NISY

12-154-08

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 08-0365-G

NOTICE SENT
05-20-08
R.+C.
J.R.B.
N.M.C.
T.G.+L.
J.F.T.
S.S.C.

NEXT GENERATION VENDING & another[1]

vs.

BRIAN T. BRUNO & others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiffs, Next Generation Vending ("Next Generation") and Food Service, Inc. ("Food Service"), filed this action against three former employees, Brian T. Bruno ("Bruno"), Thomas S. Mitchell ("Mitchell"), and Sandra Niles ("Niles"), for breach of contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with business relations, and misappropriation of trade secrets based on the defendants' roles in starting a competing enterprise. The defendants filed a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(1)-(3) & 12(c). For the following reasons, the defendants' motion is **ALLOWED** with respect to the breach of contract claim against Bruno and **DENIED** in all other respects.

BACKGROUND

At the outset, the court notes that the defendants' 12(c) motion to dismiss, which includes materials outside of the complaint, shall be considered as a motion to dismiss for failure to state a claim pursuant to Mass. R. Civ. P. 12(b)(6) because the pleadings are not yet closed. See Mass. R. Civ. P. 12(c). For purposes of a 12(b)(6) motion, the Court "accept[s] as true the allegations

[1] Food Service, Inc.

[2] Thomas S. Mitchell and Sandra Niles

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in the complaint, and draw[s] all reasonable inferences in favor of the party whose claims are the subject of the motion." *Fairneny v. Savogran Co.*, 422 Mass. 469, 470 (1996). The Court will therefore consider the complaint and attachments thereto with respect to the 12(b)(6) arguments, but nothing outside of the complaint as urged by the defendants. For purposes of personal jurisdiction, on the other hand, the Court will consider affidavits and exhibits — in addition to the complaint — in the light most congenial to the plaintiffs' jurisdictional claim. See *Cepeda v. Kass*, 62 Mass. App. Ct. 732, 737-738 (2004).

Next Generation, a Delaware corporation with its principal place of business in Canton, Massachusetts, was formed on September 11, 2007 for the purpose of acquiring All Seasons Inc. ("All Seasons") and operating a vending and food services business. Prior to the sale, All Seasons was one of the largest providers of vending, office refreshment, and food services in the nation. All Seasons had multiple office locations in the eastern United States, including an office in Canastota, New York and headquarters in Canton, Massachusetts.

Bruno, a Massachusetts resident,[3] began working for All Seasons on or about July 16, 2001. On or about June 1, 2005, he was promoted from his position as Vice President to Chief Operating Officer. In connection with the promotion, Bruno signed a "Non-Disclosure and Non-Competition Agreement" preventing him from working or consulting with All Seasons competitors in the event he was terminated for any reason. The agreement also prohibited Bruno from revealing any trade secrets or confidential information to any person or company except pursuant to his employment obligations with All Seasons. The agreement stated that it "shall be

[3] Documents outside the pleadings suggest that Bruno currently resides in New York, however, the complaint alleges that he was a Massachusetts resident and, as will be discussed, he was a Massachusetts resident while he was employed by Next Generation.

governed by and construed in accordance with the law of the Commonwealth of Massachusetts" and that "[e]ach party hereby accepts and consents to the jurisdiction of the state and federal courts of Massachusetts."

Niles, a New York resident, began working for All Seasons on or about September 28, 1987. On March 8, 2007, Niles signed a "Non-Disclosure and Non-Competition Agreement" with All Seasons that was nearly identical to the one signed by Bruno. Unlike Bruno's agreement, however, Niles' agreement contained an "assignment" clause. The clause stated "[t]his agreement is assignable by [All Seasons] and inures to the benefit of [All Seasons], its subsidiaries, affiliated entities, and its and their successors and assigns."

Mitchell, a New York resident, began working for All Seasons on or about November 1, 1986.

In 2006, All Seasons entered into a credit agreement with Capital Source Finance LLC ("CapSource") under Maryland law. On October 15, 2007, as a result of continuing defaults by All Seasons, CapSource foreclosed its security interests in All Seasons pursuant to the credit agreement and Md. Code Ann. § 9-610. Next Generation acquired All Seasons' assets pursuant to an Asset Purchase Agreement with CapSource and a holding company. At the time of the sale, Bruno was still the Chief Operating Officer in the Canton, Massachusetts office; Niles was a general manager working out of the Canasota, New York office; and Mitchell was a territory manager in the Canasota, New York office. All three remained employed by Next Generation after the acquisition.

From October 15, 2007 to December 27, 2007, Bruno held the position of Director of Operations for Next Generation's vending business at the Canton, Massachusetts office. He

reported to Next Generation's Chief Operating Officer/Chief Financial Officer, Joseph Rogan ("Rogan"). During the same time period, Mitchell was an Operations Manager in Next Generation's vending business, supervising New York vending routes from the Canasota, New York office. According to Rogan, Mitchell also sent and received e-mail communications from Next Generation employees in Massachusetts, had telephone communications with Next Generation employees in Massachusetts, including Bruno, received pay checks from Massachusetts, and submitted expense reports to the Massachusetts office. Mitchell attended a senior management meeting on October 24, 2007 at the Next Generation headquarters in Massachusetts. From October 15, 2007 to January 17, 2008, Niles held the position of District Controller responsible for contract coordination from the Canasota, New York office.

On December 11, 2007, Bruno and Mitchell formed a New York company called Servomation, LLC ("Servomation") while they were still employed by Next Generation. Servomation is a vending business that competes with Next Generation's business in New York.

Bruno resigned from Next Generation on December 27, 2007; Mitchell resigned on December 28, 2007; and Niles resigned on January 17, 2008. All three now work at Servomation. Tessy Plastics, a former Next Generation customer, terminated its contractual relationship with Next Generation as urged by Bruno and Mitchell and now conducts its vending business with Servomation. In addition, Bruno asked Richard DeFazio ("DeFazio") to resign from Next Generation and work for Servomation. DeFazio resigned from Next Generation on January 17, 2008.

DISCUSSION

Against the foregoing background, the plaintiffs' complaint alleges breach of fiduciary

duty against Bruno and Mitchell (Count I); aiding and abetting breach of fiduciary duty against Bruno and Mitchell (Count II); tortious interference with business relations against Bruno and Mitchell (Count III); breach of contract against Bruno (Count IV); breach of contract against Niles (Count V); and misappropriation of trade secrets against Bruno and Mitchell (Count VI). The defendants' move to dismiss the breach of contract claim against Bruno;[4] the misappropriation of trade secrets claim against Bruno and Mitchell; all claims for lack of personal jurisdiction or, in the alternative, on forum non conveniens grounds.

Breach of Contract

The plaintiffs allege that Bruno violated his Non-Disclosure and Non-Competition Agreement ("non-compete") by forming Servomation and enticing Tessy Plastics and DeFazio to leave Next Generation. The defendants argue that Bruno's non-compete could not be assigned to Next Generation because it was limited to his employment with All Seasons and — unlike the Agreement signed by Niles — did not contain an "assignability" clause. The plaintiffs counter by explaining that Bruno's non-compete is governed by New York law and, under New York law, non-compete agreements are assignable absent contractual provisions stating otherwise.

There appears to be a divergence between New York and Massachusetts law about the assignability of non-compete agreements. In New York, non-compete agreements are assignable unless the contract prohibits such assignment whereas in Massachusetts, non-compete clauses are not assignable unless specifically assented to by the employee. Compare *Special Prod. Mfg., Inc. v. Douglass*, 553 N.Y.S.2d 506, 509 (N.Y. App. Div. 1990) (non-compete clauses are assignable

[4] The defendants also move to dismiss the breach of contract claim against Niles, however, their arguments are based on materials outside the pleadings and are more appropriate for consideration in a motion for summary judgment.

absent a clear and unambiguous prohibition preventing such assignment), with *Securitas Sec. Serv. USA, Inc. v. Jenkins*, 2003 Mass. Super. LEXIS 200, 14-15 (non-compete clauses are not assignable absent assent to such an assignment). Nothing in the plaintiffs' complaint suggests that Bruno assented to the assignment of his non-compete with All Seasons. The question then is whether Bruno's non-compete is governed by New York law or Massachusetts law.

Bruno's non-compete states that it "shall be governed by and construed in accordance with the law of the Commonwealth of Massachusetts." Where parties have agreed to a specific choice of law provision, Massachusetts courts will generally give effect to such a provision. *Morris v. Watsco, Inc.*, 385 Mass. 672, 676-677 (1982). The plaintiffs explain, however, that a choice of law provision should not be honored where its "application would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which would be the state of the applicable law in the absence of an effective choice of law by the parties." *Shipley Co., Inc. v. Clark*, 728 F.Supp. 818, 825 (D. Mass. 1990), quoting *Restatement (Second) of Conflict of Laws*, § 187(2)(b) (1971). The plaintiffs argue that New York law should be applied because New York has a greater interest in enforcing Bruno's non-compete than Massachusetts.

The complaint alleges that Bruno worked out of the Canton, Massachusetts office during his employment with All Seasons. Bruno also continued to work from the Massachusetts office when the company was acquired by Next Generation. Massachusetts has a strong interest in enforcing agreements made by its employees and businesses. See *Shipley Co., Inc.*, 728 F.Supp. at 826. The Massachusetts choice of law provision shall therefore be upheld and Massachusetts law shall be applied to Bruno's non-compete.

As stated above, under Massachusetts law, a non-compete agreement is unassignable absent an express agreement permitting assignment. *Securitas Sec. Serv. USA, Inc.*, 2003 Mass. Super. LEXIS at 14-15. The burden to negotiate for an assignability clause rests with the employer — not the employee. See *Traffic Control Servs. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 174-175 (2004) (holding the same). Here, All Seasons chose not to bargain for an assignability clause with Bruno despite the fact that it bargained for such a clause with respect to Niles. As such, Bruno's non-compete is only enforceable as to All Seasons and was not assignable to Next Generation. See *Securitas Sec. Serv. USA, Inc.*, 2003 Mass. Super. LEXIS at 14-15; *Traffic Control Servs.*, 120 Nev. at 174-175. The plaintiffs breach of contract claim against Bruno shall therefore be dismissed.

Misappropriation of Trade Secrets

The plaintiffs' trade secrets claims allege that "Bruno and Mitchell utilized Next Generation's trade secrets, including without limitation, Next Generation's customer list, customer contact information and pricing policies, in the course of their successful efforts to persuade Tessy Plastics to terminate its relationship with Next Generation and to begin doing business with Servomation." The defendants argue that these claims must be dismissed because the plaintiffs failed to allege with sufficient particularity the trade secrets that were misappropriated. The plaintiffs' reference to client lists and pricing information, however, is sufficient to place the defendants on notice of the basis and nature of the claims against them. See *Berish v. Bornstein*, 437 Mass. 252, 269 (2002). Further, to the extent that the defendants' motion challenges the "confidentiality" or "misappropriation" of the alleged secrets, these are questions of fact not appropriate for determination at this stage of litigation. See *A.F.A. Tours,*

Inc. v. Whitchurch, 937 F.2d 82, 89 (2nd Cir. 1991).[5] As such, the defendants have not demonstrated that "the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief" and the motion to dismiss the trade secrets claim must be denied. See *Nader v. Citron*, 372 Mass. 96, 98 (1977), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[6]

Personal Jurisdiction

The defendants contend that the case should be dismissed pursuant to Mass. R. Civ. P. 12(b)(2) for lack of personal jurisdiction over each defendant. With respect to Niles, the forum selection clause and assignment clauses contained in her contract — which, as alluded to above, appear to have been properly assigned to Next Generation — is sufficient to establish jurisdiction over her in Massachusetts courts. Since Bruno's contract was not assignable, however, and because he may currently reside in New York, personal jurisdiction over Bruno must comport with G. L. c. 223A, §3 ("the long-arm statute") and the basic due process requirements mandated by the United States Constitution. See *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 5-6 (1979). Personal jurisdiction over Mitchell must also comport with the long-arm statute and due process requirements. Id.

The long-arm statute states that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the

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[5] Additionally, as stated above, any other arguments based on materials outside of the pleadings will not be considered in conjunction with the 12(b)(6) motion.

[6] To the extent that the defendants challenge the tortious interference of contractual relations claims based on the inadequacy of the trade secrets claim, the challenge must similarly fail.

person's (a) transacting any business in this commonwealth." The "transacting business" requirement is to be construed broadly but the plaintiffs' claims also "must have arisen from the transacted business." *Shipley Co., Inc.*, 728 F.Supp. at 821. In *Shipley Co.*, Inc. the court granted Massachusetts personal jurisdiction over the employee-defendants despite the fact that the defendants worked in the plaintiff-employer's Michigan office. Id. at 822. First, the court held that because the defendants made visits to Massachusetts, reported to co-workers in Massachusetts, and mailed their signed employment contracts to Massachusetts, the plaintiff's breach of contract claim arose out of the business the defendants had conducted in Massachusetts and thus satisfied the requirements of the long-arm statute. *Id.* at 821-822.

Second, the court held that personal jurisdiction did not offend due process because the defendants had reasonable notice that they might be sued in Massachusetts. *Shipley Co., Inc.*, 728 F.Supp. at 822-823. The court explained that "[i]n addition to their mailing of the contracts to [Massachusetts], the very nature of the contracts – employment contracts – contributes to placing defendants on notice of the possibility of suit in [Massachusetts]." Id. at 822. Specifically, the court pointed to the choice of law provision in the defendants' contracts, the fact that the defendants' salaries were paid from a Massachusetts employer, and the fact that they had visited and reported to Massachusetts in furtherance of their contractual obligation to generate revenue for a Massachusetts employer, as evidence that the defendants had notice of being subject to suit in Massachusetts. *Id.* at 822-823. The court concluded that "due process is [therefore] satisfied and jurisdiction pursuant to §3(a) would not 'offend traditional notions of fair play or substantial justice.' " *Id.* at 823, quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

For the reasons stated in *Shipley Co., Inc.*, personal jurisdiction over Bruno and Mitchell in Massachusetts is proper. Like in *Shipley Co., Inc.*, the employment arrangement between Bruno and Next Generation and Mitchell and Next Generation permeates each claim in this case. See *Shipley Co., Inc.*, 728 F.Supp. at 822. The breach of fiduciary duty claims are based entirely on a duty of loyalty that Bruno and Mitchell allegedly owed Next Generation as a result of their employment; the tortious interference with business relations claims are based on the knowledge of Tessy Plastics that Bruno and Mitchell allegedly acquired from their employment; and the misappropriation of trade secret claims are based on trade secrets that Bruno and Mitchell allegedly acquired during their employment. As such, the claims against Bruno and Mitchell arose from their employment relationship with Next Generation and thus satisfy the requirements of the long-arm statute. See *Id.* at 821-822.[7]

Similarly, the due process requirements are satisfied because Bruno and Mitchell had notice that they might be sued in Massachusetts. See *Shipley Co., Inc.*, 728 F.Supp. at 822-823. With respect to Bruno, there can be no doubt that he had notice that any claims arising from his employment with Next Generation would be brought in Massachusetts courts. For the entire period of his employment — from October 15, 2007 to December 27, 2007 — Bruno worked out of the Next Generation headquarters in Massachusetts. Bruno's contact with Massachusetts is therefore more than sufficient grounds to justify personal jurisdiction. See id. at 821-823.

For Mitchell, who never worked out of the Massachusetts office, the issue is a bit closer yet the result is the same. Like the defendants in *Shipley Co., Inc.*, Mitchell's employment

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[7] For the foregoing reasons, the Court need not consider the plaintiffs' argument based on §3(d) of the long arm statute.

contract was with a Massachusetts company, he received paychecks from Massachusetts, and submitted reports to Massachusetts, and regularly kept contact with Massachusetts co-workers, including Bruno. See *Id.* at 822. Additionally, Mitchell attended a senior management meeting at the Next Generation headquarters in Massachusetts on October 24, 2007. These actions were all taken in furtherance of Mitchell's contractual obligation to generate revenue for Next Generation. *Id.* at 822-823. Taken together, such actions therefore support the conclusion that jurisdiction over Mitchell in a Massachusetts court is consistent with "traditional notions of fair play or substantial justice." *Id.* at 823, quoting *Int'l Shoe Co.*, 326 U.S. at 320. As such, personal jurisdiction is proper over each of the defendants.

Forum Non Conveniens

The defendants argue that the Court should decline jurisdiction based on the doctrine of forum non conveniens.[8] According to G. L. c. 223A, §5 ("the forum non conveniens statute"), "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just." Where jurisdiction and venue[9] are proper, dismissal pursuant to the forum non conveniens statute will rarely be granted unless the balance is strongly in favor of the defendant. *New Amsterdam Cas. Co. v. Estes*, 353 Mass. 90, 95 (1967). The decision is left largely to the discretion of the trial judge. *Id.*

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[8] The defendants also argue that the Court lacks subject matter jurisdiction over the plaintiffs' claims, however, because the defendants' argument is based on two cases that discuss the doctrine of forum non conveniens, the Court will only consider the forum non conveniens argument. See *Universal Adjustment Corp. v. Midland Bank*, 281 Mass. 303, 313-314 (1933); *Neiman Marcus Group, Inc. v. D/E Hawaii Joint Venture*, 1994 Mass. Super. LEXIS 354, 15.

[9] The defendants make no arguments as to venue.

The defendants argue that because the defendants reside in New York, the alleged wrongful acts took place in New York, and all of the witnesses live in New York, New York is a more appropriate forum for the claims. See *Joly v. Albert Larocque Lumber Ltd.*, 397 Mass. 43, 43-45 (1986) (holding that judge did not abuse discretion by allowing motion to dismiss where all parties were located in Canada, the cause of action arose in Canada, discovery was easier to facilitate in Canadian forum, and witnesses were residents of Canada). The defendants' arguments fail to account for the fact that the plaintiffs' claims originate from their relationship with a Massachusetts employer or that it is unclear from what state — Massachusetts or New York — the majority of the witnesses shall originate. As such, it cannot be fairly said that the balance of forum is strongly in favor of the defendant, therefore, the motion to dismiss on forum non conveniens grounds shall be denied. See *New Amsterdam Cas. Co.*, 353 Mass. at 95.

ORDER

For the foregoing reasons, the defendants' motion is **ALLOWED** with respect to the breach of contract claim against Bruno and **DENIED** in all other respects.

Regina L. Quinlan
Associate Justice of the Superior Court

Date: May 20, 2008