

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

H & R BLOCK EASTERN	:	
TAX SERVICES, INC.,	:	
Plaintiff,	:	
	:	CIVIL NO.
v.	:	3:00-cv-1332(JCH)
	:	
DONALD L. BROOKS,	:	
Defendant.	:	OCTOBER 12, 2000

**MEMORANDUM OF DECISION ON
MOTION FOR PRELIMINARY INJUNCTION [DKT. NO. 7]**

I. BACKGROUND

The plaintiff, H & R Block Eastern Tax Services, Inc. (“H & R Block”), commenced this action on July 17, 2000. Its Complaint alleged breach of contract, tortious interference with contract, and civil trespass. H & R Block filed a Motion for Expedited Discovery, a Motion for Temporary Restraining Order, and a Motion for Preliminary Injunction. The court granted the Motion for Expedited Discovery and the Application to Show Cause why the plaintiff’s Motion for Preliminary Injunction should not be granted.¹ A Preliminary Injunction Hearing was held on

¹ The Motion for Temporary Restraining Order was withdrawn by the plaintiff in light of the expedited discovery and the defendant’s stipulation to temporary injunctive relief for a period of time. [DKT. No. 12.] When that period expired, plaintiff requested a hearing on its Motion for Preliminary Injunction.

September 12, 2000 and the parties submitted post-hearing briefs. For the following reasons, the court grants the plaintiff's motion for Preliminary Injunction.

II. FINDINGS OF FACT

The defendant, Donald Brooks ("Brooks"), is a former employee of H & R Block, a Missouri corporation. On December 30, 1996, when Brooks began working as an Accounting Service Manager with H & R Block, he had sold the assets of his previous business to H & R Block pursuant to an Asset Purchase Agreement. As a condition of the closing of the Asset Purchase Agreement, Brooks entered into a separate employment agreement with H & R Block. That latter agreement includes a stipulation regarding confidential information, a covenant against solicitation, and a covenant against competition. Under these provisions, during the course of the agreement and for two years following, Brooks is restricted from revealing any confidential information, soliciting any employees or customers, and engaging in accounting or bookkeeping services within a twenty-five mile radius of any H & R Block company office in the H & R district in which Brooks had worked.² The contract also provides that the initial employment term would be

² According to H & R Block, the offices in the district are located in South Windsor, Vernon, Manchester, Stafford Springs, East Windsor, Bloomfield, Putnam, East

extended automatically from year to year unless terminated sooner as provided for in the agreement. The annual term was from June 1 to May 31. The agreement provides that the H & R Block can terminate the agreement and the employment of Brooks without notice or salary if Brooks interfered with or prejudiced H & R's business, disobeyed or refused to discharge his duties, breached the provisions of the contract, or failed to perform his duties in a manner H & R Block found satisfactory.

Brooks received notice of H & R Block's decision to discontinue the Accounting Service Manager position on April 12, 2000. The decision provided that the employment agreement would not be renewed and would therefore terminate effective May 31, 2000. H & R Block alleges that, since that time, Brooks has been soliciting business from and providing services to prior customers of H & R Block in violation of the employment agreement. H & R Block commenced this action seeking injunctive relief for breach of contract, tortious interference with contract, and civil trespass.

Hartford, Glastonbury, and Hartford.

Brooks counterclaimed, alleging that the termination of his employment with H & R Block constituted a breach of the employment agreement and was done in retaliation for a complaint he made regarding employee benefits. He does not deny serving former H & R clients since his employment with H & R Block terminated. However, Brooks argues that the covenants are unenforceable because H & R Block breached the contract. In addition, Brooks alleges that H & R Block has failed to pay to him amounts due pursuant to the employment agreement and requests actual damages.

III. DISCUSSION

The fundamental purpose in granting preliminary injunctive relief has always been to preserve the court's ability to later render a meaningful final decision on the merits by preventing irreparable harm in the interim. See United States v. Adler's Creamery, Inc., 107 F.2d 987, 990 (2d Cir. 1939); 11A Charles Alan Wright et al., Federal Practice and Procedure, § 2947, at 121 (2d Ed. 1995). The issuance of a preliminary injunction rests in the sound discretion of the trial court. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975); American Express Fin. Advisors, Inc. v. Thorley, 147 F.3d 229, 232 (2d Cir. 1998).

In the often-cited language of Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., the Second Circuit set forth the standard that must be met to warrant issuance of a preliminary injunction:

The standard in the Second Circuit for injunctive relief clearly calls for a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

596 F.2d 70, 72 (2d Cir. 1979). Under the first prong of this standard, the movant “need not show that success is an absolute certainty. . . . There may remain considerable room for doubt.” Abdul Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985).

A. Missouri Law and Covenants Not to Compete

Both parties agree that the employment agreement at issue in this case contains a clause providing that the agreement is governed by the laws of the State of Missouri, the home state of H & R Block. A federal court sitting in diversity applies the choice of law rules of the forum state. See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496-97 (1941). Under Connecticut law, “parties to a contract generally are allowed to select the law that will govern their contract.”

Elgar v. Elgar, 238 Conn. 839, 850 (1996). The only circumstances under which the parties' choice of law will not govern occur when the chosen state has no substantial relationship to the contract or when the application of the chosen law would be contrary to a fundamental policy of a state that has a materially greater interest in the issue. Id. In this case, Missouri has a substantial relationship to the contract because it is the home state of a party to the agreement. Further, applying Missouri law would not be contrary to any fundamental policy of Connecticut because the relevant Missouri law is similar to the law of Connecticut. Therefore, neither exception to allowing the parties' choice of law to govern exists. Thus, the contract governs, and Missouri law applies to the contract.

In order to determine whether either irreparable harm or likelihood of success on the merits exists, the court must first consider whether the agreement at issue in this case is enforceable under Missouri law. Like Connecticut, Missouri recognizes and will enforce covenants not to compete that impose reasonable restrictions on a former employee in order to serve the "protectible interests" of a former employer. See Silvers, Asher, Sher & McLaren, M.D.'s Neurology, P.C. v. Batchu, 16 S.W.3d 340, 344 (Mo. Ct. App. 2000). "The purpose of a non-compete agreement is to

protect an employer from unfair competition by a former employee without imposing unreasonable restraint on the latter.” Id. (quoting Continental Research Corp. v. Scholz, 595 S.W.2d 396, 399 (Mo. Ct. App. 1980)). Restraints on a former employee’s ability to compete must serve the employer’s legitimate interest and be reasonable under the circumstances. See AEE-EMF, Inc. v. Passmore, 906 S.W.2d 714, 719 (Mo. Ct. App. 1995). In such situations, Missouri courts will grant injunctive relief.

“Temporary and spatially limited restraints on a former employee’s ability to compete with his former employer articulated in a covenant not to compete are enforceable if reasonable under all attending circumstances and if enforcement serves the employer’s legitimate interests.” AEE-EMF, Inc., 906 S.W.2d at 719. The Missouri Court of Appeals has found that an employer has a protectible interest in its customer base. See Silvers, 16 S.W.3d at 345.; see also Empire Gas Corp. V. Graham, 654 S.W.2d 329, 330-31 (Mo. Ct. App. 1983). H & R Block’s interest is made more vulnerable by the fact that Brooks is extremely familiar with a portion of the customer base because he provided lists of these customers to H & R Block when he sold the company his business in 1996.

Restrictions on competition aimed at protecting an employer's interest have been held to be reasonable under Missouri law if they are temporary and spatially limited. See AEE-EMF, Inc., 906 S.W.2d at 719-20. Limiting a former employee from soliciting business from the employer's clients and from conducting business within a specified geographical area constitute reasonable restrictions. See Silvers, 16 S.W.3d at 343 (finding a covenant not to compete that restricted a neurologist from engaging in the practice of neurology within seventy-five miles of the employer's office for two years after his termination of employment to be reasonable); Mills v. Murray, 472 S.W.2d 6 (Mo. Ct. App. 1971) (finding a three year restriction limiting an employee from soliciting, contracting with, or serving those who he served at his former employer to be reasonable).

The employment agreement at issue in this case included a specific provision that restricted Brooks from soliciting, diverting, or taking away customers served by H & R Block for two years following termination of his employment. It also included a general covenant against competition that restricted Brooks from soliciting, accepting, or otherwise engaging in accounting or bookkeeping within a twenty-five mile radius of any H & R Block office in the district for two years after

termination of employment. Both types of covenants are enforceable under Missouri law because the restrictions placed on Brooks are reasonably limited. The two year time period is not overly restrictive because it gives H & R Block only two tax seasons to try to maintain its customer base. The geographic limitation is not overly restrictive because it leaves Brooks an opportunity to continue in his profession in much of Connecticut and the rest of the country. The twenty-five mile restriction applies to all offices in the district even though the defendant only worked at the South Windsor Office. However, based on the plaintiff's description of the district as stated supra in Footnote 1, the restricted area is generally the greater Hartford area.³ Thus, the furthest distance covered by the restriction from the South Windsor office is approximately sixty miles. Most of the restricted territory is less than thirty-five miles from the office in which Brooks worked. The court finds the restriction to be temporally and geographically reasonable. Therefore, because H & R Block has a protectible interest and the restrictions on Brooks are not

³ Because of the inclusion of the Stafford Springs and Putnam offices, in the northeast section of Connecticut, the twenty-five mile radius reaches, on the north east in particular, outside of the greater Hartford area, to parts of Worcester and just west of Providence. It does not, however, include Norwich, New London, New Haven, or any of Fairfield County.

unreasonable, the covenants are enforceable under Missouri law.

B. Irreparable Harm

Under Missouri law, irreparable harm exists when covenants such as the ones at issue in this case are at risk of being or have been breached. See Schnucks Twenty-Five, Inc. v. Bettendorf, 595 S.W.2d 279, 287-88 (Mo. Ct. App. 1979); N.I.S. Corp. v. Swindle, 724 F.2d 707, 710 (8th Cir. 1984). In N.I.S., the Eighth Circuit found irreparable harm under Missouri law where the non-compete agreements at issue were valid and the defendant had been soliciting business from the former employer's customers. See N.I.S., 724 F.2d at 710. In Schnucks, the Missouri Court of Appeals found irreparable harm when a covenant similar to those at issue in this case had been breached even though the plaintiff could not speculate as to what damages it actually suffered from the breach. See Schnucks, 595 S.W.2d at 287-88.

In this case, the plaintiff estimates that it has lost approximately \$40,000.00 and suffered a 40-50% decrease in profits since Brooks began serving former H & R Block customers. Covenants protecting an employer's confidential material and customer base from former employees are created because the actual loss of clients or

information is impossible to predict. Brooks has admitted to serving customers in violation of the covenant not to compete. The fact that he is working with former H & R Block customers strongly suggests he has also acted in violation of the covenant not to solicit. Finally, while it is not clear that he has violated the covenant restricting dissemination of confidential material, the threat of this in light of his contact with previous H & R Block customers is sufficient to meet the irreparable harm standard. Thus, H & R Block has suffered and will continue to suffer the harm—loss of customers and profits—sought to be avoided by the provisions of the employment agreement. The actual damages incurred from this harm are unascertainable because H & R Block cannot predict which customers would have stayed with them and how they might have used the services H & R Block provides. Based on these facts, H & R Block has demonstrated irreparable harm.

C. Likelihood of Success on the Merits

Brooks contends that H & R Block is not likely to succeed on the merits of this case. According to Brooks, the covenants in the employment contract are not enforceable because H & R Block violated the employment agreement by terminating the agreement.

Under Missouri law, covenants are to be given their “plain, ordinary, and usual meaning.” Preferred Physicians Mutual Management Group, Inc. v. Preferred Physicians Mutual Risk Retention Group, Inc., 961 S.W.2d 100, 103 (Mo. Ct. App. 1998) (internal citations and quotations omitted). In addition, Missouri courts adhere to the employment at will doctrine. Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. 1988). “Under Missouri’s employment at will doctrine an employer can discharge—for cause or without cause—an at will employee who does not otherwise fall within the protective reach of a contrary statutory provision and still not be subject to liability for wrongful discharge.” Id. (quoting Dake v. Tuell, 687 S.W.2d 191, 193 (Mo. 1985)). An employment contract for an indefinite period of time is treated as one terminable at will. Panther v. Mr. Goo-Rents, Inc., 817 S.W.2d 1, 3 (Mo. Ct. App. 1991). Missouri does provide an exception that allows an employee to enforce an employment contract if independent and additional consideration was transferred to the employer in exchange for employment. See Superior Concrete Accessories, Inc. v. Kemper, 284 S.W.2d 482, 491 (Mo. 1955). Thus, for example, where a person was willing to sell pharmaceutical formulas in exchange for employment, the resulting contract

providing for sale of the formulas and for employment was found to be enforceable rather than at will even though it lacked a definite term. See Lopp v. Peerless Serum Co., 382 S.W.2d 620, 624 (Mo. 1964).

The contract in this case provided for automatic extension from year to year unless terminated sooner and contained specific termination provisions. The plain meaning of these terms is that the contract is a year-to-year contract that allowed H & R Block to terminate Brooks' employment under the agreement's provisions and allowed either party to choose not to renew the contract at the end of a term.

Pursuant to the terms of the contract, H & R Block did not renew the agreement for the year beginning June 1, 2000.

Brooks first argued that the covenants in the employment agreement were not enforceable because the agreement was an enforceable perpetual contract that H & R Block violated by terminating his employment.⁴ However, "to be enforceable, a contract which purports to run in perpetuity must be adamantly clear that this is the

⁴ The defendant also argues H & R Block owes him money for commissions he earned in the year 2000 and that the termination of the employment agreement was in retaliation for a complaint he filed with the State of Connecticut Department of Labor regarding the commissions. The defendant has not alleged, however, that the failure to pay the commission was a breach of the employment contract that would excuse him from the covenants at issue in this case.

parties' intent." Preferred Physicians, 961 S.W.2d at 103. Where a contract runs for a set term, terminates, and is then in need of renewal, perpetuity cannot be found. Id. at 104. Therefore, even though the employment agreement in this case provided for automatic renewal, it was not a perpetual contract.⁵

Brooks then argued that the contract was one of indefinite duration but should not be considered an at will contract because it was a part of the Asset Purchase Agreement. Relying on the Lopp decision, Brooks argued that the employer received Brooks' business as additional consideration for the employment agreement.

The court finds that the contract did contain a definite term of one year, to be renewed each year and that the plaintiff chose not to renew the contract in 2000. Even if the court agreed that the contract was for an indefinite period, the defendant has not produced any evidence that indicates the employment contract was the consideration given in exchange for the business. The only contract before the court is the employment agreement and the plain meaning of that agreement is that it is a

⁵ In addition, the court notes that, were it to find a perpetual contract here, the contract would, by operation of Missouri law, be at will. See Johnson, 745 S.W.2d at 662. If the contract were an at will contract, then H & R Block did not breach it by terminating the plaintiff's position.

contract for one year to be automatically renewed at the end of that term unless it is terminated pursuant to the termination provisions of the contract. In Lopp, the additional consideration was part of the employment contract. Here, the employment contract is a separate agreement from the Asset Purchase Agreement and substantial consideration separate from employment was provided for the purchase of the business in that Asset Purchase Agreement. Therefore, the Lopp decision is inapposite and the court finds the plaintiff did not breach the contract by failing to renew the agreement.

Demonstrating a likelihood of success on the merits does not require a showing of certain success. In this case, Missouri law enforces covenants such as those in the employment agreement, the employment agreement was an agreement with specific terms, and Brooks has admitted to serving prior H & R Block customers. Therefore, H & R Block has established a likelihood of success on the merits.

IV. CONCLUSION

H & R Block has established irreparable harm and a likelihood of success on the merits for Brooks' violation of the covenants contained in the employment agreement. Therefore, the standard for a preliminary injunction has been met.

For the foregoing reasons, the plaintiff's motion for preliminary injunction [DKT. NO. 7] is GRANTED. Therefore, it is ORDERED that:

1. The defendant is enjoined from offering accounting, bookkeeping, and/or tax preparation services in competition with H & R Block as proscribed in his employment agreement within twenty-five miles of the H & R Block offices in the following Connecticut towns: South Windsor, Vernon, Manchester, Stafford Springs, East Windsor, Bloomfield, Putnam, East Hartford, Glastonbury, and Hartford.
2. The defendant is enjoined from directly or indirectly soliciting customers of H & R Block that were customers of the company during the defendant's employment with the company; and
3. The defendant is enjoined from using confidential business information as that term is defined in his employment agreement in violation of that agreement.

The foregoing is effective until further order by the court. In no event shall the injunction extend beyond June 1, 2002.

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the foregoing injunction shall issue upon the posting of a \$200,000.00 bond by H & R Block.

SO ORDERED.

Dated at Bridgeport, Connecticut this 12th day of October, 2000.

_____/s/_____

Janet C. Hall

United States District Judge