

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-10551-RWZ

PATRIOT FUNDING, LLC

v.

HEATH LEFORT and
FAIRWAY INDEPENDENT MORTGAGE CORPORATION,
d/b/a FAIRWAY NEW ENGLAND MORTGAGE

MEMORANDUM OF DECISION

June 19, 2006

ZOBEL, D.J.

In 2002, plaintiff Patriot Funding, LLC offered to hire defendant Heath Lefort (“Lefort”) as an at-will employee with the title of Director of Specialized Lending. The offer did, however, require Lefort to agree, in writing, to confidentiality and non-solicitation agreements that safeguarded plaintiff’s confidential information and prohibited him, upon termination, from soliciting plaintiff’s customers for three years. The proposed compensation package entitled Lefort to a \$60,000 base annual salary plus various commissions. After negotiating certain terms, he agreed to the restrictive covenants. Apparently quite successful in his efforts to improve the business, Lefort received as much as \$278,887 in yearly pay and, in 2004 and 2005, earned the second-highest compensation in the company. Thereafter, plaintiff unilaterally changed Lefort’s compensation by eliminating his base salary and reformulating the methodologies underlying some of his commissions. These changes resulted in

significantly reduced income to Lefort, and the employment relationship soured. Lefort began looking for new opportunities and resigned on January 10, 2006.

Before he left, Lefort allegedly forwarded information for 96 customer accounts to his private e-mail account. Additionally, according to plaintiff, he has since solicited business from at least a subset of these accounts and thereby violated the non-solicitation and confidentiality agreements. In an effort to protect its information and enforce the terms of employment, plaintiff filed the instant suit for breach of contract, breach of fiduciary duty and the duty of loyalty, misappropriation of trade secrets and confidential information, tortious interference with contractual relations and violation of the state statute prohibiting unfair and deceptive business practices. Plaintiff now moves for a preliminary injunction against both Lefort and his new employer, defendant Fairway Independent Mortgage Corporation, d/b/a Fairway New England Mortgage (“Fairway”). Specifically, plaintiff seeks to enjoin Lefort and Fairway from using or disclosing plaintiff’s trade secrets and confidential information, soliciting or attempting to solicit plaintiff’s current, former and potential customers and providing any competitive services to any of plaintiff’s customers.

“Whether or not to issue a preliminary injunction depends upon four factors: (1) the movant’s probability of success on the merits, (2) the likelihood of irreparable harm absent preliminary injunctive relief, (3) a comparison between the harm to the movant if no injunction issues and the harm to the objectors if one does issue, and (4) how the granting or denial of an injunction will interact with the public interest.” New Comm Wireless Services, Inc. v. SprintCom, Inc., 287 F.3d 1, 8-9 (1st Cir. 2002). “The sine

qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.” Id. at 9.

Plaintiff alleges violations of rights secured both in contract, under the non-solicitation and confidentiality agreements, and in law, under Massachusetts common law protection for an employer’s trade secrets and confidential information. As an initial matter, with respect to Fairway, plaintiff has offered no evidence that Fairway has seen or possessed the alleged secrets and information, much less any evidence of improper conduct, misappropriation or misuse. Fairway correctly notes that if the court enjoins Lefort from using plaintiff’s secrets and information, there would be no need to enjoin Fairway and its employees separately. Accordingly, the Motion for a Preliminary Injunction is denied as to Fairway.

With respect to Lefort, his opposition focuses on the contractual rights and does not address the common law rights. He asserts that the reduction in his compensation constituted a unilateral, material change in the employment agreement and therefore voided the restrictive covenants. The terms of an at-will employment relationship may fairly be viewed as a form of contract. Gasior v. Mass. General Hosp., 446 Mass. 645, 650-51 (2006). “Under Massachusetts law, the parties to a contract must agree to a modification . . . [and] the modification must be supported by consideration.” Cochran v. Quest Software, Inc., 328 F.3d 1, 9 (1st Cir. 2003). In the context of at-will employment, “the employer’s forbearance from ending the employment relationship, coupled with the employee’s continued performance, can satisfy the consideration

requirement.” Id. at 10. Nothing in the record suggests, however, that Lefort consented to the modification. Thus, his argument that the salary adjustment amounted to a breach of the employee agreement may have some teeth, and “[i]t is well established that a material breach by one party excuses the other party from further performance under the contract.” Ward v. American Mut. Liability Ins. Co., 15 Mass. App. Ct. 98, 100 (1983).

Even assuming *arguendo* that plaintiff voided the non-solicitation and confidentiality agreements, Massachusetts common law still restricts an at-will employee’s ability to appropriate certain information held by the employer.

An at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed. . . . There are, however, certain limitations on the conduct of an employee who plans to compete with his employer. He may not appropriate his employer’s trade secrets. He may not solicit his employer’s customers while still working for his employer . . . , and he may not carry away certain information, such as lists of customers.

Augat, Inc. v. Aegis, Inc., 409 Mass. 165, 172-73 (1991). Although Lefort argues that he took customer information only for his own “book of business,” he offers no evidence to support a finding that the parties distinguished between their respective clienteles at either the time of contract or subsequently, or that they contemplated, much less established a principled methodology for making, any such distinction. Lefort claims that the compensation package outlined in the offer letter provided for “50% commission on loans from [his] book of business.” (Lefort Aff. ¶ 13). Exhibit B to the offer letter provides 50% commission for loans “Generated by Director,” but Exhibit A to

the offer letter obligates Lefort, as part of his duties, “to develop leads from outside sources.” (Complaint, Ex. A). In other words, the offer letter fails to suggest, much less compel, a distinction between Lefort’s alleged prior contacts and the accounts he developed while working for plaintiff.

Accordingly, plaintiff has demonstrated likelihood of success on the merits against Lefort. The potential harm suffered from the loss of a customer base sufficiently supports a finding of irreparable harm, and the absence of an injunction promises greater harm to plaintiff than to Lefort. Prohibiting the alleged improper use of otherwise confidential information also comports with public interest. Plaintiff’s Motion for a Preliminary Injunction (#2 on the docket) is allowed.

It is therefore ORDERED:

- A. that defendant Heath Lefort, pending further order of the court, be enjoined
 - 1. from using or disclosing, in whole or in part, any of Patriot’s trade secrets or confidential information, such as its business and financial methods and practices, pricing practices and strategies, operating margins, selling techniques and information, customer lists, and details of customer agreements;
 - 2. from soliciting or attempting to solicit customers from the Patriot customer list in use during defendant’s employment; and
- B. that defendant Heath Lefort return to Patriot any and all documents, software and things obtained from Patriot during his employment with Patriot (and all

copies thereof), including without limitation, any and all customer files or compilations of customer-related information.

06/19/06

DATE

/s/ Rya W. Zobel

RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE