Chicago Daily Law Bulletin.

Serving the city's law profession since 1854

April 11, 2016

Restraining order request lacked punch

By Michael R. Lied
Michael R. Lied, of Howard & Howard Attorneys PLLC, has practiced employment, labor and immigration law for more than 30 years. A frequent author and lecturer on these subjects, he is former chair of the Illinois State Bar Federal Civil Practice Section Council and Employment Law Section Council. He can be reached at mlied@howardandhoward.com and 309-999-6311.

Keith Plywaczynski, a certified financial planner, began working at Capstone Financial Advisors Inc. in Downers Grove in 2004. In 2008, he signed a confidentiality and restrictive covenant agreement with Capstone. The agreement included (1) a confidentiality provision, (2) a two-year non-solicitation provision and (3) a two-year noncompete provision.

Plywaczynski became Capstone's lead financial adviser and in 2010 became a partner. When he became a partner, Plywaczynski also signed a shareholder's agreement.

On Sept. 4, 2015, Plywaczynski resigned and said that he was leaving for Mariner Wealth Advisors LLC in Oak Brook. By the end of the following week, Capstone had lost or was "delinked" on 41 client accounts, all formerly serviced by Plywaczynski.

Plywaczynski denied taking any of Capstone's protected client information. He retained, partially in his head and partially from handwritten notes, the contact information of his clients.

Plywaczynski phoned his clients; he spoke to some and left voicemail messages for others. When he got through, however, he read from a script and provided them with his updated contact information at Mariner.

If the client asked about going with him to Mariner, he provided information on how to do so. If the client asked about staying at Capstone, he told them how to do so. Plywaczynski took the position that the restrictive covenant prevented him from soliciting Capstone's clients, but not from contacting them.

Indeed, Plywaczynski asserted he had an obligation under the professional standards applicable to certified financial planners to "timely disclose" to his clients "any material changes" to both his contact information and his employer's contact information.

The parties proceeded to a hearing on Capstone's temporary restraining order request before the trial court. The hearing focused almost entirely on Capstone's allegations concerning the non-solicitation provision and the non-disclosure provision; the non-compete provision was scarcely mentioned.

The trial court, however, found that Capstone had failed to show a likelihood of success on the merits of its three breach-of-contract claims.

Furthermore, the court observed for the limited purpose of the temporary restraining order motion that, by negative implication, the agreement's bar on solicitation appeared to permit Plywaczynski to contact his clients.

The court also stated that, again for the limited purposes of the temporary restraining order motion, "it is more likely than not that the public policy of Illinois requires the fiduciary TRO to give [his clients] that [updated] contact information, which does not constitute solicitation." Capstone appealed.

As the party seeking the injunction, Capstone had to demonstrate that there was a "fair question" as to each of the following: (1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law and (4) a likelihood of success on the merits of the case.

The parties disputed the standard of review. Because the case implicated the terms of the restrictive covenant, the appeals court reviewed the trial court's ruling on the covenant's enforceability de novo and its ultimate determination on the request for injunctive relief for an abuse of discretion.

Capstone claimed that because the trial court's oral pronouncement focused only on the non-solicitation and non-disclosure provisions, the trial court failed to consider (1) the non-compete provision entirely or (2) how the "critical operative language" in the non-compete provision affected the other two provisions.

The court of appeals disagreed. It considered both the oral judgment and the written ruling together and needed to choose between them only if they were in conflict.

Here, the trial court's written order indicated that it found no likelihood of success on the merits of all three of Capstone's breach claims. Although the court's oral ruling drove home the point that it had rejected two of the claims at issue, the appeals court could not say that the oral ruling mentioning only those two claims was in any way in tension with the written order disposing of all three.

The court agreed with the trial court that, for the limited purpose of the temporary restraining order motion, Capstone failed to show a likelihood of success on its breach claims. It made this determination on different grounds than the trial court, however.

A temporary restraining order is an extraordinary remedy and the party seeking it must meet the high burden of demonstrating, through well-pleaded facts, that it is entitled to the relief sought.

After examining Capstone's temporary restraining order motion, which incorporated its complaint, the court was "hard pressed" to say that it contained well-pleaded factual allegations that supported granting injunctive relief. All of the allegations were conclusory and lacking in specifics.

Capstone failed to identify a single client whose confidential information had been used, a single client whom Plywaczynski solicited (as opposed to merely contacted) or a single client to whom Plywaczynski rendered investment advice. The standard for injunctive relief is far too high for a court to rely solely on the moving party's innuendo.

The deficiencies in Capstone's temporary restraining order motion were not cured by affidavits submitted. The affidavits by two Capstone principals merely reiterated the vague claims made in the motion itself.

Capstone had to allege more to be entitled to a temporary restraining order. Absent a concrete factual assertion that Plywaczynski used confidential information, engaged in client solicitation or rendered or was rendering financial advice to a former Capstone client, Capstone could not make out a prima facie case for any of the four elements to warrant injunctive relief.

Thus, the trial court correctly interpreted the agreement and did not abuse its discretion when it denied Capstone's temporary restraining order motion.

Capstone Financial Advisors Inc. v. Plywaczynski, 2015 IL App (2d) 150957,