The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Brian's 1:1 Fitness

v.

Jeremy Woodward

NO. 2012-CV-00838

ORDER

Petitioner, Brian's 1:1 Fitness ("Brian's") seeks injunctive relief against Respondent, Jeremy Woodward ("Woodward"), and requests the Court to enforce a Non-Competition Agreement entered into between the parties. Specifically, Petitioner seeks to enjoin Woodward from: (a) engaging in services similar to those provided by Brian's for a client whom Brian's provided products or services for during the period of 24-months prior to the parties' termination of their relationship; and (b) engaging in a venture or business similar to that of Brian's or that is in direct or indirect competition with Brian's within 25 miles of Brian's place of business in Concord and Hooksett, New Hampshire for a period of 24 months following the parties' termination of their relationship. After originally denying the Petitioner's request without prejudice, the Court later convened an evidentiary hearing on July 12, 2013.[1] For the reasons stated in this Order the request for injunctive relief is DENIED.

I

"[I]njunctive relief in an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted."

[1] Part of the hiatus between the initial hearing and the evidentiary hearing was caused by the fact that the parties chose to engage in discovery.

Kukene v. Genualdo, 145 N.H. 1, 4 (2000) (citation omitted). A "preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." New Hampshire Dept. of Environmental Services v. Mottolo, 155 N.H. 57, 63 (2007) (citation omitted). In order to obtain a preliminary injunction, a party must show that: (1) a present threat of irreparable harm exists; (2) there is no adequate remedy at law; and (3) there is a likelihood of success on the merits. ATV Watch v. New Hampshire Dept. of Resources and Economic Development, 155 N.H. 434, 437 (2007) (citation omitted). Moreover, the Court must consider whether the grant of an injunction would be in the public interest. City of Nashua v. UniFirst, 130 N.H. 11, 14 (1987).

II

The facts from the Court's Order dated April 5, 2013 are hereby incorporated by reference. This case involves a dispute between a limited liability corporation, Brian's, which operates a personal training fitness center, and one of the personal trainers who worked at the facility, Woodward. This industry has seen substantial growth in recent years. *Our Pulchritudinous Priesthood,* New York Times, July 27, 2013. The Court originally convened a hearing to evaluate Petitioner's request for injunctive relief on February 22, 2013. At that hearing, the parties proceeded through offers of proof, although counsel for Woodward had the opportunity to cross-examine Brian's principal.

In an Order dated April 5, 2013, the Court denied the Petitioner's request for injunctive relief without prejudice. The Court reasoned that, on the record before it, Brian's could not "meet its burden to demonstrate that the interests it seeks to protect through the Non-Competition Agreement are legitimate business interests based on the nature of its relationship with Woodward." Order (April 5, 2013), 13. Indeed, the Court

found that, on the record before it, Woodward worked at Brian's facility as an independent contractor and not an employee. As the Court noted in that Order, the New Hampshire Supreme Court has never considered restrictive covenants in the context of an independent contractor relationship. However, the New Hampshire test for the reasonableness of a covenant is particularly fact sensitive; it requires a court to determine the legitimate interests of the employer that may be protected from competition. Therefore, the Court determined that a final resolution in this case required an evidentiary hearing "to identify the legitimate interests of the employer, and to determine whether the restraint is narrowly tailored to protect those interests." Order, 14, citing Syncom Industries v. Wood, 155 N.H. 73, 79 (2007).

The Court convened the ordered evidentiary hearing on July 12, 2013. At this hearing, Brian Silfies ("Silfies") the principal of Brian's, testified that he began his business in 2005. Brian's is a personal training facility where personal trainers are hired to train clients. He testified that he hired trainers to work for his business and that he entered into individual contracts with each trainer for different terms of years. In each such contract, Silfies explained that both parties agree that the contractor is charged a fee for using the facility but, thereafter, contractors retain whatever revenue they earn for personally training their clients.

Silfes testified that he required every contractor to sign an Employee Non-Compete Agreement. Silfies introduced the 2007 Non-Competition Agreement executed between Brian's and Woodward. That agreement recognized Woodward as an employee. However, in 2008, the parties executed a Non-Competition and Non-Disclosure agreement, which identified Woodward as an independent contractor. Silfies testified that he executed similar agreements with the other personal trainers that worked at the

facility.

Further, Silfies explained that, each year, he would negotiate a new annual contract with Woodward. However, the two parties never executed a new Non-Competition Agreement. Indeed, the evidence shows that both Woodward and Silfies understood that the 2008 Non-Competition Agreement remained in effect for the remainder of the time Woodward worked for Brian's. The last Independent Contractor Agreement Woodward signed was for one year, beginning in January 2012. In December 2011, Silfies sought a term longer than one year and Woodward declined to agree. In an e-mail exchange between the parties, dated December 11, 2011, Silfies stated, "I will keep price the same and I will trust you and your word that you have no intentions of opening your own facility or taking clients out of facility and to online training or any other version of training." Petitioner's Exh. 2. Silfies and Woodward recognized that Woodward had a "race company"- apparently a for-profit venture involving running- and the parties agreed that the Non-Competition Agreement did not apply to it.

Silfies testified that Woodward became a personal trainer at Brian's after the two met through a mutual friend. He provided Woodward with training on how to bill people and gave him a package regarding late policies. However, Silfies did not give Woodward training in how to be a personal trainer. In fact, Woodward testified he was already certified as a personal trainer when he went to work at Brian's.

While Woodward worked at Brian's, weekly meetings were held at which trainers would discuss new exercises, working around injuries, and keeping clients motivated. Further, at the meetings they would discuss Brian's newsletter; Brian's permitted each employee a portion of the monthly newsletter for marketing and individual advertising.

There was no testimony that any of this could be considered a legitimate trade secret.

In addition to the advertisements in the newsletters, Brian's did a significant amount of advertising for the facility. First, the newsletter had significant advertising for the facility. Brian's paid for significant advertising in the Concord Monitor and often had articles about the business placed in the newspaper. All trainers, except Woodward, had Brian's logo on their cards. Petitioner introduced a number of Brian's advertisements at the hearing. The advertisements did not mention Woodward by name, but some of them did include his picture. In addition, Silfies produced a printout of Brian's website. It included a biography of each trainer, including Woodward. Brian's also maintained an e-mail program that sent "blast" e-mails to customers, providing incentives to join or to share the information with friends. In addition, Brian's sponsored the Black Ice Pond Hockey Tournament and this resulted in significant advertising opportunities and publicity for the business.

On cross-examination, Silfies explained that there were no specific customer lists that Brian's used or distributed to new personal trainers. The only "list" that existed was the electronic customer list that Brian's used to send emails and the newsletter. The evidence shows that after the initial year that Woodward worked at Brian's, most of the clients he saw came to him directly to seek training and Brian's did not refer them. Woodward admitted that when he began working at Brian's in 2007, he had never been a personal trainer before and that he got his first clients from Brian's. However, he testified that since 2008 he has basically "been on his own" and maintains his own client base. He testified that as a result of some serious health issues in 2007, he received substantial publicity, and that attracted business.

Woodward left Brian's facility in January 2013. Silfies testified that when

Woodward left, six other trainers also left. Three of the trainers that left went to work with Woodward. Silfies testified that losing this many trainers had a significant negative impact on his business; he lost approximately 70% of his income.

Woodward admitted that in 2011, when he signed his last employment agreement, he told Silfies that he had no intention of opening a competing business. At the hearing, Woodward maintained that at that time he did not have any intention of opening a competing business. The Court does not credit this testimony. Woodward also admitted that all of the clients that were working with him at Brian's left Brian's when Woodward opened his new facility. This fact demonstrates that Woodward put some planning into opening his own facility.

In its post hearing memorandum, Petitioner identified fifteen clients that it alleges were the product of its marketing and goodwill, who worked with Woodward prior to his departure and are now training at Woodward's new facility. Brian's asserts that these fifteen clients are the product of Brian's goodwill and marketing in the following ways. Brian's asserts that two of these individuals, who are responsible for referring two additional clients, were not Woodward's clients prior to the time he joined Brian's facility and the same two individuals are connected to Silfies through neighbors and friends. Two clients joined Brian's after their wives, both returning clients at the facility, referred them, but not specifically to Woodward. Three of these individuals came to Woodward after picking up his business cards in the community. Brian's, though, asserts that the business cards were only available because Silfies made the arrangements with local businesses to permit the personal trainers to leave their cards at certain businesses. Two of these individuals were already clients at Brian's when Woodward joined the business and, according to Silfies, he had to encourage Woodward

to take them on because of his busy schedule. Two other individuals originally trained with Silfies and only later transitioned to Mr. Woodward. One individual previously trained at Brian's before Woodward joined and only later transitioned to training with Woodward. Last, one client knew Silfies after being charged with the landscaping at Silfies' residence and Brian's facility.

However, there is no dispute that these individuals never paid Brian's once Woodward became their personal trainer; rather, they would, like all other clients, pay Woodward who would then pay Brian's a fixed amount pursuant to the Independent Contractor Agreement. There is also no dispute that once these individuals became Woodward's clients, he was solely responsible for planning, implementing, and guiding them through any fitness routine.

Based on the complete record before the Court, Brian's argues that the facts demonstrate that Brian's had legitimate protectable interests in its marketing and goodwill. Therefore, Brian's contends that the Non-Competition Agreement is reasonable and enforceable against Woodward. The Court disagrees.

III

To determine the reasonableness of a non-competition agreement, the New Hampshire Supreme Court has applied a three-pronged test: first, whether the restriction is greater than necessary to protect the legitimate interests of the employer; second, whether the restriction imposes an undue hardship upon the employee; and third, whether the restriction is injurious to the public interest. Syncom Indus., 155 N.H. at 79. This three-part test finds its genesis in the Restatement (Second)Contracts, §

188.[2] Technical Aid Corporation v. Allen, 134 N.H. 1, 8 (1991).

The first step in determining the reasonableness of a restrictive covenant is to identify the legitimate interests of the employer and to determine whether the restraint is narrowly tailored to protect those interests. Merrimack Valley, 152 N.H. at 197. The New Hampshire Supreme Court has stated:

> Legitimate interests of an employer that may be protected from competition include: the employer's trade secrets that have been communicated to the employee during the course of the employment; confidential information communicated by the employer to the employee, but not involving trade secrets, such as information on a unique business method; an employee's special influence over the employer's customers, obtained during the course of employment; contacts developed during the employment; and the employer's development of goodwill and a positive image.

Syncom, 155 N.H. at 79, (quoting Nat'l Employment Ser.Corp. v. Olsten Staffing Svc., 145 N.H. 158, 160 (2000)). Employers also have a legitimate interest in protecting information about their customers gained by employees during the course of their employment. Technical Aid, 134 N.H. at 9.

In this case there is no dispute that Woodward is an independent contractor and not an employee. As the court noted in Edix Media Group, Inc. v. Mahani, 2006 WL 3742595 (Del. Ch. December 12, 2006) *7 n.30, "[f]ew jurisdictions have directly addressed the effect of independent contractor status on the enforceability of covenants not to compete. Most jurisdictions allow such agreements with an independent contractor, subject to limitations similar to those on employees." See also Eichmann v. National Hospital and Health Care Services, Inc., 719 N.E.2d 1141, 1146 (Ill. App. 1999)

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[2] The Restatement takes the position that a restraint that is ancillary to an otherwise valid transaction or relationship is an unreasonable restraint of trade if one of two conditions is present. The first condition is that the restraint is greater than necessary to protect the promisee's legitimate interest. The second is that the promisee's need was outweighed by the hardship to the promisor and the likely injury to the public. If these conditions are not present, then the covenant cannot be ancillary to an otherwise enforceable agreement and is simply a naked restraint of trade. Restatement (Second)Contracts §188.

(judicial scrutiny of a covenant not to compete with an independent contractor would be as strict where relationship was similar to employment); Bristol Window and Door, Inc. v. Hoogenstyn, 650 N.W.2d 670, 673-674 (Mich. App. 2002) (finding that covenant not to compete in independent contractor relationship can be enforced so long as it is reasonable); Jenkins v. Jenkins Irrigation, Inc., 259 S.E.2d 47, 49–50 (Ga. 1979) (finding that independent contractor's covenant should be analyzed the same as one between an employer and employee). In Edix Media Group, Inc., the court noted that some jurisdictions have taken the Delaware Court's position: the nature of the relationship constitutes one factor in considering the enforceable scope of a non-compete agreement. EDIX Media Group, Inc. v. Mahani, 2006 WL 3742595 at *7 n.30, citing Hope Found, Inc. v. Edwards, 2006 WL 3247141 (S.D. Ind. April 12, 2006) * 9; see also Starkings Court Reporting Services, Inc. v. Collins, 313 S.E.2d 614 (N.C. App. 1984) (finding that a covenant not to compete exceeded the legitimate interests of the employer in an independent contractor context).

The New Hampshire Supreme Court has never considered restrictive covenants in the context of an independent contractor relationship. However, the New Hampshire test for the reasonableness of a covenant, laid out supra, is particularly fact sensitive; it requires a court to determine the legitimate interests of the employer that may be protected from competition. Syncom, 155 N.H. 79. The New Hampshire approach is based on the Restatement(Second) Contracts §188, which requires that a court consider whether an ancillary restraint from competition is "unreasonably in restraint of trade." Technical Aid Corporation, 134 N.H. at 8. Such an analysis requires that a reviewing court understand the nature of the transaction before it. The nature of the transaction may be significantly affected by whether or not a party to it is an employee or an

independent contractor.

As the court in EDIX explained:

> The traditional employee/employer relationship usually involves a much more intimate relationship than that of an independent contractor. Independent contractors maintain a greater degree of control over how they accomplish tasks; remain engaged to a much greater extent in a distinct occupation or business (as opposed to an employee, who may be asked to perform other reasonable tasks as required); and traditionally work with a lesser degree of supervision.

2006 WL 37425696, at *7, citing RESTATEMENT (SECOND) OF AGENCY §220(c). Further, "[i]f a person is an independent contractor, that fact may signal a greater likelihood that he has brought his own strengths and abilities to the joint enterprise...." Hope Found, Inc., 2006 WL 3247141, at *9. For these reasons, the legitimate protectable interests of an employer seeking to enforce a restrictive covenant against an independent contractor may be considerably limited as compared to enforcement against an employee. Id.; EDIX, 2006 WL 3742595, at *8.

The documents suggest that the arrangement between Brian's and Woodward allowed for Brian's to match customers seeking a personal trainer with Woodward—however, Brian's involvement ended there. According to the Independent Contractor Agreement, Brian's permitted Woodward to personally train his clients according to his own strategies and plans. Woodward would have been the only individual responsible for determining a customer's goals and designing a program to reach those goals; he was not subject to direction by Brian's. Both the traditional and statutory relationships between employers and employees reflect a closer bond: the employer pays a percentage of the employee's social cost (through tax contributions or Social Security payments), must accept greater legal duties, and is responsible for the employee's torts in negligence. At the very least, this suggests that independent contractors have less access

to legitimately confidential information of their employers: "[f]irms will, in general, invest a greater amount of firm-specific know-how in employees than in contractors engaged in a 'distinct occupation.'" EDIX, 2006 WL 3742595 at *7.

Bearing in mind that Woodward acted as an independent contractor and not an employee, his argument that Brian's did not have any trade secrets or client lists that would have been helpful to him has more force. The testimony at the hearing was that Woodward did not receive training in any unique or confidential procedures used by Brian's. Moreover, to the extent that customer list existed, it existed electronically so that Brian's could send blast emails to customers; Woodward was not privy to it and did not use it or rely on it. Indeed, although Brian's may have distributed Woodward's cards, Brian's logo did not appear on his card. In sum, Brian's has not established that it had any confidential information which was made available to Woodward. Therefore, Brian's has limited, if any, legitimate interests that it can protect through the Non-Competition Agreement.

Moreover, Woodward did not have access to Brian's confidential information, trade secrets, or "information on a unique business method." Syncom, 155 N.H. at 179. Woodward cannot be found to have had special influence over the employer's customers, since by the terms of the Independent Contractor Agreement, Brian's had no control over the manner in which he worked with his clients. See Petitioner's Exh. 1A, Independent Contractor Agreement, § 1.11(d). Moreover, while it is true that Brian's had an interest in the development of goodwill and a positive image, it is apparent from the Agreement and the actions of the parties that Brian's goodwill was not necessarily the same goodwill Woodward had; he did not place Brian's logo on his business cards and operated his own race business, which apparently involved media coverage which