respect to Chris personally, upon which injunctive relief could appropriately be granted.

[31] With respect to the argument that both defendants should be equally bound by Gord's non-compete covenants in the SPA, I have declined to order injunctive relief with respect to those covenants because the plaintiff failed to establish a serious issue to be tried with respect to extension of the temporal aspect of those terms.

[32] In addition, I am of the view that, as set out below, on the balance of convenience such an order would be more harmful to Gord than refusing to make the order would be on the plaintiff. Therefore, there is no basis upon which to extend such restrictions to Chris.

[33] With respect to the issue of whether the plaintiff has established that there is a serious question to be tried with respect to whether Chris owed and breached fiduciary duties to Valley, the plaintiff argued that the evidence establishes that Chris was a key employee and effectively the face of the company in Manitoba, and as such, he was a fiduciary.

[34] As a fiduciary they argued that Chris owed a duty not to solicit the plaintiff's customers, take a customer list, or use confidential employer information for his own advantage (see ***Brian L. Leipert Financial Services Ltd. v. Reiter***, 2019 SKQB 310 at para. 32)

[35] With respect to whether Chris was a fiduciary, while the facts of this case suggest that such a finding is not certain on a balance of probabilities, I do not find that the allegation is frivolous or vexatious. There is some evidence upon

which this finding could be made and as such the plaintiff has met the threshold test.

[36] Similarly, with respect to a breach if such duties are found, while there is not clear evidence of solicitation of clients and use of confidential information, there is some evidence upon which the court could draw inferences of a breach of his duties. As such I find that the threshold of a serious issue to be tried has also been met there.

[37] The same finding relates to imposition or breach of a common law duty of loyalty and good faith. The court in my view is likely to find that those duties apply to Chris and there is some evidence upon which they could find a breach. The threshold at the injunctive stage is quite low.

[38] However, even if the court were to find that Chris owed, and breached a fiduciary and/or common law duty to the plaintiff, such a duty does not prevent an employee from competing with the former employer, or providing services to its customers. Any prohibition against doing so is therefore not appropriate in this case.

[39] The question then becomes whether the prohibitions sought against Chris with respect to soliciting clients of the plaintiff, and using or retaining confidential or proprietary information of Valley, is warranted. And further whether such prohibitions should, if ordered, extend to Gord and the defendant, Detect Air Technologies ("Detect Air").

[40] This determination requires an analysis of the issues of irreparable harm and the balance of convenience.

IRREPARABLE HARM

[41] With respect to irreparable harm, the plaintiff argues that the damage suffered as a result of the defendants taking their clients is significant and will result in the failure of their business. They indicate that they had immediately suffered irreparable losses in revenue and their client base following Gord, and then Chris, leaving.

[42] However, I note that at the hearing nine months after Gord quit and seven months after Chris quit they were able to point to only a handful of their 1000 clients who they believe have moved to Detect Air.

[43] There is also evidence that their revenue was adversely affected by management issues and staff loss prior to Chris leaving. These issues were identified by Chris as the primary reason he left. The evidence is that Chris was being burdened with an ever increasing workload and responsibilities because of poor management and employees quitting and not being replaced. This evidence is not challenged in any significant way. There is no denial of Chris' evidence that he had in fact quit earlier for these reasons and had been persuaded, with the help of an increase in pay, to stay on.

[44] For these reasons, I am reluctant to accept that losses experienced by the plaintiff can be attributed solely to any breaches of obligation that Chris may be found to have had to the company.

[45] I am not satisfied that there have been, or will continue to be, losses attributable to the obligations and conduct of this former employee which could not be compensated by way of damages.

BALANCE OF CONVENIENCE

[46] With respect to the balance of convenience, the relief sought by the plaintiff against both defendants is quite broad. They are seeking an order restricting Gord and Chris and Detect Air from carrying on or being employed in any business which is substantially the same or in competition with the plaintiff's business until December 2022, or alternatively until February 2023. As I have already ruled, I believe that it is very unlikely that the court would extend the contractual terms agreed upon between Gord and Valley at the time that Gord sold the business to them.

[47] If the non-compete relief was granted the effect would be to render both Gord and Chris unable to work at all in their field during the period of the non-compete order. This would result in significant harm to the defendants which is disproportionate to harm sought to be prevented to the plaintiff.

[48] The plaintiff is also seeking that Gord and Chris be prohibited from soliciting or *offering* services or products to any of the plaintiff's customers and from soliciting any employees from Valley. This would effectively restrict the defendants from doing work for any clients that had at some time been customers of the plaintiff. It would be very difficult to differentiate on a practical basis whether services have been offered to a former Valley customer by the defendants, or

provided at the customer's request. The relief sought is even broader than a standard non-solicitation covenant which generally just restricts solicitation of customers from a former employer.

[49] With respect to the effect upon the plaintiff if the relief is not granted, the plaintiff is already beyond the period agreed upon between the parties for non-competition by Gord after sale of the business to Valley. The plaintiff has had five years, which is a very significant period of time, to make whatever arrangements they needed to make to replace Gord, train employees and secure their customer relationships. In my view the effect upon Gord of ordering a further prohibition from operating a business in this field, providing services to Valley customers, or hiring employees who worked for Valley, would be more detrimental to him than declining to make the order would be on the plaintiff. Any breach of the SPA has already occurred at this point and if appropriate the plaintiff will be compensated for any losses they can establish as a result.

[50] With respect to a prohibition against the defendants soliciting business from Valley's customers the only basis upon which this prohibition would be appropriate is on the basis of a finding that Chris owed the company a fiduciary duty. Having found that there is a triable issue with respect to both the duty and potential breaches of the duty, I am prepared on an interim basis to order that Chris is prohibited from soliciting business from Valley's repeat customers.

[51] Given the nature of this business, the plaintiff has many customers who require scheduled calibration of their gas detection services. The recommended

calibration schedule is maintained by the plaintiff for these existing clients and the clients are contacted by the plaintiff to schedule that service on a routine business. In my view, the plaintiff has demonstrated a proprietary interest in these repeat customers and that they will suffer a loss of ongoing business if these customers are actively solicited away by a former employee.

[52] In my view the balance of convenience weighs in favour of protecting the plaintiff from active solicitation of these customers by former employees of some tenure, while allowing the defendants to do work for any of the plaintiff's customers that approach them for services, and allowing the defendants to solicit business from any customers that have not been recent repeat customers of the plaintiff. This strikes the appropriate balance between the potential harms to either party.

[53] In order to give effect to this prohibition, the plaintiff will be required to provide a list to counsel for the defendants of all customers that it provided scheduled gas detection system calibration services to (the "List") between April 1, 2020 and the date of judgment. This List must be provided within 10 days of the date of this Decision.

[54] The prohibition will be only with respect to solicitation of services of the customers on the List (not offering services as included in the plaintiff's draft order), but it will extend to Gord Mattes and Detect Air Technologies Inc.

[55] Further, if the defendants have in their possession any client lists or calibration schedules that were obtained from the plaintiff, they are prohibited

from using that proprietary information to contact any of the clients who are on the List for the purpose of soliciting business.

[56] Nothing in this decision is intended to prohibit any of the defendants from operating or working in a business that competes directly with the plaintiff, or from providing services of any kind to customers of the plaintiff, including those on the List. There is also no prohibition from selling the product of any supplier that the plaintiff also uses (including Honeywell), or from soliciting or hiring any former employees of the plaintiff. These restrictions are in my view outside of any obligations owed by a fiduciary or employee to a former employer.

[57] The only prohibition is against soliciting the business of customers on the List and using confidential information for that purpose.

[58] I am not making any finding that the defendant Chris has likely taken any confidential or proprietary information from the plaintiff in breach of any duty he may owe Valley. However, there is enough evidence to establish that there is a serious issue to be tried in this regard. The plaintiff, on the other hand, has not established that it had a proprietary interest in protecting any information other than their client list and their recalibration schedules. Given the length of employment of these two individuals it is possible that much of that information is simply known to them at this point as part of their knowledge acquired through experience. There will therefore be no additional order with respect to use or return of confidential or proprietary information.

COSTS

[59] With respect to costs, the parties had mixed results. However, perhaps if the plaintiff had filed the correct draft order it was seeking in advance of the hearing (and here I am referring to the request for a non-compete order only to December 30, 2022, rather than until the matter has been determined on a final basis) some resolution might have been possible. It is possible that had the defendants known the plaintiff's position in that regard the parties could have agreed upon the very limited injunctive relief I have granted.

[60] That in my view should be taken into account in discussions between the parties as to the appropriate costs of this motion. If the parties are unable to agree to costs, the matter can be set down for submissions before me. I am prepared to also consider the filing of written submissions or submissions by teleconference on the issue of costs, if required.

McCARTHY J.