

Discussion Paper 2

Please discuss the facts and issues presented by the information provided and provide your best answers to the questions posed, giving the reason or reasons for your answers. Good luck! Prof. Grey

In 2000, Len, Jane and Charley, licensed architects, formed a New York professional service corporation (PC). PC designs commercial buildings in the New York City area and specializes in designing "green" buildings that utilize environmentally sustainable building materials. PC's only office is located in New York City.

In 2013, PC entered into a written contract with Developer, a commercial developer, for the design of an office building. Len was the only PC shareholder involved in creating the design of the building. PC timely completed the design according to the parties' contract, which did not contain any provisions about damages in the event of a breach.

Developer thereafter commenced construction of the building pursuant to PC's design. Mid-way through construction, extensive mold was discovered behind the building walls. It was determined that the cause of the mold was excessive moisture trapped behind the drywall caused by a design defect. Completion of construction of the building was delayed nine months while the mold was remediated and certain design changes were made. Developer claims that, due to the delay, it has lost rental income which would have produced a profit of \$250,000. Although Developer did not have any tenants under lease, it claims that, had the building been completed on time, it could have rented all of its space earlier based upon the current rental market and comparable properties it owns in the same locale. PC was not aware of Developer's anticipated date for completion of the building, which was not part of its contract with Developer, and it had no knowledge of Developer's plans for rental of the building.

Developer thereafter commenced a breach of contract action against PC seeking to recover its lost profits as consequential damages. In addition to PC, Developer named Len, Jane and Charley, individually, as defendants in the action, and duly served each of them with the summons and complaint. In a separate cause of action sounding in negligence, Developer alleges that Len, Jane and Charley, as shareholders of PC, are personally liable for PC's negligence.

In 2008, PC had hired Sam as its exclusive sales and marketing director. As a condition of his employment, Sam was required to sign a non-competition agreement, which stated, *inter alia*, that for a period of one year after Sam left PC's employ, he could not:

directly or indirectly own, operate, control, be employed by or consult for, participate in, render services for, or be connected in any manner with the ownership, management, operation or control of any architectural firm or other business engaged in the design or construction of "green" buildings anywhere in New York State.

PC trained Sam extensively in its confidential design techniques and its pricing methodologies. It also provided Sam with a generous expense account which enabled Sam to promote PC's designs.

Last week, Sam contacted Attorney seeking legal advice concerning the enforceability of the non-competition agreement. Sam would like to quit his position with PC and accept a similar sales position with Central Architectural, an architectural firm located in Syracuse, approximately 250 miles from the New York City area.

During the client interview, Sam told Attorney that he had over 20 years of experience in sales and marketing in various industries. He conceded that PC had devoted significant time and money creating its goodwill in the "green" building market, which enabled Sam to expand PC's customer base in that market. Although Central Architectural designs "green" buildings, Sam maintains that his new sales position would not require him to disclose any of PC's confidential designs and that its pricing methodologies are publically known. Sam explained that the business contacts, such as suppliers and contractors, he made while at PC are generally known in the industry and readily accessible through trade publications and other public sources. Finally, Sam believes that his employment with Central Architectural would not impact PC's business, because PC's customers are concentrated heavily in the New York City area, whereas Central Architectural's client base is only in the Syracuse area.

- (1) Is Developer likely to succeed on its claim for lost profits?
- (2) Can Len, Jane and Charley each be held personally liable for PC's negligence?
- (3) What factors should Attorney consider in analyzing the enforceability of the non-competition agreement and what conclusion should Attorney reach?