

CIVIL COURT OF THE CITY OF NEW YORK,
COUNTY OF NEW YORK, PART 81

EYES OF THE WORLD, INC. D/B/A SHOBHA
AND SHOBHA, INC.,

Plaintiffs,

-against-

MIRANDA BOCI, AND NYC WAXING, LLC,

Defendants.

Index No.: CV 46549/09

DECISION/ORDER

HON. MARGARET A. CHAN
Judge, Civil Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1, 2
Answering Affidavits/Affirmations.....	_____
Reply Affidavits/Affirmations.....	_____
Memoranda of Law.....	_____
Other.....	_____

This matter was referred to this court for trial on May 4, 2011. After a conference, the only issue hinged upon the validity of a restrictive covenant in an employment agreement between parties. The parties submitted pre-trial memoranda on the issue on June 1, 2011. The court finds as follows:

Defendant Boci (“Boci”) was an employee of plaintiffs Eyes of the World, Inc. D/B/A Shobha and Shobha, Inc. (collectively “Shobha”) performing hair removal services at plaintiffs’ business locations from 2006 to 2009. On February 15, 2009, defendant Boci voluntarily resigned her position with Shobha and began working for NYC Waxing, LLC. Plaintiffs settled their claim against NYC Waxing, LLC, which is no longer a party to this action.

Boci’s employment agreement with Shobha, dated March 24, 2006, stated in part:

For a period of one (1) year following termination of your employment for any reason, you agree not to provide Salon Services in New York City to any client of Eyes of the World, Inc. or Shobha, Inc. for whom you provided services during the last twelve (12) months of your employment with Eyes of the World, Inc.

Plaintiffs seek to enforce this restrictive covenant in the employment agreement and seek damages. Plaintiffs allege that Boci performed services on former Shobha clients at her new place of employment. In fact, plaintiffs assert Boci performed services for eighty six (86) former plaintiffs’ clients at her new employer within one (1) year of her termination.

“In order to be enforceable, an anticompetitive covenant ancillary to an employment agreement must be reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the public, and not unreasonably burdensome to the employee” (*Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263 [App Div, 1st Dept 2004] citing *BDO Seidman v Hirshberg*, 93 NY2d 382 [Ct App 1999]). Restrictive covenants are generally frowned upon by courts due to public policy considerations that seek to prevent restrictions on a person’s livelihood (*see Kanan, Corbin, Schupak & Aronow, Inc. v. FD International, Ltd.*, 8 Misc3d 412 [Sup Ct, NY Cty 2005] citing *Purchasing Associates, Inc. v Weitz*, 13 NY2d 267, 271 [Ct App, 1963]). It has been held that “[s]ince 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” (*Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [Ct App 1977]). Consequently these 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”, or if the employee’s services are unique or extraordinary (*id.* at 499; *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307-308 [Ct App 1976]).

Plaintiffs attempted to establish that the services provided by Boci are unique and extraordinary, however, there is nothing to support such a contention. Boci did not have access to trade secrets, client lists, or proprietary information (*see Columbia Ribbon & Carbon Mfg. Co., Inc. v A-1-A Corp.*, 42 NY2d 496 [Ct App 1977]; *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303; *Maltby v Harlow Meyer Savage, Inc.*, 223 AD2d 516 [App Div, 1st Dept 1996]; *Michael G. Kessler & Associates, Ltd. v White*, 28 AD3d 724 [App Div, 2nd Dept 2006]).

The covenant at bar is unreasonable in its limitation, burdensome to the employee, and not necessary to protect the employer’s legitimate interests. The Appellate Division First Department in *Investor Access Corp. v Doremus & Co., Inc.*, 186 AD2d 401, did not enforce a restrictive covenant of one (1) year that prevented the employee, a public relations account executive, from soliciting or servicing any current or former client of the plaintiff employer. The court held that the restrictive covenant did not protect the legitimate interests of the employer because the defendant did not provide unique or extraordinary services to his employer, and had not misappropriated any trade secrets or confidential information. The court went on to find that clients’ decisions to follow the defendant were based upon the clients’ needs and the employee’s outstanding ability in the field (*id.* at 404).

Similarly here, when considering all the prongs necessary to enforce such an agreement, the employers’ legitimate interests do not mandate such a restrictive covenant (*see BDO Seidman v Hirshberg*, 93 NY2d 382 [restrictive covenant will not be enforced in the absence of circumstances evincing a need for the protection of the former employer]). As discussed above, despite Boci’s training, her job and skills used for that job are not legally considered unique or extraordinary. Likewise to the situation in *Investor Access Corp. v Doremus & Co., Inc.*, it appears that clients opted to follow Boci based on their needs and her ability. Shobha’s restrictive covenant is overly broad and unenforceable.

This court shall deem defendant's pre-trial memorandum as a motion to dismiss and plaintiffs' pre-trial memorandum as opposition. After a review of the legal issues presented, the court finds the restrictive covenant in the employment agreement unreasonable and unenforceable. As such, the action is dismissed and stricken from the calendar.

This constitutes the decision and order of the court.

Dated: August 19, 2011



HON. MARGARET A. CHAN
Judge, Civil Court

MARGARET A. CHAN
JUDGE, CIVIL COURT