NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5752-11T1

TRUONG, LLC d/b/a V.I.P.
NAILS and V.I.P. NAILS TOO,

Plaintiff-Respondent,

v.

ANNA TRAN a/k/a THU NGUYET TRAN,
ANTHONY LE, individuals, and
ANTHONY'S NAILS, INC. d/b/a
ANTHONY'S NAILS,

Defendants-Appellants,

and

MANOB LAMLAMAY,

Defendant.

Argued November 27, 2012 - Decided January 9, 2013

Before Judges Messano and Ostrer.

On appeal from the Superior Court of New Jersey, Chancery Division, Sussex County, Docket No. C-12-12.

Pádraig P. Flanagan argued the cause for appellants (Florio Perrucci Steinhardt & Fader, L.L.C., attorneys; Mr. Flanagan, of counsel and on the briefs).

Jack T. Spinella argued the cause for respondent (Nicoll Davis & Spinella LLP, attorneys; Mr. Spinella, of counsel; Steven C. DePalma and Jessica Wilde, on the brief).

PER CURIAM

By leave granted, defendants Anna Tran and Anthony Le appeal from a preliminary injunction enforcing a restrictive covenant that barred them from competing with their former employer, Truong, LLC, (plaintiff),[1] which operated two nail salons, V.I.P. Nails in Vernon Township, and V.I.P. Nails Too in Wantage Township. We stayed the injunction pending appeal and now reverse.

I.

Plaintiff hired Le in May 2005, and Tran in April 2009 to work as manicurists. Shortly after they began work, they signed a restrictive covenant that prohibited them from working within twenty-five miles of the municipalities where plaintiff's salons were located. The restriction lasted for two years after their employment terminated. The covenant stated:

> Employee agrees that during the term of this Agreement and for a period of two consecutive years immediately following the termination of this Agreement or [his or her] employment, whichever occurs later, and regardless of the cause of termination, [he or she] will not by [himself or herself] or on behalf of any other person, firm, partnership or corporation, engage in the business of nail salon within a radius of 25 miles from Vernon [and] Wantage, New Jersey.

[1] We use "plaintiff" to refer to Truong, LLC, and refer to its managing member, Johnny Truong, as "Truong."

> Employee agrees that [he or she] will not, directly or indirectly, for [himself or herself] or on behalf of, or in conjunction with any other person, firm, partnership, or corporation, solicit or attempt to solicit the business or patronage of any person, firm, corporation or partnership within a 25 mile radius for the purpose of selling manicure or pedicure services or other products similar to those dealt[] in by company.
>
> Employee shall not perform such other incidental business and service as [the] company [is] now engaged in, nor will employee disclose to any person any of the secrets, methods, or systems used by company in and about its business.

Le and Tran each ceased working for plaintiff for a period of months — Le from June to September 2006, and Tran from August to November 2009 — then returned to plaintiff's salon. Both Le and Tran resigned in August 2011. In May 2012, Le opened Anthony's Nails, a competing nail salon, in the McAfee section of Vernon, and employed Tran there. Anthony's Nails was located within five miles of plaintiff's salons.

Truong had learned of Le's business plans before Le opened for business. In March 2012, plaintiff filed a proposed order to show cause with temporary restraints, along with a verified complaint seeking injunctive and other relief as a result of

defendants' alleged breach of the employment agreement.[2] Plaintiff also asserted claims of tortious interference with contractual relations and unfair competition.

Judge Thomas L. Weisenbeck conducted a non-testimonial hearing on the request for temporary restraints on April 26, 2012. The court explored issues in oral argument, but reached no formal findings, regarding whether plaintiff possessed an enforceable interest in confidential customer lists, and whether the temporal and geographical limits of the restrictive covenant were justified. Rather than focus on the enforceability of a twenty-five mile limit, the court suggested that at least a five-mile restriction would be reasonable. Defense counsel declined to concede the reasonableness of a two-year restriction, which the court noted had been accepted in the context of other cases.

The court concluded there was a disputed issue of fact regarding whether the agreement was in force, as Le and Tran asserted their respective breaks in service terminated their employment under the agreements; consequently, the two-year period of post-termination restrictions had possibly already

[2] Plaintiff names Le, Tran, Anthony's Nails, Inc. and Manob Lamlamay as defendants. The case against Lamlamay is not before us. We use "defendants" to refer to Le, Tran, and Anthony's Nails.

expired. Plaintiff asserted Le's interruption in service was a vacation and his agreement remained in force. He asserted Tran breached the agreement when she left to work for a nearby competitor and the restraints applied upon her return.

Judge Weisenbeck secured the parties' consent to interim restraints, embodied in an order issued the next day that barred defendants from directly soliciting plaintiff's customers, pending further order of the court. The judge then allowed a period of expedited discovery; referred the matter to mediation; and, if mediation were unsuccessful, then to another judge in the vicinage to conduct a preliminary injunction hearing. The order provided the hearing would address "factual issues relating to the timing of defendants['] . . . termination of the non-competition agreements and other related issues[.]" Judge Weisenbeck recognized, on the record, "of course ultimately [the court is] going to rule on the propriety of the restraints that you're seeking."

At the preliminary injunction hearing on June 26, 2012, the testimony focused on the nature and impact of Le's and Tran's breaks in service. Plaintiff also presented evidence regarding the confidentiality of its customer lists, defendant's access to the lists, and the financial harm that defendants allegedly had already caused plaintiff. It was undisputed that both Le and

Tran signed their agreements in 2006 and 2009 respectively, both left in August 2011, and they had commenced work at Anthony's Nails in McAfee in May 2012.

Truong testified Le informed him in June 2006 that Le was going to help Rosa Dahn,[3] his girlfriend and another VIP Nails employee at the time, move to Missouri for "a month or two." About a week later, Le allegedly told Truong that Le and Dahn planned to visit family in Vietnam, as did many of plaintiff's employees. Truong testified that after Le's and Dahn's New Jersey lease expired, they both lived briefly in Truong's home before leaving for Missouri in Dahn's vehicle. Le left articles in Truong's home, and did not say he quit.

Thahn Nguyen, Truong's live-in girlfriend and a receptionist at plaintiff's salons, also testified about Le's departure. She claimed Truong threw a farewell party for Dahn, but not Le. Nguyen testified Le informed her he was leaving his school books behind because he would return to finish college in New Jersey, where he had been enrolled. Truong's and Nguyen's version of events was supported by the testimony of two employees. Truong claimed that sometime in September, Le called to tell Truong he had returned from Missouri, and would be at

[3] Dahn testified that her first name is Hong, and Rosa was a nickname, although some witnesses referred to her as "Rose."

the salon the next Monday. Le then resumed his station, which had been kept vacant in his absence.

Le claimed he terminated his employment in June 2006, intending to relocate permanently with Dahn. Aside from his visit to Vietnam with Dahn, Le and Dahn lived in Dahn's sister's house while searching for an apartment. Le testified he worked at a nail salon owned by Dahn's sister, applied for a Missouri manicurist license, and explored colleges in Missouri.

However, in late August, Dahn and Le had a falling out, Dahn broke off their relationship, and Le unexpectedly returned to New Jersey. Both Dahn and her sister, residents of Missouri, appeared at the hearing and corroborated Le's version of the facts pertaining to his time in Missouri. Dahn denied there was a farewell party for her.

Le testified he left boxes of unimportant items in Truong's garage because he could not fit them in Dahn's vehicle, and he planned to eventually retrieve them when he returned to Jersey City to visit his parents. Le stated that upon his return, no one asked him to sign a new employment contract, nor did Truong inform him the 2005 agreement was still effective.

Turning to the circumstances of Tran's interruption of service, Truong testified that in September 2009, Tran "left" and "went somewhere to work" within the proscribed twenty-five

mile radius. Nguyen testified that after she and Truong learned Tran was working for a nail salon about ten miles from one of plaintiff's salons, Nguyen told Tran that plaintiff would "have to take legal action" if she did not return. She offered Tran her job back, and Tran accepted. Truong did not ask Tran to sign a new employment agreement upon her return. However, Nguyen claimed she told Tran, in Truong's presence, that the old employment contract was still in effect. Truong did not corroborate that statement. Instead, he stated he assumed the agreement remained in force, and it was unnecessary for her to sign another one, although he conceded Tran was "hired again."

Tran disputed Truong's and Nguyen's testimony. She contended she terminated her employment in August 2009 because she disagreed with how Truong handled a dispute she had with co-workers. She thereafter worked at salons in Rockaway, New Jersey and Warwick, New York. After repeatedly ignoring Nguyen's calls, Tran eventually spoke to Nguyen, who did not allege a contractual breach, but apologized for how Truong handled Tran's dispute with other employees, and invited Tran to return to work for plaintiff. Tran accepted because plaintiff's salon was closer to her home than her current job. She resumed work for plaintiff in November 2009. Neither Truong nor Nguyen

asked her to sign another employment agreement, nor inform her the original one remained in force.

Regarding plaintiff's claim it maintained a confidential customer list, Truong testified clients had "their own box, their own kit," that contained the client's name and phone number. The kit numbers were also listed in a "book" containing all customer names. Truong testified every employee had access to the book. However, Nguyen testified only she, Truong and the manager had regular access to the book, and Le only used it occasionally when she was unavailable as the receptionist.

Truong claimed Anthony's Nails had reduced plaintiff's business by about twenty percent, but did not specify whether that reduction was in gross revenues or profits. Nguyen confirmed the twenty-percent-drop claim, but could not recall the amount of total revenues against which the twenty percent reduction applied. Without objection on hearsay grounds, Truong testified that Le and Tran were "calling clientele, tell[ing] them where they are all going to be, and most of the time, they call the client by exchange the phone number." Also, without objection, Nguyen testified that, before Anthony's Nails opened, a customer told her that Le approached her near plaintiff's salon and solicited her business.

Le admitted some of plaintiff's customers came to his new salon. He denied directly soliciting them and explained that he publicized the opening of his salon in advertisements and on internet sites.

Both plaintiff's and defense counsel focused in summation on whether Le's and Tran's breaks in service constituted terminations, as a result of which, the two-year restriction had already expired. The court then issued an oral decision granting preliminary injunctive relief.

The court presumed defendants did not contest the effectiveness of the agreement, but for the break-in-service issue.

> Not before me today, as I understand it, is a challenge to the restrictive covenant as to its effectiveness, and the restrictive covenant basically prohibits those who sign them from entering into a competing business or soliciting customers within two years of termination and within 25 miles.
>
> There was a comment made that perhaps Judge Weisenbeck thought that the 25 miles might be excessive. I don't know that he said that. There's no evidence of it, but I'm not going to make — I'm not going to accept that as a ruling because I don't think it's appropriate to do that. There is no challenge to the language of the restrictive covenant, so I do accept it.

Referring to Maw v. Advanced Clinical Communications, Inc., 179 N.J. 439 (2004), and the test under Whitmyer Bros., Inc. v.

Doyle, 58 N.J. 25 (1971) and Solari Industries, Inc. v. Malady, 55 N.J. 571 (1970), the court concluded the non-compete agreement was enforceable because it protected plaintiff's legitimate interest in protecting its confidential customer lists. The agreement did not impose undue hardship on Le and Tran, noting Le and Tran could pursue their livelihoods beyond the protected geographical area. The court also concluded there was no evidence the public would suffer.

The judge determined Le never terminated his employment with plaintiff, nor triggered the two-year period, until his resignation in August 2011. The judge noted Le did not obtain a lease or professional license in Missouri, did not enroll in college there, left belongings in New Jersey, and did not testify he quit.

> Mr. Le did not ever testify, I quit, I told him I quit, and I left. He didn't say that. The only thing he did say is, when he returned, he called and there was some suggestion that maybe he was seeking reemployment, but he never said that I quit . . . when he did return, his station was still there and he was able to use the same position.

With respect to Tran, the judge recognized that she, unlike Le, did not intend to return when she first left plaintiff. The judge did not directly address Nguyen's claim that she informed Tran the agreement remained in force upon her return in November

2009. However, he found Tran "violated the restrictive covenant," and credited Nguyen's testimony that Tran was warned she was in breach and "had better return." Conceding "there's no law on this," the court reasoned:

> If you work for somebody and there's a restrictive covenant and then you leave that employment and return . . . in a fairly reasonably short period of time and the employer doesn't ask you to execute another agreement, are you entitled to say the agreement doesn't apply? I don't think so.
>
> It seems to me that it's pretty logical to think if you left a position with a restrictive covenant, came back in a very few months to the exact same position, you're not then entitled to stand up and say . . . I no longer a[m] bound to that because the employer doesn't happen to mention it.

The court recited the standard that, in order to secure injunctive relief, plaintiff was required to show irreparable harm, likelihood of success on the merits, and a balance of hardships of the parties that favored relief. However, the court did not specifically articulate the basis for concluding these factors were met, particularly the irreparability of harm.

On June 29, 2012, the court entered a preliminary injunction restraining defendants, "until further order," from:

> A. Engaging in manicure, pedicure, or other nail salon related services at the nail salon presently known as "Anthony's Nails". . . .

> B. Engaging in manicure, pedicure, or other nail salon related services, within a radius of twenty-five (25) miles from 530 Route 515, Vernon, New Jersey, 07462 and 205 Route 23, Wantage, New Jersey 07461;
>
> C. Directly or indirectly, for themselves or on behalf of, or in conjunction with any other person, firm, partnership, or corporation, solicit or attempt to solicit the business or patronage of any person, firm, corporation or partnership within a twenty-five mile radius [of the boundaries provided in Paragraph B] for the purpose of selling manicure or pedicure services or other products similar to those dealt in by V.I.P.; and
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> D. Performing such other incidental business and services as V.I.P. now engages in within a twenty-five mile radius [of the boundaries provided in Paragraph B]; and
>
> E. Disclosing to any person any of the secrets, methods, or systems used by V.I.P. in and about its business[.]

We granted defendants leave to appeal and entered a stay of the restraints on July 11, 2012. Defendants argue: the agreement does not apply because of their break in service; plaintiff should be barred as a matter of public policy from enforcing the agreement because it knowingly employed Le while he was unlicensed to work to a manicurist in New Jersey, an issue which defendants did not present to the trial court; the restrictive covenant does not satisfy the Solari/Whitmyer test; and plaintiff did not satisfy the prerequisites for an injunction under Crowe v. De Gioia, 90 N.J. 126 (1982).

II.

A.

Our review is guided by well-established principles. A trial court may issue a preliminary injunction only upon the applicant's showing (1) the injunction is necessary to prevent irreparable harm; (2) the legal right underlying the applicant's claim is settled; (3) the applicant is reasonably likely to prevail ultimately on the merits; and (4) the balance of hardships to the parties favors relief. Crowe, supra, 90 N.J. at 132-34. Mindful that the trial court must engage in a "delicate balance of equities," we review the trial court's entry of a preliminary injunction for an abuse of discretion. See Nat'l Starch & Chem. Corp. v. Parker Chem. Corp., 219 N.J. Super. 158, 162 (App. Div. 1987) ("A trial court's decision to issue a preliminary injunction will not be disturbed on appeal unless it results from an abuse of discretion.").

Applying an abuse-of-discretion standard, we may not substitute our judgment for the trial court's ruling if it falls within "a range of acceptable decisions." In re Kollman, 210 N.J. 557, 577 (2012) (citation and quotation omitted). While "abuse of discretion" "defies precise definition," Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002), we must ascertain whether the exercise of discretion is "founded on the

facts and the applicable law and not simply an undisciplined whim." State v. Daniels, 38 N.J. 242, 249 (1962). An abuse of discretion occurs "when a decision is made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." Feigenbaum v. Guaracini, 402 N.J. Super. 7, 17 (App. Div. 2008) (quotations and citations omitted).

We owe no deference to the court's interpretations of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Thus, we shall not let stand an injunction that rests on an error of law. A.O. Smith Corp. v. F.T.C., 530 F.2d 515, 525 (3d Cir. 1976). In exercising our review, we may consider whether, on the concededly abbreviated factual showing made in a preliminary hearing, the movant has made a sufficient showing that it is likely to prevail on the merits, would suffer irreparable harm without relief, and the balance of equities supports its request. Ibid.

B.

Applying these standards, we turn first to the threshold issue whether the restrictive covenants expired under their own terms because of a break in service. As to Le, the trial court found, at least preliminarily, plaintiff had proved there was no

termination. Instead, Le's time in Missouri and Vietnam was an extended vacation.

The factual issue was disputed, but there was sufficient credible evidence in the record to support the trial judge's findings. We shall not disturb them. See Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974); Horizon Health Ctr. v. Felicissimo, 263 N.J. Super. 200, 215 (App. Div. 1993) (referring to fact-findings supporting grant of injunctive relief), modified on other grounds and aff'd, 135 N.J. 126 (1994).

As to Tran, it was undisputed that she quit her employment with plaintiff in August 2009. The court declined to accept or reject Nguyen's claim she advised Tran the restrictive covenant applied when she returned in November. Rather, the court determined, as a legal matter, the prior contract controlled. Although we defer to the court's finding that Tran's employment violated the terms of the restrictive covenant,[4] we part company

[4] The court did not consider the extent to which the covenant would have been enforceable against Tran at that point. The court made no finding regarding the reasonableness of the geographical limits of the restriction, particularly as applied to Warwick, New York and Rockaway, New Jersey, to the north and south of plaintiff's salons, where Tran had worked. Also, Tran had worked for plaintiff for merely four months. The court made no findings that she had access to plaintiff's customer list, obtained any confidential information, serviced any of (continued)

with the trial court's legal conclusion that the covenant remained in force upon her return.

Once Tran terminated her employment for the first time in August 2009, the restrictive covenant, by its terms, expired two years thereafter, "regardless of the cause." Absent a new agreement, Tran's return to work later in 2009 is of no moment. The restrictive covenant did not spring back to life because of Tran's return after her alleged breach. In order to revive its rights under the agreement, plaintiff had to reach a new agreement.

A court may not "rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently." Levison v. Weintraub, 215 N.J. Super. 273, 276 (App. Div. 1987) (citation and quotation omitted). When a fixed-term employment agreement expires, an at-will contract is created and the original agreement is no longer in effect. Craffey v. Bergen County Utilities Auth., 315 N.J. Super. 345, 351-52 (App. Div. 1998); see also Bernard v. IMI Sys., 131 N.J. 91, 106 (1993) ("Today, both employers and employees commonly and reasonably expect employment to be at-

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(continued)
plaintiff's customers at her new posts, or otherwise threatened any protectible interest.

will, unless specifically stated in explicit, contractual terms.").

While plaintiff may allege that it impliedly agreed with Tran to revive the restrictive covenant by withdrawing its breach claim in return for Tran resuming her old job, the court made no finding of an implied-in-fact agreement. See Wanaque Borough Sewerage Auth. v. Twp. of W. Milford, 144 N.J. 564, 574 (1996) (describing implied-in-fact contract). Plaintiff bears the burden to establish a breach in 2011. Nolan v. Control Data Corp., 243 N.J. Super. 420, 438 (App. Div. 1990). That includes the burden to show that there existed an enforceable agreement between the parties in 2011. Accepting the court's fact-finding that Tran violated the terms of the covenant in 2009, and Nguyen so informed her, does not compel a finding that Tran agreed upon her return to be subject to the covenant again. It is equally plausible that Tran returned free from the covenant, in return for Tran's cessation of services for competitors.

In sum, the preliminary injunction was improvidently granted as to Tran because, based on the preliminary evidence, the restrictive covenant no longer applied to her.

C.

Although we do not disturb the court's finding that Le's agreement was in force when he resigned in August 2011, the

record does not support the court's grant of injunctive relief. As we noted, plaintiff was obliged to show a likelihood of prevailing on the merits, Crowe, supra, 90 N.J. at 133, which includes, in this case, a likelihood of establishing the restrictive covenant was enforceable under the Solari/Whitmyer test. Plaintiff was also required to show the relief was required to prevent irreparable harm, that is, the breach was not remediable by monetary damages. Crowe, supra, 90 N.J. at 132-33. On both prongs, plaintiff's proofs were insufficient.

A restrictive covenant is reasonable if it "simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public." Solari, supra, 55 N.J. at 576. The court must assess an agreement's reasonableness on a case-by-case basis. Pierson v. Med. Health Ctrs., P.A., 183 N.J. 65, 69 (2005). A court therefore may not presume that a temporal or geographical limitation deemed reasonable in one case is necessarily reasonable in another. A court must determine whether the non-compete agreement is overbroad based on its duration, geographic limits, and the scope of activities prohibited. "Each of those factors must be narrowly tailored to ensure the covenant is no broader than necessary to protect the employer's interests." Cmty. Hosp. Grp., Inc. v. More, 183 N.J. 36, 58-59 (2005). As

an "employer has no legitimate interest in preventing competition as such," Whitmyer, supra, 58 N.J. at 33, the court must guard against an overbroad restriction that prevents competition, as opposed to protecting the employer's legitimate interest.

In this case, the only legitimate interest preliminarily established by the evidence was plaintiff's interest in its customer lists.[5] See Lamorte Burns & Co. v. Walters, 167 N.J. 285, 298 (2001) (noting that service business's customer lists "afforded protection as trade secrets"); AYR Composition, Inc. v. Rosenberg, 261 N.J. Super. 495, 504 (App. Div. 1993) (stating service company's customer names and addresses are protectible property); J.H. Renarde, Inc. v. Sims, 312 N.J. Super. 195, 204 (Ch. Div. 1998) (legitimate business interest at stake because defendants had plaintiff hair salon's "client list and other information about those clients").

However, we discern insufficient evidence in the record to support the temporal scope of the court's order. Therefore, plaintiff did not satisfy its burden to show a likelihood of prevailing on the merits. Although the trial court's order was of indefinite duration — effective "until further order" — the

[5] Although the preliminary injunction also bars disclosure of "secrets, methods or systems used by V.I.P. in and about its business," there was no proof of any such secrets.

court implicitly determined plaintiff was entitled to more than eight months of protection, as that much time elapsed between Le's resignation and the opening of his salon. Although the court stated "[t]here is no challenge to the language of the restrictive covenant," defense counsel refused to concede the reasonableness of a two-year restriction in oral argument before Judge Weisenbeck, and plaintiff retained the burden to establish the covenant's reasonableness. Whitmyer, supra, 58 N.J. at 37 ("employer was not entitled to preliminary restraint unless it made a suitable showing that such restraint was necessary to protect its legitimate interests and that it would not impose undue hardship on the employee or injure the public"); Maw, supra, 179 N.J. at 457 (Zazzali, J., dissenting) (stating employer bears "burden . . . to demonstrate the reasonableness of non-compete agreements" because of "continuing public-policy concerns engendered by these restraints on trade").

We review factors pertinent to determining the reasonableness of a restrictive covenant's temporal scope. For example, the court should consider the inherent characteristics of the client-relationships the employer seeks to protect. The Court in Community Hospital Group, supra, deemed relevant the time it would take an employer to develop a relationship between its client and a new employee.

> Although recognizing that "a longer restriction may be permissible in medical specialties where the number of contacts between the physician and patient are relatively infrequent," the Karlin Court emphasized that "the covenant should not be enforced beyond the period needed for the employer (or any new associate he may have taken on) to demonstrate his effectiveness to the patients."
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> [183 N.J. at 59 (quoting Karlin v. Weinberg, 77 N.J. 408, 423 (1978)).]

See also Maw v. Advanced Clinical Commc'ns, Inc., 359 N.J. Super. 420, 437 (App. Div. 2003) (striking non-compete provision in part because the agreement "g[a]ve[] no explanation as to why such a lengthy period of time [wa]s necessary"), rev'd on other grounds, 179 N.J. 439 (2004).

The court may also consider the relevant lifespan of a trade secret or other protectible information. A non-compete covenant may not extend beyond the temporal point when the secret information has become obsolete, See, e.g., EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999) (finding one-year restrictive covenant was too long given the "dynamic nature" of an online services business in which information can quickly lose its value). A covenant also may not extend beyond the period in which the former employee could independently replicate the protected information, so long as any research and development cost savings are adequately

addressed in awarded damages or injunctive relief. See Raven v. A. Klein & Co., Inc., 195 N.J. Super. 209, 216 (App. Div. 1984) (stating "[i]njunctive relief should be granted for a period equal to the time that would be required for the former employees independently to develop the same process[,]" by extending the injunction to redress the former employee's avoidance of development costs). In the case of customer lists, the court should consider what percentage of the employer's customers persist after the contractual time period. If only a small fraction do persist, then the covenant may unreasonably bar competition to protect an obsolete list.

Plaintiff provided insufficient proofs that a temporal scope of more than eight months was reasonable. There was no evidence regarding the time it would take to solidify customer relationships with new salon employees. Assuming regular customers utilize services once a month, plaintiff would have had eight opportunities to develop and solidify a relationship between its customer and a new manicurist. There also was no proof regarding the persistence of plaintiff's customers, and how long it would take for its customer list to become stale. We note the restrictive covenant sustained in J.H. Renarde, supra, was only nine months in duration. 312 N.J. Super. at 202.

We also discern insufficient support in the record for the court's finding that injunctive relief was necessary to prevent irreparable harm. "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. Plaintiff argues it would suffer irreparable harm without the injunction because "it would be incredibly difficult, if not impossible, to identify each former VIP Nails customer that went to Anthony's Nails for manicure related services, . . . try[] to determine if Anthony's Nails employed use of VIP Nails' trade secrets to solicit that customer, then to calculate damages." We are unconvinced.

This is not a case involving a secret process, where it may be difficult to determine if a former employee is exploiting the protected information, and the resulting lost income. Cf. Nat'l Starch & Chem. Corp. v. Parker Chem. Corp., 219 N.J. Super. 158, 163 (App. Div. 1987). Nor does the evidence indicate a level of harm that could result in "the total destruction of [one]'s business, good-will and profits," which constitutes irreparable harm. Ferraiuolo v. Manno, 1 N.J. 105, 108 (1948). Plaintiff asserts defendants solicited several of its customers, and that it experienced a twenty-percent drop in business — not defined as gross revenue or profit — almost two months after Anthony's Nails opened. However, plaintiff did not demonstrate its lost

business was attributable to the loss of existing customers whose identity was confidential and who were protected from solicitation, as opposed to a reduced share of first-time customers caused by the defendants' legitimate competition.

In Raven, supra, 195 N.J. Super. at 217, we modified a restrictive covenant that barred competition by former employees for ten years and barred use of trade secrets. We allowed the former employees to compete, but enforced the prohibition against the use of the trade secrets — dealing with the manufacture of heart-shaped boxes — because a violation would be evident in the marketplace. Id. at 216.

Likewise, here, a complete bar on competition appears unnecessary to protect the confidential customer lists. Rather, a ban on solicitation may adequately protect plaintiff's interest in barring exploitation of its confidential customer list. If defendants successfully solicit plaintiff's customers, the solicitation presumably will be evident when the customers do not return to plaintiff's salons. Moreover, the damage from the loss of a customer appears to be calculable, based on the customer's prior frequency of visits and proofs regarding the average amount of services purchased and profits earned from that customer.

Nor are plaintiff's damages incalculable because some former customers may gravitate to defendants' shop on their own, without solicitation. The impetus for the customer's defection is subject to proof. Plaintiff did not present evidence that its repeat customers are so numerous that it would be impractical to identify defectors, and then determine what caused them to shift their business.

Also, plaintiff misplaces reliance on J.H. Renarde, supra, where the court concluded damages were irreparable because of the difficulty "in determining whether a particular customer who may be served by defendant is one which would have gone to plaintiff's business (but for the unlawful competition)[.]" 312 N.J. Super. at 203. Plaintiff's interest is in existing identified customers, not new unidentified ones as in J.H. Renarde. Also, the court in J.H. Renarde apparently found an enforceable interest in processes and trade secrets other than plaintiff's customer lists. Id. at 204 (noting defendants' concession that "they obtained knowledge and information . . . which may only be protected through the enforcement of the covenant").

Given our views that plaintiff made an insufficient showing of irreparable harm, and of likelihood of prevailing on the merits on the issue of temporal scope, we need not reach

defendants' remaining arguments, including Le's argument, raised for the first time before us, that his employment contract was unenforceable because he was not licensed in New Jersey when he was initially hired. See Borough of Keyport v. Maropakis, 332 N.J. Super. 210, 216 (App. Div. 2000) (stating that appellate court will ordinarily decline to consider issues not raised before the trial court).

Reversed and remanded. We do not retain jurisdiction.