MASSACHUSETTS Lawyers Weekly

Aesthetician can sue ex-employer for tortious interference, 93A

Says ex-employer tried to sabotage new venture

By: Eric T. Berkman July 8, 2022

Plaintiff's lawyer

An aesthetician at a medical spa who opened her own business after being terminated could sue the spa over its actions in attempting to enforce an allegedly void restrictive covenant, a Superior Court judge has held.

The covenant purported to bar plaintiff Tori Macaroco from soliciting customers of defendant Vanity Lab, revealing any of its confidential information, or practicing her profession at all for one year after leaving its employ.

When Macaroco started her own aesthetician business after being terminated without cause, an out-of-state attorney for Vanity Lab threatened her with a cease-and-desist letter. Meanwhile, the spa allegedly contacted third parties to warn them against doing business with her.

When Macaroco responded with a lawsuit alleging tortious interference, trade libel and Chapter 93A violations, Vanity Lab moved to dismiss for failure to state a claim.

But Judge William M. White Jr. denied the motion.

"The defendants contend that [the tortious interference claim should fail] because the [plaintiff] fails to identify any person that would not conduct business with Macaroco based upon Defendants' alleged interference," White wrote. "The court disagrees."

Similarly, White said, Macaroco's allegations that Vanity Lab published false and derogatory statements about the quality of her services to at least one third party, and that it sent the cease and desist letter with the intention of gaining a business advantage over her while knowing the restrictive covenants were unenforceable, were enough to state trade libel and Chapter 93A claims respectively.

The judge did, however, dismiss Macaroco's claims of intentional and negligent infliction of emotional distress. And while Macaroco brought a Wage Act claim as well, Vanity Labs did not move to dismiss that count.

The eight-page decision is *Macaroco v. Vanity Lab, LLC, et al.*, Lawyers Weekly No. 12-040-22.

Common practice

Macaroco's attorney, James Ostendorf of Boston, said it is common for medical spas to use restrictive covenants like the one here in an effort to gain leverage over workers who do not know their rights. But he said the covenants are unenforceable under G.L.c. 149, §24L, because they are not supported by consideration and are unnecessary to protect confidential information.

> *"There were some obvious signs the noncompete was not enforceable. The court is clearly signaling that such conduct may, in fact, violate not only the noncompete act, but also constitute unfair and deceptive conduct between the former employer and employee."*
>
> *— Charles F. Rodman, Newton*

"A lot of laypeople who work for med spas, like aestheticians, nurse injectionists and microbladers, call me because their employers are threatening them with lawsuits and they just had no idea that these kinds of clauses are difficult to enforce or, in their profession, completely unenforceable," Ostendorf said.

However, he said this was the first time he had seen an out-of-state attorney not licensed in Massachusetts sending threatening letters over such a covenant.

"The [local] attorney Vanity finally hired when I sued to get the letters to stop is a very good attorney and put a stop to it, but by that point in time there was so much damage done that the rest of the counts came in," Ostendorf said.

The ruling will be useful for employees' counsel in future cases because of its detailed explanation as to the level of detail that will satisfy notice-pleading requirements and get a case to discovery, he added.

Vanity's lawyer, John Davis of Reading, declined to comment on the record, citing ongoing litigation in the case.

But Boston employment attorney Russell Beck, who handles trade secret and noncompete disputes, said the case provides guidance to employees trying to determine if they should affirmatively sue over attempts to enforce a likely invalid restrictive covenant, or whether they should wait and see if the employer actually follows through with a lawsuit of its own.

"Most times the calculus yields a result where you don't challenge it and you wait," he said. "But where, like here, the employer also allegedly went so far as to tell its customers, 'We're going to sue this person because they're violating their covenants and you can't work with them,' coupled with a situation where the employee allegedly wasn't paid appropriately in the first place, you've got the makings of a good reason not to wait."

Charles F. Rodman of Newton said the case should serve as a warning to management-side attorneys to refrain from using a noncompete to bully a former employee out of competition when there is a legitimate question about its validity.

Macaroco v. Vanity Lab, LLC, et al.

THE ISSUE: Could an aesthetician at a medical spa who opened her own business after being terminated sue the spa over its actions in attempting to enforce an allegedly void restrictive covenant?

DECISION: Yes (Bristol Superior Court)

LAWYERS: James Ostendorf of Boston (plaintiff)

John Davis of Davis & Davis, North Reading (defense)

"Here, there were some obvious signs the noncompete was not enforceable," Rodman said. "The court is clearly signaling that such conduct may, in fact, violate not only the noncompete act, but may also constitute unfair and deceptive conduct between the former employer and employee, when normally claims under 93A cannot be pursued if they arise out of intra-organizational relationships."

Cease and desist

Macaroco, a licensed aesthetician, started working for Vanity Lab full time in April 2019 following two weeks of allegedly unpaid, part-time mandatory training.

Two months after starting work, Macaroco signed a contract with non-solicitation and confidentiality provisions as well as a clause barring her from practicing her profession for one year after departure.

Decision out of federal court 'disconcerting' for employees

The covenant allegedly violated §24L because Macaroco was not given 10 days' notice before it took effect; it was not supported by a garden leave clause or other mutually acceptable consideration beyond continued employment; it ran contrary to public policy; and it was not signed by the employer.

In May 2020, Vanity Lab terminated Macaroco, allegedly without cause.

After Macaroco started an aesthetician business of her own, New York attorney Allyson Avila sent a letter on Vanity Lab's behalf warning her not to practice her profession per the restrictive covenant.

Vanity Lab also defamed Macaroco to potential customers, according to her complaint.

In June 2021, Macaroco sued Vanity Lab in Superior Court alleging Wage Act violations as well as tortious interference, trade libel and Chapter 93A violations. She also sought a declaration that the restrictive covenants were void under §24L.

Vanity Lab moved to dismiss the business tort counts, while the parties resolved the declaratory counts without a court ruling.

Sufficient allegations

White rejected Vanity Lab's argument that Macaroco's tortious interference claim should fail because she had not identified anyone who would not conduct business with her based on its alleged interference or that Vanity Lab knowingly interfered with any third parties or caused any financial harm.

As he pointed out, the court could infer based on the complaint that Vanity Lab contacted third parties claiming a restrictive covenant barred Macaroco from practicing her profession; that Vanity Lab knew Macaroco had potential business relationships with such "third parties"; and that it wanted to interfere with her ability to do business with them.

"Another way Macaroco alleges that the Defendants improperly interfered with these potential business relationships is by sending her the Letter … knowing that the Contract and the restrictive covenants therein violated Massachusetts law," White wrote.

Regarding the trade libel claim, White noted Macaroco's allegations that members of the public told her Vanity Lab was defaming her in texts and calls calculated to prevent them from working with her.

"She alleges that the statements caused her damage," the judge said. "While thin, these allegations are sufficient to state a claim."

Meanwhile, White rejected Vanity Lab's contention that Chapter 93A was inapplicable because the case stemmed from an employment relationship and not "trade or commerce."

"In opposition, Macaroco contends that the basis of her Chapter 93A claim is the Defendants' sending of the Letter itself, with the

A recent U.S. District Court decision suggests that an employee in a customer-facing role who takes on a different, non-customer-facing role for a competitor could still be enjoined from working for the new employer because of what it might imply to customers about the former employer's products.

In *Nuance Communications, Inc. v. Kovalenko*, defendant Kathryn Kovalenko worked for Nuance, a maker of diagnostic imaging and workflow solutions for the radiology field, as a product manager for one of its key technologies. Her role allegedly involved access to substantial confidential information as well as customer interaction.

Kovalenko, who was subject to noncompete, nonsolicitation and confidentiality agreements, resigned to join a company that was not a competitor. But she never went to work there, instead taking a job with Sirona Medical, a startup that Nuance deemed a competitor.

Nuance filed suit in U.S. District Court seeking a preliminary injunction.

In opposition, one of Kovalenko's arguments was that she was in no position to impact Nuance's goodwill with its customers because Sirona had no customers of its own at that point, and her job was not customer-facing.

But in granting the injunction on multiple grounds, Judge Denise J. Casper — relying on the 1995 ruling *Marcam v. Orchard* — wrote that "Kovalenko's mere 'association with [a] competing product would be enough to raise doubts in the eyes of [Nuance's] customers as the relative value of [Nuance's products],' given Kovalenko's substantial customer interaction while at Nuance."

Nuance's counsel, Katherine Perrelli of Boston, declined to comment.

aim of gaining a business advantage over her and knowing that the Contract's restrictive covenants referenced therein were unenforceable," he said. "The court agrees with Macaroco."

Kovalenko's attorney, Boston's Raymond P. Ausrotas, distinguished *Marcam*, pointing out that the earlier case involved two companies actively competing, whereas Sirona is still a year or two away from selling any products. He also said his client disputed, as a factual matter, that her role at Nuance involved "substantial customer interaction."

Meanwhile, Russell Beck of Boston, who handles noncompete cases, described the decision's reasoning as "disconcerting" for employees.

"Basically, if you had a lot to do with customers and go to leave for a new company, that somehow casts the old employer's product in a negative light? That is a little much," he said.

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