IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA
CIVIL ACTION

GARCIA HOW AND ASSOCIATES, LLC, a Florida Corporation,
Plaintiff,

v. **CASE NO.: 2016-CA-000232**

EVELYN GARCIA, an individual, and STACY CARLSON, an individual,
Defendants.
_____/

ORDER DENYING TEMPORARY INJUNCTION

THIS CAUSE having come before this Court on the Plaintiff's Verified Emergency Motion for Injunction and this Court having considered said motion, Defendants' Verified Response, evidence presented at hearing held August 25, 2016 and September 2, 2016 and the argument of counsel, finds:

1. The Plaintiff entered into contracts with the Defendants, EVELYN GARCIA, and STACY CARLSON on December 28, 2012 and June 21, 2013 for employment commencing February 1st and June 21st, 2013 respectively. Said contracts contain restrictive covenants in paragraph 9 which Plaintiff is attempting to enforce.
2. Both Defendants were and are Florida Certified Public Accountants as that term is defined in § 473.302(4) Florida Statutes and are licensed as such. The Plaintiff is not and has not ever been licensed as a CPA Firm. The Plaintiff is a Florida Limited Liability Company and at all times material to this action failed to comply with Florida Statute 473.309 which requires at least 51% ownership by a CPA.
3. It is the Plaintiff's contention that it was only required to be licensed as a CPA firm by § 473.3101 Florida Statutes if it engaged in "audit" or "attestation" public accounting as defined by § 473.302(8)(a) Florida Statutes and, as it did not perform such audit services, it was not required to be licensed.
4. It is the Defendants' contention that pursuant to § 473.3101 Florida Statutes, the Plaintiff was required to be licensed as a CPA firm if it performed any of the three types of public accounting described in § 473.302(8)(a), (b) or (c) Florida Statutes (which include the "audit" function, the "consulting or advisory services by a CPA" function

and the "other financial services by a CPA" function) if, while performing those services, the firm was using any "device tending to indicate it is a CPA Firm." (*See* § 473.3101(1)(a)(1) Fla. Stat. (2013) and § 473.3101(1)(b) Fla. Stat. (2015).)

5. The Employment contracts defined the employees' services to include "the performance of tax and accounting professional services for the Company, and such other activities as are directed by the Company's Managing Member...." (*See* ¶ 4 of Exhibits "A" and "C" to Plaintiff's Motion.) Testimony adduced at hearing confirmed that the parties contemplated these services to include the "practice of public accounting" as that term is defined in § 473.302(8)(b) Florida Statutes (the "consulting or advisory services by a CPA" function of public accounting) and that said services did, in fact, include public accounting as defined by § 473.302(8)(b) and (c).
6. The sole testimony of a client or prospective client of the Plaintiff was local attorney Brian Cross. Mr. Cross testified that when interviewing Garcia, Howe, and Associates for his law firm he was told that Garcia, Howe, and Associates was going to help the law firm with tax planning, including issues of receivables, distributions, salaries. Further, he was advised that he should not be an individual owner, that there should be an S-Corporation. Further, Mr. Cross received a voice message from Mr. Dick Howe which was played for the Court. The messages stated that Mr. Howe was calling about tax matters, that Evelyn Garcia had left "the firm" and for Mr. Cross to please call him.
7. Defendant, Evelyn Garcia testified that she and Mr. Howe would meet with potential clients. In those meetings Mr. Howe stated that Garcia, Howe, and Associates "thinks outside the box", they are "proactive", they "don't just put numbers on a form".
8. The Florida Legislature has deemed it "necessary in the interest of public welfare to regulate the practice of public accountancy in this state." § 473.301 Fla. Stat. (2013).
9. In 2013, § 473.3101(1)(a)(1) required licensure for "[a]ny firm with an office in this state which used the title "CPA," "CPA firm," or any other title, designation, words letters, abbreviations, *or device tending to indicate that the firm practices public accounting*." (*Emphasis added.*) As such, licensure was required for any "firm" ("any legal entity that is engaged in the practice of public accounting" see § 473.302(5) Fla. Stat. (2013).) which utilized devices tending to indicate it was a CPA firm.
10. Based on the testimony and evidence presented at the time the subject contracts were entered into and during the performance of the subject contracts the Plaintiff was a legal entity engaged in the practice of public accounting and therefore a "firm" as defined by

§ 473.302(5) (2013).

11. At the time the subject contracts were entered into and since that time, the Plaintiff had used devices tending to indicate that it is a CPA Firm, including, but not limited to: (1) use of the names of non-owner CPA's in its name in a misleading manner as referenced in § 473.321 Florida Statutes and Rule 61H1-26.001 Fl. Admin. Code (2013); (2) references to it being a "Boutique Certified Public Accounting Firm" on its website; (3) description of services on its website that included public accounting services; (4) verbal communications with clients and potential clients in sales calls; (5) hourly rates for CPA "consulting services;" and (5) Engagement Letters that offer services of a CPA Firm.
12. This Court therefor concludes that in 2013, the time the subject contracts were entered into, the Plaintiff was required to be licensed as a CPA Firm in order to perform the services contemplated to be provided by the Defendants under the subject contracts.
13. When a statute declares it to be unlawful to perform certain acts without first obtaining a license permitting the performance of such acts and imposes a penalty for the violation thereof, or where the statute prohibiting certain acts is enacted for the protection of the public, contracts made for the performance of such acts without first obtaining the appropriate license, are unenforceable. Spiro v. Highlands General Hospital, 489 So. 2d 802, 804 (Fla. 2d DCA 1986) *citing* D & L Harrod, Inc. v. U.S. Precast Corp., 322 So.2d 630, 631 (Fla. 3d DCA 1975).
14. Florida Statute 542.335 is the restrictive covenant statute. The statute allows for the enforcement of contracts that restrict or prohibit competition, provided the "line of business, is not prohibited." Additionally the statute allows for the enforcement of contracts that restrict or prohibit competition to protect "legitimate business interests".
15. The Court concludes that considerations of public interest do not support the granting of an injunction that would have the effect of restricting the Defendants from providing public accounting services which Defendants and their firm are licensed to provide, under circumstances where the Plaintiff is not licensed to provide those services.
16. For all of the above reasons, the Court finds the subject contracts are unenforceable, including the restrictive covenants therein.

THEREFORE it is hereby ORDERED AND ADJUDGED:

17. Plaintiff's Verified Emergency Motion for Temporary Injunction is hereby denied as the Plaintiff has failed to establish: (1) the existence of valid and enforceable contracts;

(2) a substantial likelihood of success on the merits; and/or (3) that an injunction is supported by considerations of public interest.

DONE AND ORDERED this 7th day of October, 2016 in Chambers in Naples, Collier County, Florida.

Honorable James R. Shenko
Circuit Court Judge

Cc: Andrew Tretter, Esq.
Steven V. Blount, Esq.