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Noncompetes clauses gain focus in digital world

by Gregory Zeller
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When RBR Melville Contractors' sales manager left the snow-removal company last year to form his own plow-for-hire business, he took a lot with him.

Not just experience and knowledge, alleges RBR President Robert Wesolowski, but several longtime RBR customers – plus the only hard copy of a noncompete agreement that would have prevented such a coup.

That's the crux of an ongoing lawsuit pitting RBR against Patrick Feehan, founder of Carle Place-based Professional Snow Management. Wesolowski claims things "disappeared right out of the office" when Feehan left, including the noncompete agreement signed by Feehan.

Feehan denies the charge. "I never signed any noncompete clause," he told LIBN, "nor was any ever presented to me the entire time I worked there."

These are not simply guys with plows, but contract-driven corporate entities targeting shopping centers, multiunit residential communities and other lucrative accounts.

Wesolowski insists the noncompete agreement existed and claims Feehan defied it to steal "customers that have been with us for years." Citing the ongoing lawsuit, he declined additional comment, adding only that the Feehan affair has been "tremendously damaging, financially."

While litigation of the case continues in Suffolk County Supreme Court, the court has already dismissed RBR's motion for preliminary injunctive relief, allowing Professional Snow Management to continue to do business during the trial.

Whether a signed noncompete agreement actually existed and mysteriously vanished, the court's denial of RBR's injunctive-relief motion "establishes the need for business owners to put safeguards into place," according to attorney Jeffrey Basso of Bohemia corporate law firm Campolo, Middleton & McCormick.

Restrictive covenants – including non-compete, nondisclosure and nonsolicitation agreements – are nothing new. But new technologies are generating new emphasis, as it becomes easier for employees to surreptitiously swipe proprietary information before jumping ship.

"You're seeing a lot more of these situations where employees are getting out and forming new companies, and taking with them a lot of electronically available information," Basso said. "It's just easier, technologically, to transfer information that you wouldn't have been able to transfer previously, so it's more important than ever to have [restrictive covenants] in place."

Myriad types of information can benefit unscrupulous ex-employees. Customer lists, pricing plans, insider product-development knowledge, even the personal preferences of longstanding clients are all exploitable – hence, the evolution of the three main types of restrictive covenants.

Nondisclosure agreements basically forbid former employees from revealing R&D secrets, business strategies and other inside information. Nonsolicitation agreements stop former employees from marketing directly to the company's current – and sometimes former or future – clients, while noncompetes prevent them from launching rival enterprises in the same market.

"The courts are very strict in interpreting these agreements," Basso said. "They don't want former employees to be restricted from earning a living. If an agreement is unreasonable or isn't created expressly for the protection a business' interests, the courts will strike it down."

For instance, no court is going to enforce a lifetime noncompete agreement – two years is the current standard, Basso said – and clauses concerning factors like geography change fluidly from industry to industry.

Basso hypothesized a doctor leaving a medical practice: A noncompete might stop her from opening another practice within 25 miles, because that's where the old practice's patients physically exist, but that's very different from a software company defector who can theoretically service clients anywhere.

"You can't just restrict a person from competing anywhere in the world – there has to be a limited geographic scope," Basso said. "Courts will basically

take it on a case-by-case basis, consider the facts about what companies do and how they interact with customers, and use all that to determine what's reasonable."

Similarly, employers are within their rights to require restrictive covenants as an employment condition and can legally deny employment to anyone who won't sign, "but if it's anything you wouldn't have another employee sign based on race, gender or anything discriminatory like that, that's illegal," Basso noted.

And if an employee is forced to sign something without having an opportunity to review it – or, if necessary, have an attorney review it – "that's something the court is likely to consider later," he added.

The risks of operating without restrictive covenants can be especially large for small businesses, where the "impact of losing a key employee with confidential information can huge," according to Basso.

"If an ex-employee takes confidential information and starts soliciting all of a small company's customers, it could completely destroy the business," he said.