IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
LAW DIVISION

GAGE SALON, LLC, d/b/a RK SALON .	)	Case No. 2022 L 1192
Plaintiff,	)	Hon. Mary Colleen Roberts
v.	)	
EMILY SPARKS, d/b/a BOHO BLONDE CHICAGO	)	Calendar N
Defendant.	)	

ORDER

This matter is coming before the Court on Defendants Emily Spark's Motion to Dismiss Plaintiffs' Complaint pursuant to 735 ILCS 5/2-619.1; the Court having considered the written submissions and being advised of the premises, finds:

STATEMENT OF FACTS

This is a lawsuit brought by a hair salon against a former stylist who had the temerity after her resignation to open a competing studio a few blocks away. Plaintiff Gage Salon, LLC, d/b/a RK Salon ("RK Salon") pleads that Sparks was employed by it as a stylist for approximately a year. After her resignation, Sparks is alleged to have opened her own studio two blocks from RK Salon's place of business and to have supposedly solicited and successfully taken RK Salon customers. RK Salon contends that through these actions, Sparks breached "Non-Competition Clause 8.2 of Plaintiff RK Salon's At-Will Employment Agreement and Acknowledgment of Receipt" and it seeks to recover approximately $50,000.00 for a purported breach of contract.

Defendant argues that RK Salon's attempts to quash competition should be rejected for multiple reasons. She argues that RK Salon cannot establish most of the elements needed to prevail on a breach of contract claim. First she argues that because Sparks worked for RK Salon for substantially less than two years, there is insufficient consideration to enforce a non-competition provision against her. Furthermore, RK Salon's Complaint fails to explain that "Non-Competition Clause 8.2" is part of Plaintiff's Employee Handbook and that both the Handbook and the so-called "At-Will Employment Agreement and Acknowledgment of Receipt" ("Acknowledgment") **expressly** state that they are not contracts. On a procedural

level, it is also noteworthy that RK Salon did not even attach the "Non-Competition Clause 8.2" it is seeking to enforce. Likewise, Plaintiff's allegations regarding its performance, Sparks' supposed breach, and its purported damages are deficient according to Defendant.

RK Salon's claim is premised on the assertion that during her employment, Sparks was bound by the Acknowledgment and "Clause 8.2, the Non-Compete and Non-Solicit." (Complaint ¶¶ 4, 6).

The Acknowledgment states, in part, as follows:

> I acknowledge that I have been provided with a copy of the RK Salon (legal name Gage Chicago Salon) Employee Handbook, which contains important information on RK Salon's policies, procedures and benefits, including the policies on Anti-Harassment/Discrimination, Substance Use and Abuse, Confidentiality, Non-Compete and Non-Solicit. I understand that I am responsible for familiarizing myself with the policies in this handbook and agree to comply with all rules applicable to me.
>
> ***I understand that the policies described in the handbook are intended as a guide only and do not constitute a contract of employment***. . . .
>
> ***I understand that RK Salon reserves the right to make changes to its policies, procedures or benefits at any time in its discretion***. . .

RK Salon claims to have been injured in the amount of $49,516.44, which supposedly is based on "her commission for service" as well as a projected $551.70 "projected over the upcoming 2022 year based on 2021 figures reporting EMILY's clients that became her regulars whom all have now actively left RK Salon." (Complaint ¶ 16).

At the time Sparks executed the Acknowledgment of Receipt, she was presented a copy of RK Salon's Employee Handbook ("Handbook").

Section 1 of the Handbook states, in part:

> The information contained in this Manual applies to all employees of RK Salon. Following the policies described in this Manual is considered a condition of continued employment. However, nothing in this Manual alters an employee's status. ***The contents of this Manual shall not constitute nor be construed as a promise of employment***

> ***or as a contract between the Company (RK Salon) and any of its employees. The Manual is a summary of our policies, which are presented here only as a matter of information.***

(Handbook § 1, Introduction) (p. 6 of 31) (emphasis added).

The "Non-Compete and Non-Solicit" clause of the Handbook provides:

> In the event of termination or resignation, employees agree to not work as a hairstylist, if you are a hairstylist for RK Salon, or as a make-up artist, if you work as a make-up artist for RK Salon, within a 2 mile radius of all locations, for a period of one year post-employment with RK Salon.
>
> All employees obtained during the course of your employment at RK Salon are property of RK Salon. Employees may not take any client's contact information for any reason and are absolutely prohibited from contacting or marketing to those clients in the event of termination or resignation. Please refer to our confidentiality and non-competition agreement for employees of RK Salon.

(Handbook § 8.2, p. 30 of 31).

Sparks did not compete with RK Salon until her resignation on January 16, 2022 and only began advertising and accepting customers to her new business after that time. (Sparks Aff. ¶ 6).

OPINION OF THE COURT

When proceeding under a Section 2-619 motion, the movant concedes all well-pleaded facts set forth in the complaint but does not admit conclusions of law. *Piser v. State Farm Mut. Auto. Ins. Co.*, 405 Ill. App. 3d 341, 346 (1st Dist. 2010). In reviewing the sufficiency of the complaint, the Court accepts as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Porter v. Decatur Mem. Hosp.*, 227 Ill. 2d 343, 352 (2008). A Section 2-619 motion to dismiss should be granted only when it raises an affirmative matter which negates the plaintiff's cause of action completely, or refutes critical conclusions of law, or conclusions of material but unsupported fact. *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 96-97 (2004). Upon ruling on a 2-619 motion, the court must deny the motion if there is a material and genuine question of fact. 735 ILCS § 5/2-619(c); see also,

Semansky v. Rush-Presbyterian-St. Luke's Medical Ctr., 208 Ill. App. 3d 377, 384 (1st Dist. 1990).

Section 2-606 requires that if a claim "is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her." 735 ILCS 5/2-606.

In a claim for breach of contract, a plaintiff must establish the existence of a contract, the plaintiff's performance of all contractual conditions, defendant's breach of that contract, and consequential damages. See *Premier Electrical Construction Co. v. City of Chicago,* 159 Ill.App.3d 98, 102, 111 Ill.Dec. 140, 512 N.E.2d 44 (1987).

Damages which "naturally and generally result from a breach are recoverable." *Hallberg,* 2012 IL App (1st) 092385, at ¶ 89, 364 Ill.Dec. 451, 976 N.E.2d 1014 (quoting *Midland Hotel Corp. v. Reuben H. Donnelley Corp.,* 118 Ill.2d 306, 318, 113 Ill.Dec. 252, 515 N.E.2d 61 (1987)). Damages which are not the proximate cause of the breach are not allowed. *Feldstein v. Guinan,* 148 Ill.App.3d 610, 613, 101 Ill.Dec. 947, 499 N.E.2d 535 (1986). Damages are an essential element of a breach of contract action and a claimant's failure to prove damages entitles the defendant to judgment as a matter of law. *Walker,* 316 Ill.App.3d at 596, 249 Ill.Dec. 746, 736 N.E.2d 1184; see *Prevendar v. Thonn,* 166 Ill.App.3d 30, 36, 116 Ill.Dec. 394, 518 N.E.2d 1374 (1988).

Illinois courts use the following test to judge whether sufficient consideration has been offered in exchange for assent to a non-competition agreement:

> A promise of continued employment for an at-will employee is adequate consideration to render a restrictive covenant enforceable, as long as there is at least two years of continued employment following the execution of the restrictive covenant. (citations omitted). And where no additional compensation, ***such as a raise or special benefits***, is given to the employee and the employee resigns less than two years after executing the restrictive covenant, the consideration is inadequate and the restrictive covenant is unenforceable.

Axion RMS, Ltd. v. Booth, 2019 IL App (1st) 180724, ¶ 21 (emphasis added). The "additional compensation" described by *Booth* must be directly tied to the execution of the restrictive covenant. See, e.g., *Booth*, 2019 IL App (1st) 180724, ¶ 27 (Giving promotion and a raise in exchange for executing agreement sufficiently pleaded consideration, except such claim conflicted with verified original complaint); *Prairie Rheumatology Assocs., S.C. v. Francis*, 2014 IL App (3d) 140338, ¶¶ 17-18 (since employer did not assist employee in obtaining credentials and did not introduce

doctor to referral sources, it did not provide sufficient consideration); B*rown & Brown, Inc. v. Mudron*, 379 Ill.App.3d 724,729 (3rd Dist. 2008) (employer failed to show how benefits received after signing agreement differed from those provided beforehand).

Further, in *Duldulao*, the Illinois Supreme Court held that no contract was formed where an employee handbook contained a similar disclaimer of the handbooks non-contractual nature and reserved the employer's right to amend, modify, or delete sections. In that case, the Illinois Supreme Court observed "the handbook contains no disclaimers to negate the promises made. In fact, the introduction to the handbook states just the opposite, that the policies in the handbook 'are designed to clarify your rights and duties as employees.'" *Duldulao*, 115 Ill.2d at 491. In contrast, when a handbook contains a disclaimer, it does not create any enforceable contractual rights. *Dawson v. City of Geneseo*, 2018 IL App (3d) 170625, ¶¶ 18-19 (disclaimer stated that policies were for information purposes only and not intended to create a contract); *Ivory v. Specialized Assistance Servs.*, 365 Ill.App.3d 544, 546 (1st Dist. 2006)(handbook introduction stated that it was only a general outline of company policy and did not form a contract); *Davis v. Times Mirror Magazines,* 297 Ill.App.3d 488, 498 (1st Dist. 1998)(no contract formed from handbook when employer reserved the right to amend, modify or delete any provisions and stated employment was at-will). Intuitively, it makes sense that no contract is formed where a document says "This is not a contract" and where the document allows one party to unilaterally modify their rights.

Here, Defendant Sparks argues that there are numerous deficiencies in Plaintiff's Complaint. First, Defendant argues that there is a lack of consideration for a non-compete agreement because Defendant Sparks worked there for less than two years. Next, Defendant Sparks argues that there could not be a breach of contract without a contract forbidding Defendant Sparks from working elsewhere. Defendant Sparks also argues that Plaintiff's Complaint is insufficient under Section 2-606 because only portions of the Handbook are attached to Plaintiff's Complaint. Finally, Defendant Sparks argues that Plaintiff's Complaint fails to specify calculable damages.

This Court declines to make holdings on all of Defendant's arguments where it is immediately apparent that Plaintiff's Complaint fails to allege that a contract was ever formed. Plaintiff cannot allege breach without sufficiently alleging contract formation.

Here, both the Acknowledgment and the Handbook contain disclaimers. The Acknowledgment provides that "the policies described in the Handbook are intended as a guide only and ***do not constitute a contract of employment***" while the Handbook's Introduction states that the Handbook may not "be construed as a

promise of employment or as a contract between the Company (RK Salon) and any of its employees" and that it is just "***a summary of our policies which are presented here only as a matter of information***." (Acknowledgment and Handbook Introduction)(emphasis added). The Response's reference to Handbook provisions regarding the probation period, non-discrimination rules, business hours, termination, etc. does not obviate the disclaimers. Plaintiff has reserved to itself the right to unilaterally change each of these policies at any time. *See* Acknowledgment. Since Sparks (or any employee) could not reasonably believe that Plaintiff intended to form a contract due to the multiple disclaimers in the Acknowledgment and the Handbook, Plaintiff's breach of contract claim cannot succeed.

To determine whether a transaction constitutes a contract, an "offer" is an expression by one party of his assent to certain definite terms, provided that the other party in the transaction will likewise express her assent to the identical terms. *Arbogast v. Chi. Cubs Baseball Club, LLC*, 2021 IL App (1st) 210526, ¶ 20. Where a supposed offer is not intended to give the so-called offeree the power to make a contract, there is no offer. McCarty v. Verson Allsteel Press Co., 89 Ill.App.3d 498, 508 (1st Dist. 1980). Here, RK Salon cannot establish that it made a valid offer that gave Sparks or any other employee the ability to form a contract.

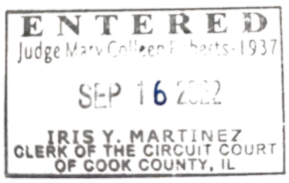
Such a disclaimer prevents RK Salon from claiming that the non-competition provision in the handbook is an enforceable contract under Illinois law. See *Symbria, Inc. v. Callen*, 2022 U.S. Dist. LEXIS 2719 ** 55-56 (N.D. Ill. 1/6/22)(Clear disclaimer in handbook was complete defense to employer's claim for breach of contract based on handbook);2 *Holbrook Mfg. LLC v. Rhyno Mfg,* 497 F.Supp.3d 319, 340 (N.D. Ill. 2020) (employer could not rely on confidentiality provision in handbook with disclaimer); *Dawson v. City of Geneseo*, 2018 IL App (3d) 170625, P19 (it is not reasonable to construe an employee handbook with a disclaimer as an offer); *Ivory v. Specialized Assistance Servs.*, 365 Ill. App. 3d 544, 546 (1st Dist. 2006). Since there is no way that RK Salon can show that Section 8.2 of the Handbook was made as part of a valid offer, it cannot show that a contract was ever formed. Therefore, Plaintiff's breach of contract claim should be dismissed.

As such, this Court GRANTS Defendant Emily Spark's Motion to Dismiss.

Wherefore, it is hereby

ORDERED:

1. Defendants' Motion to Dismiss Plaintiff's Count I for Breach of Contract is GRANTED with prejudice. This is a final and appealable order.



Entered:

Judge Mary Colleen Roberts 1937

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Circuit Court of Cook County, Illinois
County Department, Law Division