IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

CRYOSURGERY, INC.,	)	
	)	
Plaintiff,	)	
	)	NF
VS.	)	**NO. 15-935-BC**
	)	
STEPHEN B. TOWNES,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER: (1) GRANTING DEFENDANT'S MOTION TO DISMISS COUNT 2 OF THE FIRST AMENDED COMPLAINT AND (2) ENTERING RULE 54.02 ORDER

This lawsuit was filed by the industry leader in manufacturing, selling and distributing cryogenic surgical products and appliances of refrigerated gases for outpatient removal of warts, sun spots, age spots and other common lesions. The lawsuit is filed against a former employee who served as Plaintiff's Senior Vice President. The causes of action alleged are Count I—breach of contract: confidentiality provisions; Count 2—breach of contract: noncompete and nonsolicit; and Count 3: misappropriation of trade secrets—all related to Defendant Townes' current work which allegedly competes with the Plaintiff.

The case is presently before the Court on the Defendant's motion to dismiss the Count 2 claims of breach of a nonsolicitation and noncompete contract asserted in the First Amended Complaint.

After studying the supplemental briefing, the Court grants the Defendant's motion to dismiss. Plaintiff's claims in Count 2 of violation by Defendant of a written or oral nonsolicitation and noncompete agreement (hereinafter referred to as the "noncompete") fail as a matter of law. On the face of the pleadings, any written agreement to extend the terms of Defendant's previous noncompete agreement in place when he was an independent contractor has not been exhibited in conformity with Tennessee Civil Procedure Rule 10.03. Plaintiff's claims of violation of an oral noncompete are barred as a matter of law by the Statute of Frauds. The legal authorities, analysis, and orders for this decision are as follows.

Pleadings In Issue

According to paragraphs 8-10 of the First Amended Complaint ("FAC"), Defendant worked as an independent contractor for the Plaintiff beginning in 2004. At that time he signed an agreement (Exhibit B to the FAC) that he would not compete with the Plaintiff for 18 months "after the termination of the contract." Paragraph 11 of the FAC states that in 2011 the Defendant became an employee of the Plaintiff, hired as Senior Vice President, and at that time "he agreed to be bound by the terms of" the noncompete included in the Contractor Agreement. No written agreement, extending the noncompete in the Contractor Agreement is attached as an exhibit to the FAC. Paragraph 13 of the FAC states the Defendant resigned from Plaintiff's employment in June 2013 and began competing with the Plaintiff.

Dismissal of Count 2 Under Rule 10.03

Tennessee Civil Procedure Rule 10.03 requires a claim founded upon a written instrument to have attached, as an exhibit to the pleading, a copy of the instrument. No noncompete instrument is attached with respect to Plaintiff's claim in paragraph 11 of the FAC that "when Townes became an employee of the Company, he agreed to be bound by the terms of the restrictive covenants included in the Contractor Agreement." Also, Plaintiff does not claim one of the Rule 10.03 exceptions for the absence of an attached written noncompete instrument related to Plaintiff's 2011-2013 employment. The requirement of an attached written instrument is not form over substance particularly in this case. Noncompete agreements are restraints of trade. *Vantage Technology, LLC v. Cross*, 17 S.W.3d 637, 644 (Tenn. App. 1999). Accordingly, it is appropriate for Rule 10.03 to serve as a basis for dismissal in this case.

It is therefore ORDERED that the Plaintiff's claim in Count 2 related to Defendant Townes' violation of a written noncompete agreement entered into with respect to his June 2011-2013 employment with Plaintiff is dismissed with prejudice because no such written instrument has been exhibited by the Plaintiff as required by Tennessee Civil Procedure Rule 10.03.

Dismissal of Count 2 Under Statute of Frauds

With respect to the Plaintiff's claims in Count 2 that the 2011 oral noncompete the Defendant violated was an agreement to be bound by the terms of the previous 2004 Contractor Agreement, it is ORDERED that that claim is barred by the Statute of Frauds and is dismissed with prejudice.

Under Tennessee law, "reliance on an affirmative defense in granting a motion to dismiss is very seldom sustainable." *Indiana State Dist. Council of Laborers v. Brukardt*, 2009 WL 426237, at *6 (Tenn. Ct. App.). This case is the exception. That is because (1) the Statute of Frauds defense is clearly established from the face of the FAC and (2) the Plaintiff can prove no set of facts in support of an exception to the bar of the Statute of Frauds. Under these circumstances, dismissal is appropriate under Tennessee law. *See Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 426 (Tenn. 2011).

The Statute of Frauds is a well-recognized exception to the quotation above regarding the sustainability of a dismissal upon an affirmative defense. Recognizing the inefficiency and cost in requiring a defendant to file an answer or a subsequent motion with affidavits if a Statute of Frauds affirmative defense "clearly and unequivocally appears" from the allegations of the complaint, under these circumstances Tennessee law allows courts to consider the facts of the complaint and apply the affirmative defense as a matter of law. *Anthony v. Tidwell*, 560 S.W.2d 908, 909 (Tenn. 1977).

The Defendant's Statute of Frauds affirmative defense is the inability of the alleged oral agreement to be fully performed within a year of its making as applied to the allegations of the FAC.[1] The Court concludes that this affirmative defense is established from the face of the pleadings because the Plaintiff asserts in paragraph 10 of the FAC that the term of the alleged oral noncompete is 18 months which means it cannot be performed within a year, and therefore is subject to the Statute of Frauds. TENN. CODE ANN. § 29-2-101.

The Plaintiff's defense to the Statute of Frauds is partial performance and/or equitable estoppel.

The Court adopts the Defendant's analysis that Plaintiff has failed to state a claim of partial performance and/or equitable estoppel:

> As noted by Plaintiff, in order to demonstrate the doctrine of partial performance as an exception to the Statute of Frauds, Plaintiff must show both (1) acts by Mr. Townes that evidenced his agreement and intention not to rely upon the Statute of Frauds to escape his performance under this agreement and (2) acts by Plaintiff in reliance on that representation. *See Buice v. Scruggs Equipment Co.*, 250 S.W.2d 44, 48 (Tenn. 1952). Plaintiff's position appears to be that because Mr. Townes worked for Plaintiff and received certain "confidential" information, he fulfilled the first, and CryoSurgery by providing Mr. Townes with "confidential" information satisfies the second. It simply cannot be the law that a company can enforce an oral non-compete provision by providing an employee with supposed "confidential information."
>
> Additionally, the cases cited by Plaintiff regarding other equitable exceptions to the Statute of Frauds are easily distinguishable on the facts, and

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[1] "Although the inclusion of that language in the 2004 Contractor Agreement bars the supposed oral modification, even absent that language, an oral extension of the 18 month restriction is barred by Tennessee's Statute of Frauds, Tenn. Code Ann. § 29-2-101, which requires contracts to be in writing that cannot be fully performed within one year." *Defendant Stephen B. Townes' Reply In Further Support of Motion to Dismiss*, December 9, 2015 at 2.

> Plaintiff has not alleged any facts in its Complaint that would allow for the application of any such exception. *ISCO Industries, LLC v. Erdle, 2011 WL 6293788 (E.D.N.C. Dec. 15, 2011)* (Plaintiff company specifically alleged "both the existence of a valid Non-Compete Agreement and that Erdle received additional bonus commissions as a result of agreeing to such a covenant."); *Thur v. IPCO Corp.*, 173 A.D.2d 344, 345 (NY 1991) (NY Court noted that unspecified duration of period of employment outlined by purchase agreement "could be considered indefinite" and employee admitted "that he believed himself bound by the restrictive covenant.").

Defendant Stephen B. Townes' Supplemental Brief on Further Support of Motion to Dismiss, January 21, 2016, at 3-4.

In addition to the legal insufficiency of facts asserted by the Plaintiff, the Court also repeats and relies upon the analysis from its December 23, 2015 Memorandum and Order that it cannot conceive of facts of this case that would fit an exception to the Statute of Frauds nor can it locate any such facts in case law:

> The Plaintiff's opposition is the partial performance exception to the Statute of Frauds. The Plaintiff asserts that under *Anthony* the Court must considers allegations that may support the partial performance exception, draw all reasonable inferences in favor of the Plaintiff and must deny the Motion to Dismiss to allow discovery to proceed. *Plaintiff's Response to Defendants' Motion to Dismiss and Brief In Support*, December 7, 2015, at pp. 9-10. These steps the Court has taken in drafting its Memorandum. The result, however, is that the Court is unable to derive or conceive from the facts pleaded in the First Amended Complaint, inferences therefrom, or hypothetical facts how the partial performance exception could be present in this case. Further testing its inability, the Court studied the case cited in the papers dealing with partial performance in the context of oral noncompete agreements: *Gray v. Prime Management Group, Inc.*, 912 So. 2d 711 (Ct. App. Fla. 2005). *Gray* provided the Court no assistance in conceiving how this case could meet the partial performance exception as *Gray* held the noncompete agreement was unenforceable due to the Statute of Frauds. Moreover, no concept or theory of the partial performance exception was supplied by the Plaintiff in its briefing in opposition to the Motion to Dismiss. The Court further conducted

nationwide research and could locate no case where partial performance removed a noncompete case from the Statute of Frauds. The Court did locate another case, *McGarth v. Aon Re, Inc.*, 2000 WL 1222209 (N.D. Ill. 2000), which held that the former employee was not bound by a noncompete agreement in the context of a Statute of Frauds defense. It, therefore, appears to the Court that in this case the Statute of Frauds defense "clearly and unequivocally appears on the face of the complaint and does not fall within any exception to the Statute of Frauds," the Tennessee standard acknowledged by the Plaintiff with citation to *Anthony*.

For all these reasons, Count 2 of the Plaintiff's First Amended Complaint is one of those cases where "it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief," and, with these circumstances, under Tennessee law dismissal is appropriate. *See Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011).

It is additionally ORDERED that, pursuant to Tennessee Civil Procedure Rule 54.02, the Court directs entry of a final judgment dismissing Count 2 of the First Amended Complaint. Given the absence of Tennessee law on point regarding the enforceability of an oral noncompete agreement, the Plaintiff should be given the opportunity to appeal dismissal of the Count 2 claim without delay for the remainder of the case to be decided.

Ellen Hobbs Lyle

ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Adam Dread
Joshua Hedrick
Jacob B. Kring
Michael C. Wurtz
Anne Martin
Susan Neal Williams