COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: November 14, 2005
Decided: February 7, 2006

Teresa Ann Cheek, Esquire
Young, Conaway, Stargatt & Taylor, LLP
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, DE 19899-0391

Joseph Grey, Esquire
Stevens & Lee, P.C.
1105 N. Market Street, 7th Floor
Wilmington, DE 19801

Re: *Deloitte & Touche USA LLP and Deloitte Tax LLP v. Jose S. Lamela, Jr.*, Civil Action No. 1542-N

Dear Counsel:

Pending before the Court is Plaintiffs, Deloitte & Touche USA LLP and Deloitte Tax LLP's ("Deloitte"), motion for reargument on the scope of the preliminary injunction entered on October 24, 2005. In particular, Deloitte seeks to expand the scope of the injunction restraining Defendant, Jose S. Lamela, Jr., from soliciting or performing services for various companies to cover nine Deloitte clients that the Court did not

include because those companies put their tax services out for competitive bid.[1] For the reasons stated below, the Court denies Deloitte's motion.

I. BACKGROUND[2]

Lamela primarily works as a financial consultant advising clients on multistate tax matters. He began his career as a tax consultant at Arthur Andersen. While there, Lamela became a tax partner and had contacts with numerous clients who eventually followed him to Deloitte.

Deloitte also is in the business of providing tax advisory services. In May 2002, Deloitte admitted into their partnerships or hired a number of former tax partners, principals, directors and employees of Arthur Andersen. Lamela was one of those who became a partner at Deloitte.

After working at Deloitte for three years Lamela resigned on June 17, 2005. On August 3, 2005, Deloitte filed this action accusing Lamela of violating his post-resignation restrictive covenant. That covenant purports to preclude Lamela from, among other things, soliciting or accepting an engagement to perform professional services for any clients of Deloitte in the South Florida area. Shortly thereafter, I entered a temporary restraining order enjoining Lamela's ability to solicit or service clients of Deloitte.

---

1 *Deloitte & Touche USA LLP v. Lamela*, 2005 WL 2810719, at *9 (Del. Ch. Oct. 21, 2005).

2 For a more detailed description of the factual background of this matter, *see Deloitte & Touche*, 2005 WL 2810719.

At the hearing on Deloitte's motion for a preliminary injunction on August 30, 2005, Lamela argued that no preliminary injunction was necessary and that, in any event, the TRO was too broad. For the reasons stated in a Memorandum Opinion entered on October 21, 2005, I issued a preliminary injunction on October 24 restraining Lamela from soliciting or accepting an engagement to perform "any tax advisory services" for any of 46 specifically identified Deloitte clients.[3] At Lamela's urging and over Deloitte's objection, however, I excluded nine Deloitte clients from that list because they held out their multistate tax work for competitive bidding (the "Excluded Companies").[4]

Deloitte then moved for reargument on the grounds that the Court mistakenly excluded those nine companies from the proscriptions of the injunction. After Lamela filed his opposition to reargument, Deloitte sought leave to file a ten page reply memorandum.[5] In support of that motion, Deloitte argued that it needed to rebut a material misstatement in Lamela's opposition regarding his knowledge of Deloitte's pricing information and to note Florida cases demonstrating their right to protect such information known to Lamela. To the extent Lamela's opposition may have contained a misstatement as alleged or raised new legal issues regarding confidential pricing

---

3 Prelim. Inj. Order ¶ 1.

4 *Deloitte &* Touche, 2005 WL 2810718, at *8-9. Those nine companies are listed in the Confidential Appendix attached to this letter opinion.

5 Court of Chancery Rule 59(f) does not contemplate a reply to a motion for reargument in the typical case.

information, I consider those matters immaterial in that they did not influence my conclusion on the motion for reargument. Accordingly, I deny Deloitte's motion for leave to file a reply memorandum.[6]

II. ANALYSIS

The standard applicable to a motion for reargument is well settled. To obtain reargument, "the moving party [must] demonstrate that the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law."[7] In addition to the requirement that there be a misapprehension of fact or law, that misapprehension must be such that "the outcome of the decision would be affected."[8]

Reargument under Chancery Rule 59(f) is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion.[9] Further, a motion for reargument will not be granted when a party merely restates its prior arguments.[10]

---

6 On November 14, 2005, Lamela filed a Memorandum of Law in Opposition to Plaintiffs' Motion to File a Reply Brief. The first page of Lamela's memorandum makes clear that it addresses the substance of the proposed reply memorandum, which I have not read. Consequently, I have disregarded Lamela's memorandum, as well.

7 *Goldman v. Pogo.com Inc.*, 2002 WL 1824910, at *1 (Del. Ch. July 16, 2002).

8 *Stein v. Orloff*, 1985 WL 21136, at *2 (Del. Ch. Sept. 26, 1985).

9 *Miles, Inc. v. Cookson America, Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995) (citing *Maldonado v. Flynn*, 1980 WL 272822 (Del. Ch. July 7, 1980)).

10 *Id*.

A. The Court Did Not Misapprehend the Facts

Deloitte suggests that the Court misapprehended the facts in terms of whether the Excluded Companies based their decisions to retain tax consulting firms solely on price. They support this proposition with Brunson's testimony that companies rarely use competitive bidding. Deloitte and Brunson acknowledge, however, that Bacardi and Burger King put their SALT services out for competitive bidding and that Ryder Systems also used competitive bidding for some tax advisory services. Lamela responds that he has presented sufficient evidence to show that the Excluded Companies engage in competitive bidding. Having reviewed the matter again in light of the evidence presented on Deloitte's motion for preliminary injunction, I find that it has not demonstrated a reasonable probability of success in proving that the injunction it seeks necessarily must include the Excluded Companies to protect its legitimate business interests.

Lamela submitted extensive evidence that the nine Excluded Companies retain tax advisory service providers based on competitive bidding.[11] In seeking reargument, Deloitte asserts that only four of the Excluded Companies allegedly use multiple providers for SALT work and have awarded such work through bidding.[12] The

---

[11] *See, e.g.*, Lamela Dep. 9, 12, 24, 104, 112, 116, 121, 123; Diaz Dep. at 103-04, 139-40; Clavero Dep. at 144; Brunson Dep. at 89-90; Lamela Supp. Aff. at 9-12.

[12] Pl.'s Mot. for Reargument at 5. The four companies Deloitte listed did not include AutoNation. In that regard, Deloitte points to Lamela's deposition testimony that AutoNation's CFO issued a directive that its tax work must be provided by multiple firms. They contend that this does not mean that AutoNation uses competitive bidding. At Lamela's deposition, however, he testified that

injunction Deloitte sought and to a significant extent obtained, however, applied to "any tax advisory services," not just SALT work. Deloitte also emphasizes the absence of direct evidence that price was the sole deciding factor for any of the Excluded Companies in selecting tax consulting firms.

The admitted use of competitive bidding by the Excluded Companies is relevant to at least two different issues: first, whether the restriction Deloitte seeks to enforce is reasonably necessary to protect a legitimate business interest; and second, whether a restraint applicable to the Excluded Companies is overbroad or otherwise not reasonably necessary to protect such interests. I understood and considered the evidence presented by both sides on these issues. I concluded that at the preliminary injunction stage Deloitte had not shown a reasonable probability of success on its claimed right to prohibit Lamela from soliciting or serving the Excluded Companies. I explicitly noted, however, that this was a "preliminary ruling only" and that if Deloitte ultimately succeeds after trial on the merits of its claims as to the Excluded Companies, it would be entitled to appropriate relief. Nothing in Deloitte's motion for reargument causes me to alter that conclusion.

In the alternative, Deloitte argues that even if certain clients based their decisions to purchase SALT services solely on price, the Court should enjoin Lamela from

---

AutoNation "occasionally puts out bids, request for bids on projects, tax projects." Lamela Dep. at 83.

soliciting or serving these clients because of his knowledge of Deloitte's trade secrets or confidential information. They assert that this knowledge gives Lamela an unfair competitive advantage. In response Lamela contends that Deloitte did not plead and prove the existence of any confidential or trade secret information with respect to the nine clients at issue, or for any other Deloitte clients.

In connection with its preliminary injunction motion, Deloitte focused most of its claims for protection of trade secret or confidential information on its client list. Yet, for companies who solicit competitive bids for their business, it seems less likely that the identity of those companies and their contact persons will be perceived as valuable trade secrets. Moreover, nothing in the preliminary injunction record demonstrates that Lamela used Deloitte's trade secrets in competition with Deloitte. In any event, Lamela's employment agreement still prevents him from using trade secrets and confidential Deloitte information to attain new clients. Thus, the Court did not misapprehend the facts relating to Deloitte's alleged trade secrets or confidential information and their relevance to the relief Deloitte sought.

B. The Court Did Not Misapply the Law

Deloitte contends that the Court failed to apply the requisite burden shifting standard provided for in Florida Statute § 542.335. Specifically, they argue that because eight of the Excluded Companies are former Arthur Andersen clients, the Court properly found that Deloitte established a legitimate business interest in those clients. Deloitte

argues that Lamela therefore had the burden under § 542.335 of "establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests." Deloitte also acknowledges that the Court properly applied this burden shifting rule in the Sarbanes Oxley section of the Memorandum Opinion. There, the Court stated that it was mindful of the business interest Deloitte had already shown in the Arthur Andersen clients.

In seeking reargument, Deloitte seizes upon the fact that the competitive bidding section of the Memorandum Opinion makes no mention of burden shifting.[13] Although I did not state it explicitly in the competitive bidding analysis, I recognized the parties' respective burdens of proof as to the Excluded Companies, including the former Arthur Andersen clients.[14] Nevertheless, the ultimate issue was whether Deloitte had demonstrated a reasonable probability of success on its claim to preclude Lamela from directly or indirectly soliciting or serving any of the Excluded Companies on tax advisory matters. While most of those companies were former Arthur Anderson clients in which Deloitte had a legitimate business interest, the fact that they put at least some of their tax advisory services out to competitive bid undermines the extent of that interest. Moreover, the evidence presented on the preliminary injunction motion raised serious

---

[13] *Deloitte & Touche*, 2005 WL 2810719, at *8-9.

[14] Deloitte retained the burden of proof as to Paxson Communications because they are not a former Arthur Andersen client.

doubts, in my opinion, as to whether the injunctive relief Deloitte sought was overbroad or otherwise not reasonably necessary to protect whatever legitimate business interest it might have in the Excluded Companies. On balance, I concluded that Deloitte had not demonstrated a likelihood of success on the merits as to those companies, and therefore declined to include them in the preliminary injunction order. Deloitte may disagree with that conclusion, but I reject its argument that I misapplied the law on the competitive bidding issue.

As noted in the Memorandum Opinion,[15] Deloitte ultimately may prevail at trial with respect to the Excluded Companies, when a full record is developed. In the meantime, the restrictive covenants between Lamela and Deloitte in terms of competition and prohibitions on the disclosure or use of Deloitte's trade secrets and proprietary confidential information remain in place. If Lamela acts in contravention of those provisions, he does so at his own peril.

Deloitte further argues that the *Shields* and *Anich* decisions[16] do not apply to this case because neither of those cases involved a situation in which the Court had found a protectible interest like we have here (referring to the Arthur Andersen clients). Deloitte made this argument in their brief on the preliminary injunction motion.[17] I considered it

---

15 *Deloitte & Touche*, 2005 WL 2810719, at *9 n.65.

16 *Shields v. Paving Stone Co.*, 796 So.2d 1267 (Fla. App. 4th Dist. 2001); *Anich Indus., Inc. v. Raney*, 751 So.2d 767 (Fla. Dist. Ct. App. 2000).

17 *See* Pls.' Main Br. in Supp. of their Mot. for a Prelim. Inj. at 30-31.

in making my decision and found it unpersuasive.[18] Indeed, the Memorandum Opinion discusses both the *Shields* and *Anich* cases.[19]

III. CONCLUSION

For the foregoing reasons, I deny Deloitte's motion for reargument. In briefing that motion, however, both sides expressed a desire for a prompt trial. Depending on the amount of time needed for trial, the Court is prepared to set a trial date as early as the latter part of April. Counsel are hereby directed to confer among themselves and with my chambers to develop an appropriate schedule for the completion of any remaining pretrial activities and trial. Counsel shall submit a proposed scheduling order on or before February 15, 2006.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

lef

---

[18] A motion for reargument will not be granted when a party merely restates its prior arguments. *Miles*, 677 A.2d at 506.

[19] *Deloitte & Touche*, 2005 WL 2810719, at * 8-9.