Would the Stormy Daniels NDA Be Enforceable Under Pennsylvania Law?

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By now, who has not heard the name Stormy Daniels? Yes, the adult film star who will forever be linked to President Donald J. Trump. With so much news regarding nondisclosure agreements (NDAs), it got this writer to thinking about the enforceability of NDAs in our state. Feared by many and abused by all, NDAs are a powerful tool in shutting the mouths of the people you don't want speaking publicly. NDAs, however, are not just limited to adult film stars and presidents of the United States. In the

employment law world we see them all the time. Confidentiality clauses have become more routine in the settlement of disputed employment claims. Often, the employer will include a claw back provision or liquidated damage clause in the event of a breach by the employee. It is not unusual to even see nondisclosure clauses coupled with restrictive covenants in employment agreements at the commencement of the employment relationship, as well.

If ever there were a reason to suppress the murmurs of the peonage, surely it would come in the form of an iron clad restrictive covenant. Courts, however, have disfavored restrictive covenants for centuries. To quote from one of the leading cases on the disfavor of restrictive covenants, "as early as the fifteenth century, pursuant to English common law, restrictive covenants in the employment arena were per se void and unenforceable," see *Hess v. Gebhard & Compamy*, 808 A. 2d 912, 917 (Pa. 2002) (citing *Morgan's Home Equipment v. Martucci*, 390 Pa. 618, 136 A.2d 838 (1957) (*reviewing Dyer's Case*, Y.B. Mich. 2 Henry 5, f. 5, pl. 26 (C.P.1414).

The *Dyer's Case*, from 1414, struck down a restrictive covenant where an individual bound himself to another to refrain from practicing his trade in a particular village for a brief period. The court observed: "The obligation is void because the condition is against the common law, and by God, if the plaintiff [employer] were present he should rot in gaeol till he paid a fine to the King." Ouch. Harsh words. Covenants not to compete were clearly disfavored in medieval times because they prohibited employees from working under the supervision of anyone other than his original employer, resulting either in his violation of the law or the deprivation of his right to earn a living. Suffice to say, restrictions on what your servants can do and say has some historical significance.

Turning to the Stormy Daniels situation and her confidential settlement agreement, some might suggest that prohibiting her from speaking publicly about the behavior that is the subject of the NDA is, in fact, depriving her of her right to make a living. Given the $1 million penalty Stormy Daniels faces for each breach of the NDA, perhaps rotting in jail is preferable. The NDA, which is now the subject of a

declaratory judgment action in California, is interesting in a lot of ways. Having reviewed the language of the agreement and Stormy Daniels' lawsuit, here are some observations.

First, the parties to the agreement are "EC, LLC" (EC) and/or David Dennison (DD), on the one part, and Peggy Peterson (PP) on the other. There is no reference to Stormy Daniels or her legal name, Stephanie Clifford in the settlement agreement. Nor is there any mention of Donald Trump. There is a side letter agreement attached to the confidential settlement agreement, however, which purportedly identifies the pseudonyms for the parties and contains the signatures of Stephanie Clifford, her attorney and Michael Cohen on behalf of EC. Neither the agreement itself nor the side letter contains a signature for DD or Donald Trump. For this reason, Stormy Daniels' new counsel, Michael Avenatti, is asking the court for a declaratory judgment that "no agreement was formed between the parties, or in the alternative, to the extent an agreement was formed, it is void, invalid, or otherwise unenforceable."

Some other interesting observations of the agreement. Section 2.4 makes it clear that "DD expects and requires that PP never communicate with him or his family for any reason whatsoever" and 2.6 states that the parties "shall never directly or indirectly communicate with each other or attempt to contact their respective families." Clearly, DD was not only concerned that PP was going to blab to the press on the eve of an historic presidential election, DD did not want PP communicating or "meddling" with DD's inner circle.

In order to prevent against the possibility of inadvertent disclosure, the agreement required Stormy Daniels to deliver every copy of property linking her to DD and to completely divest herself of all videos, images, emails, text messages, Instagram messages relating to DD. She was also required to transfer all physical, ownership and intellectual property rights to DD.

The enforcement provisions of the agreement carried some serious weight. In the event of a breach (or threatened breach) by Stormy Daniels, she would have to disgorge any monies or profits derived from disclosure or exploitation of confidential information and she could face a one million dollar penalty for each breach. The agreement also gave DD the right to obtain an injunction, which would be filed under seal on an *ex parte* basis. DD also retained the sole option to elect the venue and choice of law for enforcement.

Most confidentiality clauses have a provision permitting disclosure under limited circumstances. The Stormy Daniels NDA was no different. Disclosure of the confidential information was permitted only if compelled to do so by legal process and with 10 days advance notice to DD. Unlike most confidentiality clauses, though, this did not contain an exception for information which is already in the public domain or disclosed by persons who were not parties to the agreement. Nor did the NDA contain any public policy exceptions, as is sometimes customary.

Which all brings us back to the original question. What if the Stormy Daniels NDA were subject to Pennsylvania law? Would it be enforceable? Would it matter that it was not signed by one of the parties? What exceptions might apply that would permit disclosure of confidential information?

While we may not have as many high-profile situations like DD and PP here, Pennsylvania courts are no stranger to high stakes courtroom drama involving nondisclosure agreements. Look no further than Dr. Heathcliff Huxtable, aka Bill Cosby. The enforceability of a confidential settlement agreement was front and center of a heavy weight legal battle after a copy of Cosby's deposition transcript was released in 2015. Ultimately, the admissions from Cosby's deposition contributed to him being criminally charged in Montgomery County.

In 2005, Andrea Constand sued Cosby claiming that he drugged and sexually assaulted her at his Montgomery County home, see *Cosby v. American Media,* 197 F. Supp. 3d 735, 737-38 (E.D. Pa. 2016) (Robreno, J.). In 2006, the parties settled and

entered into a confidential settlement agreement agreeing to a full settlement and release of all claims in exchange for financial consideration and mutual promises to keep information confidential. Those promises included agreements "not to disclose to anyone, via written or oral communication or by disclosing a document, in private or public, any aspect of this litigation," including "the events or allegations upon which the litigation was based" and "allegations made about [Mr. Cosby] or [Andrea Constand] by other persons." Almost 10 years after the settlement, allegations regarding Cosby's widespread sexual misconduct began to surface causing both Cosby and Constand to issues statements publicly which called into question the viability of the nondisclosure provisions of the settlement agreement. Eventually, Cosby sued Constand, her lawyers and several others for breach of the confidential settlement agreement with both sides hurling accusations that the other side breached the agreement first.

One of the first things the court did in addressing the Cosby disclosures was to recite the very strong public policy exception when disclosures are made to law enforcement or for the purpose of a criminal investigation. The court wrote that where "the enforcement of private agreements would be violative of [public] policy, it is the obligation of courts to refrain from such exertions of judicial power," as in *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 92 L.Ed. 1187 (1948). "To declare a contract unenforceable on public policy grounds, … courts must first determine that the public policy at issue is 'well defined and dominant,' " as in *Fomby-Denson v. Department of Army*, 247 F.3d 1366, 1375 (Fed.Cir.2001). The court had no problem determining that a contract preventing a party from voluntarily disclosing confidential information to law enforcement is unenforceable as against public policy.

Turning to whether a breach occurred because of Constand's lawyers' disclosure of information which was already part of the public domain, the court noted that it was within its purview to determine whether the NDA contained an unambiguous exception to the general prohibition against disclosures. Key issues to determining

whether a breach occurred turn on what was already in the public record when the disclosures about Cosby occurred and the timing of Cosby's own actions and disclosures. Notably, the court did not rule out the possible viability of an unjust enrichment argument based on Constand's receipt of the settlement proceeds.

Back to the Stormy Daniels NDA for the moment. No argument has been made that Stormy Daniels was justified in making voluntary (or involuntary) confidential disclosures about DD to law enforcement officials. Of course, none of us are privy to Special Counsel Robert Mueller's investigation, nor do we know if Stormy Daniels was asked to cooperate with any other law enforcement proceedings against the president. It's possible she has not; it's also possible that the $130,000 payment from an entity purportedly on behalf of then-candidate Trump may have constituted a violation of the Federal Election Commission. Again, as members of the public we are not privy to that. If Stormy Daniels has participated in any law enforcement investigation, it seems clear that the public policy allowing for disclosure would shield her from breach of contract.

Similarly, if Stormy Daniels claims that the disclosures she made are already part of the public domain, then a court would be free to consider the timing of the disclosures, as well as any admissions or disclosures made by DD or his attorneys. In her declaratory judgment lawsuit, Stormy Daniels alleges that DD's lawyer, Michael Cohen, issued a public statement confirming the existence of the confidential settlement agreement and the $130,000 payment. If true, then arguably DD has opened the door to public dissemination of the information.

Finally, there is the not-so-small issue of whether the contract was enforceable in the first place because it was never signed by DD. Pennsylvania courts will not void a contract merely because it is not signed by one or both parties, as long as all of the material terms are agreed upon. It is also reasonable to assume that if Stormy Daniels received the $130,000 payment, DD may have an unjust enrichment claim

for repayment of that amount. In the absence of an enforceable, written nondisclosure agreement, however, DD is not likely to have any ability to keep her quiet or keep her from meddling in his affairs.

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