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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN Justice PART 57

Index Number : 603204/2007
WEIR, JOHN K.
vs.
HOLLAND & KNIGHT, LLP
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

INDEX NO. 603204/07
MOTION DATE
MOTION SEQ. NO. 008
MOTION CAL. NO.

this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,2A,3
Replying Affidavits	4

Memo of Law M1–M3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
DEC 14 2011
NEW YORK COUNTY CLERK'S OFFICE

RECEIVED
DEC 12 2011
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

Dated: 12/9/11

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

JOHN K. WEIR,

Plaintiff(s),

- against -

HOLLAND & KNIGHT, LLP, et al.,

Defendant(s).

Index No.: 603204/07

DECISION/ORDER

This action arises out of the expulsion of plaintiff John Weir, in November 2002, from defendant Holland & Knight, LLP, a law firm partnership. Defendant partnership and partners individually named as defendants (collectively Holland & Knight) move for summary judgment dismissing plaintiff's complaint and for summary judgment and an accounting on their counterclaims. Plaintiff moves for summary judgment on his cause of action for breach of contract and for summary judgment dismissing the counterclaims.

The complaint alleges nine causes of action: the first and second, for age discrimination and retaliation, respectively, under the New York State and City Human Rights Laws; the third, for breach of fiduciary duties; the fourth, for breach of contract; the fifth, for breach of implied contract and breach of the covenant of good faith and fair dealing; the sixth, for fraudulent inducement; the seventh, for fraud and misrepresentation; the eighth, for conversion and unjust enrichment; and the ninth, for tortious interference with contract. (Compl., Ex. A to Aff. of Renee Phillips [Ds.' Atty] In Opp. To P.'s Motion [Ds.' Aff. In Opp.].) The answer asserts four

counterclaims: the first, for breach of contract; the second, for breach of fiduciary duty; the third, for money had and received; and the fourth, for unjust enrichment. (Answer, Ex. B to Aff. of John Giansello [Ds.' Atty] In Support of Ds.' Motion [Giansello Aff.].)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b]." (Zuckerman, 49 NY2d at 562.)

Plaintiff's Breach of Contract Claim

Plaintiff, a former partner in Haight Gardner Poor & Havens (Haight Gardner), became a "New Class B Capital Partner" in Holland & Knight, pursuant to an Asset Contribution and New Partner Admission Agreement (Asset Agreement), dated July 1, 1997, under which Haight Gardner combined with Holland & Knight. (Asset Agreement, Ex. C to P.'s Motion.)

Plaintiff's breach of contract claim seeks damages for Holland & Knight's failure to pay him "dissociation benefits," also referred to as Schedule C benefits, upon his expulsion from the Holland & Knight partnership, and damages for lost compensation based on Holland & Knight's alleged wrongful refusal to permit him to retire, at his option, at age 62 or 70. In claiming entitlement to such damages, plaintiff relies on section 21(a) of the Asset Agreement, which provides that the committee negotiating the combination of the firms will recommend, and bring

to a vote before the Holland & Knight partners, that the New Class B Capital partners from Haight Gardner be entitled to the same death, disability, expulsion, and retirement benefits (the Schedule C benefits) to which existing Holland & Knight partners are entitled under the Holland & Knight Partnership Agreement. In claiming that he has a guaranteed right to Schedule C benefits upon expulsion, plaintiff cites the absence of any provision in the Asset Agreement for termination with or without cause. He also relies upon section 22 of the Asset Agreement which states: "The New Partners shall have no Schedule C Benefits upon withdrawal (other than retirement, death, disability or expulsion) from Holland & Knight, but shall, except as otherwise provided above, have the rights provided by the Partnership Agreement relevant to a return of Capital Accounts."

Plaintiff's reliance on the Asset Agreement entirely ignores that section 32 of that Agreement expressly provides that upon the combination of the firms, "the Holland & Knight LLP Partnership Agreement shall be the surviving governing instrument for both the Holland & Knight partners and New Partners. . . ." Plaintiff argues that he is not bound by the Partnership Agreement because section 32 of the Asset Agreement also required the New Partners to execute the Partnership Agreement, and he never did so. This claim is belied by plaintiff's execution, on July 31, 1997, of an "Agreement of Partners To be Bound by the Holland & Knight LLP Partnership Agreement." (Ex. 39 to Ds.' Aff. In Opp.)

Section 26.04 of the Partnership Agreement, which supersedes the Asset Agreement, unambiguously provides that "[a] partner may be expelled from the firm with or without cause," and that, effective as of the expulsion date, "the firm shall purchase the expelled partner's interest, if any, in the firm. The value of the interest will be determined and paid in the manner

set forth in paragraph 27." (Partnership Agreement, Ex. A to Aff. of Kinder Cannon In Support of Ds.' Motion [Cannon Aff.].) Section 27.01 specifies that the value of a Class B Capital partner's interest upon termination is the value of the partner's capital account and Schedule C benefits. Section 27.02 further provides: "A withdrawn or expelled partner is not entitled to receive any Schedule C payment while, in the determination of the Managing Partner, he or she has failed to take all steps reasonably required to accomplish the recording and billing of his or her time or has failed to exhaust all reasonable efforts to effect collection of accounts for which he or she was primarily responsible." Section 24.06 provides that clients for whom the partners perform services "are clients of the firm and not of individual partners. . . . That general statement of principle endures, notwithstanding any withdrawal of partners from the firm."

Significantly, plaintiff does not dispute that he did not submit time sheets for work on which he represented clients in the approximately nine months between March 2002 and his expulsion in November 2002. Nor does he dispute that defendant partnership was entitled to fees for the clients he represented, and that defendants made repeated demands for the submission of the time sheets. Rather, he claims that he withheld the time sheets – an act that he describes as a "restrained countermeasure" – based on defendants' alleged wrongful demand that he withdraw from the firm or be expelled, and on defendants' alleged wrongful reduction of his compensation. (Reply to Ds.' Counterclaims, ¶ 7 [Ex. R to P.'s Reply Aff. On P.'s Motion]; Weir Dep. at 37 [Ex. C to Giansello Aff.].) Plaintiff wholly fails, however, to submit legal authority that his withholding of time sheets was an act of self-help that was justified based on his claim of wrongdoing on defendants' part.

Moreover, defendants make an unrebutted showing of material financial loss as a result of

plaintiff's failure to cooperate with billing of the clients he represented in the nine months before his expulsion. The Schedule C benefits that plaintiff claims amount to approximately $300,000. The amount of the unbilled fees for plaintiff's services during the period of his non-cooperation is not fully established on this record. However, defendants submit evidence that after his expulsion, plaintiff billed one client (Stolt Nielsen Transportation Group) approximately $114,000, and a second client (United States Aviation Underwriters) $14,000, for services performed exclusively while he was a partner at Holland & Knight. (See Ds.' Memo. Of Law In Opp. To P.'s Motion at 8-9 [Ds.' Memo. In Opp.]; Ex. 25 to Ds.' Aff. In Opp.) Defendants also submit evidence that they received only partial payment of approximately $70,000 on account of the fees for these clients. (Ds.' Memo. In Opp. at 8-9.) Plaintiff does not deny that he issued these bills, although he claims, without proof, that he was paid only for work performed after he left Holland & Knight for these clients. (See Reply to Ds.' Counterclaims, ¶ 21 [acknowledging that plaintiff billed for services rendered before and after expulsion, but claiming receipt of payment only for "that portion of his bill which the client determined related to his services" after expulsion]; Weir Dep. at 44-45 [same].)

The undisputed record thus demonstrates that plaintiff refused to facilitate billing of clients of the firm he represented, with resulting financial loss to defendant partnership that was material in relation to the amount of plaintiff's claim for retirement benefits. Under these circumstances, plaintiff's claim for Schedule C benefits is barred as a matter of law by the clear terms of section 27.02 of the Partnership Agreement. The court further holds that plaintiff's claim that he had a guaranteed right to continue to work at least until the age of 62 is barred by the plain language of section 26.04.

In holding that these provisions bar plaintiff's breach of contract claim, the court rejects plaintiff's contention that the Florida Revised Uniform Partnership Act of 2005 (Fla St. §§ 620.81001, et seq.) (FRUPA) mandates that a statutory dissociation payment be made to plaintiff. As a Florida partnership, Holland & Knight is subject to FRUPA. However, plaintiff blatantly misconstrues its terms. Citing FRUPA § 620.8103(2) for the proposition that a partnership agreement may not "vary the power to dissociate as a partner," plaintiff argues, without any supporting authority, that this language creates an exception to the general principle that the partnership agreement governs relations between the partners and the partnership. He then argues, also without any supporting legal authority, that § 6201.8701(1) sets forth a mandatory procedure – i.e., a procedure that may not be varied – for valuing and purchasing a dissociated partner's interest in the partnership. (See P.'s Memo. Of Law In Support of P.'s Motion at 9-10 [P.'s Memo. In Support].)

In fact, § 620.8103(2) provides that "[t]he partnership agreement may not: (g) Vary the power to dissociate as a partner under s. 620.8602(1), except to require the notice under s. 620.8601(1) to be in writing." Section 620.8602(1) concerns the right of the partner to dissociate, and provides: "A partner has the power to dissociate at any time, rightfully or wrongfully, by express will. . . ." *It is section 620.8601 that enumerates the events upon the* occurrence of which a partner is dissociated from a partnership, other than at the partner's option. These events include: "The partner's expulsion pursuant to the partnership agreement." (§ 620.8601[3].) Moreover, as noted by Uniform Comment 1 to § 620.8103, "[t]he general rule under Section 103(a) is that relations among the partners and between the partners and the partnership are governed by the partnership agreement. . . . To the extent that the partners fail to

agree upon a contrary rule, RUPA provides the default rule." As noted by Uniform Comment 4 to section 620.8601, "Section 601(3) provides that a partner may be expelled by the other partners pursuant to a power of expulsion contained in the partnership agreement. That continues the basic rule of UPA Section 31(1)(d). The expulsion can be with or without cause." As to compensation upon the dissociation of a partner, § 620.8701(1) provides that "[i]f a partner is dissociated . . . without resulting in a dissolution . . . of the partnership, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection two." Subsection 2 sets forth a formula for determining the buyout price based on the value of the partnership business at the time of the dissociation. Significantly, Uniform Comment 3 to this section states that "[t]he Section 701 rules are merely default rules. The partners may, in the partnership agreement, fix the method or formula for determining the buyout price and all of the other terms and conditions of the buyout right." (See also Paoli v Natherson, 732 So 2d 486 [Fla App 2d Dist 1999], review denied sub nom Natherson v Paoli, 749 So 2d 503.)

That is precisely what the Partnership Agreement does here, providing for enumerated Schedule C benefits in lieu of the §620.8701(2) formula for computation of the buyout. Plaintiff's assertion that the FRUPA buyout formula may not be varied simply ignores the contradictory terms of both the statute and the official comments. The court accordingly holds that plaintiff's claim that he is entitled to a buyout payment, as calculated pursuant to the FRUPA formula, is plainly without merit.

Discrimination Claims

Plaintiff claims age discrimination and retaliation under the New York State and City

Human Rights Laws, based on his expulsion from the firm at age 55. The State Law, Executive Law § 296(1)(a), provides that "[i]t shall be an unlawful discriminatory practice" for an "employer" to discriminate against an "individual" based on age and other prohibited classifications. The City Law, Administrative Code § 8-107(1)(a), provides that "[i]t shall be an unlawful discriminatory practice" for an "employer" to discriminate against any "person" based on age or other prohibited classifications. The State Law, Executive Law § 296(1)(e), also prohibits an "employer" from retaliating against any person who has opposed or complained of a practice forbidden by the statute. The City Law, Administrative Code § 8-107(7), similarly prohibits retaliation by persons engaged in activity to which the Code applies – here, employers – against any person on the ground, among others, that the person has opposed or complained of a practice forbidden by the Code.

Focusing on the word "person" and again ignoring contradictory terms of the statutes – in this instance, that they prohibit discriminatory or retaliatory conduct by an "employer" – plaintiff agues that nothing in the statutes requires a plaintiff to be an "employee" to invoke their protection. (P.'s Memo. Of Law In Opp. To Ds.' Motion at 4-5 [P.'s Memo. In Opp.].) This contention is insupportable under the express terms of the statutes.

The issue, rather, is whether plaintiff, although a partner, was an employee within the meaning of the statutes. In claiming that plaintiff was not, defendants rely on two New York cases which held that a partner was not an employee entitled to the protection of the anti-discrimination laws. (See Ballen-Steir v Hahn & Hessen, L.P., 284 AD2d 263 [1st Dept 2001], lv dismissed 97 NY2d 699 [2002]; Levy v Schnader, Harrison, Segal & Lewis, 232 AD2d 321 [1st Dept 2006].) However, these cases are not inconsistent with the extensive authorities, decided

under the analogous federal anti-discrimination laws, which hold that the determination of whether a partner is an employee is fact-specific, and should be made by applying a factors test which assesses the individual's control over the terms and conditions of employment.

In Clackamas Gastroenterology Assocs., P.C. v Wells (538 US 440 [2003]), the Supreme Court articulated the standard for determining whether a shareholder of a professional corporation is an employee for purposes of the Americans with Disabilities Act (ADA). The Court held that the determination should "focus on the common-law touchstone of control" (id. at 449), and that six factors are relevant to the inquiry:

> " Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
>
> Whether and, if so, to what extent the organization supervises the individual's work
>
> Whether the individual reports to someone higher in the organization
>
> Whether and, if so, to what extent the individual is able to influence the organization
>
> Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
>
> Whether the individual shares in the profits, losses, and liabilities of the organization"

(Id. at 449-450 [internal quotation marks omitted], citing EEOC Compliance Manual.)

The Clackamas factors have been extended beyond the ADA to the definition of employee under Title VII. (42 USC § 2000e, et seq.) These factors have thus been applied by courts in determining whether a shareholder/director or shareholder/partner in a professional corporation is an employee for purposes of Title VII (e.g. Kirleis v Dickie, McCamey &

Chilcote, P.C., 2010 WL 2780927 [3d Cir 2010], cert denied 2011 WL 55433[2011]; Bragg v Orthopaedic Assocs. of Virginia, Ltd., 2007 WL 702786 [ED Va 2007]), and whether a partner in a professional association is an employee for such purposes. (Solon v Kaplan, 398 F3d 629 [7th Cir 2005][attorney]; Mehta v HCA Health Servs. of Florida, Inc., 2006 WL 3133327 [MD Fla 2006][physician].)

As the Court of Appeals recently noted, it has "generally interpreted state and local civil rights statutes consistently with federal precedent where the statutes are substantively and textually similar to their federal counterparts. And [it has] always strived to resolve federal and state employment discrimination claims consistently." (Zakrzewska v New School, 14 NY3d 469, 479 [2010] [internal quotation marks, citations, and emphasis omitted].) Here, none of the parties argues that there is a textual inconsistency between the definition of employer in Title VII and that in the New York State and City Human Rights Laws. Moreover, while the Appellate Division of this Department has emphasized that the New York City Human Rights Law has remedial purposes that go beyond those of the state and federal civil rights laws and therefore should be "more broadly" construed (Williams v New York City Hous. Auth., 61 AD3d 62, 66, 74 [1st Dept 2009], lv denied 13 NY3d 702), the definition of employer for purposes of the federal anti-discrimination statutes "has been construed liberally." (Lima v Addeco, 634 F Supp 2d 394, 399 [SD NY 2009], affd 375 Fed Appx 54 [2d Cir 2010].) The Clackamas test is therefore appropriate under both the New York State and City anti-discrimination laws.

Applying this test, the court finds that defendants make a prima facie showing that plaintiff was not an employee:

As to termination, under the Partnership Agreement, plaintiff could be expelled from the

firm only upon the vote of at least 70 percent of the firm's Directors Committee. (§ 26.01).

As to supervision, defendants cite plaintiff's testimony that for a period of years (not specifically identified in the record) during which he was head of the New York labor and employment law group, there were "no specifically defined reporting responsibilities," although there was a hierarchy at the firm, including a practice area leader above him. (Weir Dep. at 80, 79.) Defendants also cite plaintiff's deposition testimony acknowledging that after he ceased to be head of his group, the new head did not supervise plaintiff's work. Rather, he and the new head conferred and, on a few occasions, reviewed each others' legal papers. (Id. at 92-93.)

As to influence, under the Partnership Agreement, Class B partners are the only category of partners who have the right to elect the Managing Partner (§ 11.04) and remove the Managing Partner. (§11.061.) Only Class B Capital partners may override action of the Managing Partner on major decisions, including establishment of a professional corporation to succeed the partnership, modification of retirement benefits, making of capital expenditures in excess of one million dollars, and cessation of payment of interest on capital accounts. (§§ 14, 15.) Only Class B Capital partners are eligible for election to the Directors Committee or to the office of Managing Partner. (§§ 10.03, 11.01.) Only Class B Capital partners may vote on whether to dissolve the firm. (§ 36.01.) In addition, while the Managing Partner approves distributions of the net profits of the firm to Class B Capital partners, only such partners have the right to receive a schedule of the proposed distributions and may question any proposed distribution in writing. (§ 8.044.)

As to writings evidencing the parties' intent, while not determinative, plaintiff's status as a partner was memorialized in an agreement to bound by the Partnership Agreement. (See supra

at 3.)

As to sharing of profits and losses, only Class B Capital partners contribute capital to the firm – in plaintiff's case, approximately $100,000. (§ 3.02; Weir Dep. at 96.) As a Class B Capital partner, plaintiff shared in the profits and liabilities of the firm. (§§ 8.044, 8.06.)

In opposition, plaintiff fails to raise a triable issue of fact as to whether he was an employee. In claiming employee status, plaintiff rests on wholly conclusory, unsworn assertions, some of which are inconsistent with his deposition testimony cited above. For example, he claims, without any supporting detail, that he "reported to" various named individual defendants, "all of whom had power to direct the Plaintiff's work and client development activities." (P.'s Memo. In Opp. at 11; see also P.'s Response To Statement of Undisputed Material Facts [P.'s Response], ¶¶ 25, 34.) He also relies on the bare assertion that he never served as Managing Partner or on the Directors Committee, and "was utterly unable to 'influence' the firm to do much of anything." (P.'s Memo. In Opp. at 11; P.'s Response, ¶ 42.)

As the Supreme Court cautioned in Clackamas, "[t]oday there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners." (538 US at 446.) Under the federal Age Discrimination in Employment Act (29 USC § 621, et seq.), a partner has thus been held not to be an employee of a partnership that included hundreds of partners, where "all power reside[d]" in a small executive committee that was not even elected by the partners, and the partner had no bona fide ownership interest (see Equal Empl. Opportunity Commn. v Sidley Austin Brown & Wood, 315 F3d 696, 702-703 [7th Cir 2002]), or where an unelected management committee exercised exclusive authority over the admission or discharge of partners, and the partner had no

ownership interest. (See Simpson v Ernst & Young, 100 F3d 436, 441-442 [6th Cir 1996], cert denied sub nom Ernst & Young v Simpson, 520 US 1248 [1997].)

On this record, in contrast, although the Holland & Knight partnership included numerous Class B Capital partners, plaintiff does not submit any evidence to show that he was not a bona fide partner, or to raise a triable issue of fact in this regard. Plaintiff does not dispute that, under the Partnership Agreement, he had the right to elect the Managing Partner and Directors Committee and, indeed, was eligible for election to such positions. The Clackamas factor regarding influence "does not require that all of those with influence had equal potential to control the organization." (Cronkhite v Unity Physician Group, P.C., 2007 WL 1035091 [SD Ind 2007] * 9 [emphasis in original].) Plaintiff also does not dispute that he had the right to participate in the firm's governance, was not subject to expulsion without a 70 percent vote of the Directors Committee, and was entitled to share in the profits of the firm. Such rights have been held to support the finding as a matter of law that a partner or shareholder-director in a professional association is not an employee for purposes of the anti-discrimination laws. (Kirleis v Dickie, McCamey & Chilcote, P.C., 2010 WL 2780927, supra; Solon v Kaplan, 398 F3d 629, supra.) Here, similarly, the court holds that plaintiff was not an employee within the meaning of the New York State and City Human Rights Laws, and that his claims under these statutes for age discrimination and retaliation must be dismissed.

In view of this holding, the court does not reach the merits of plaintiff's claims under the anti-discrimination laws. The court notes parenthetically, however, that on these motions, plaintiff rests solely on bare assertions, unsupported by any evidence, that his expulsion was based on age discrimination and that he was subject to retaliation.

Remaining Causes of Action

As will be seen in the following summary of the bases for plaintiff's remaining causes of action, plaintiff repeats many of the same allegations in each of the causes of action, principally asserting defendants' failure to make a required dissociation payment, age discrimination and retaliation, and maintenance of inaccurate financial records. Given the myriad of additional allegations, many of which are irrelevant to the causes of action in support of which they are pleaded, the court does not discuss each allegation, but has considered all in determining whether a triable issue of fact exists on any of the causes of action.

– Fiduciary Duty

Plaintiff's breach of fiduciary duty cause of action is based on allegations that the firm had the duty to maintain accurate financial records of the firm's account, and the duty not to engage in fraud, not to unlawfully discriminate against plaintiff based on age, not to retaliate against plaintiff, and not to tortiously interfere with plaintiff's practice of law. (Compl.,¶ 70.) This claim is also based on the allegation that defendants had the duty to make dissociation payments to partners pursuant to Florida law. (Id., ¶ 71.) Plaintiff alleges that defendants breached these duties and seeks damages under this cause of action which include loss of Schedule C benefits and loss of the opportunity to practice law until age 70 at the firm. (Id., ¶¶ 72, 76.)

To the extent that the breach of fiduciary duty cause of action is based on allegations that plaintiff was improperly expelled from the firm or is entitled to dissociation payments or damages for lost compensation as a result of his expulsion, the cause of action is based on the same allegations as the breach of contract cause of action, and should be dismissed as

duplicative. (See Batas v Prudential Ins. Co. of Am., 281 AD2d 260 [1st Dept 2001][cause of action for breach of fiduciary duty may not be maintained absent a duty that is additional to a mere contract action].) To the extent that the breach of fiduciary duty cause of action is based on allegations of discrimination or retaliation, it is duplicative of plaintiff's causes of action under the anti-discrimination laws which, as held above, must be dismissed. Similarly, to the extent that plaintiff pleads the breach of fiduciary duty claim based on tortious interference with contract, plaintiff fails to plead a wrong independent of the wrongs alleged in the separate tortious interference claim discussed below.

To the extent that the breach of fiduciary duty cause of action is based on the allegation that defendants did not maintain accurate financial records, this allegation is in turn based on plaintiff's claim that Holland & Knight failed to reflect in its financial records five million dollars in attorney's fees that were earned by Haight Gardner partners prior to the combination with Holland & Knight and received by the latter after the combination. Plaintiff further claims that defendants failed to include this receivable in determining plaintiff's compensation. (Compl., ¶¶ 21-24.) This wrongdoing allegedly occurred in 2000 (id., ¶ 23) and was first pleaded in a federal court action that was filed in 2005 and dismissed in 2007, then repleaded in the instant action commenced in 2007. Even giving plaintiff the benefit of the tolling statute, the claim was not pleaded until five years after the wrongdoing, and is therefore barred by the three year statute of limitations for money damages. (See Kaufman v Cohen, 307 AD2d 113, 118 [1st Dept 2003].) In so holding, the court rejects plaintiff's claim that the failure to maintain accurate financial records was a fraud, and is governed by the six year statute of limitations applicable to a

fiduciary duty claim based on fraud. (See id. at 119.)[1] Plaintiff does not make any showing that Holland & Knight made any misrepresentation to him regarding the Haight Gardner attorney's fees and, once again, relying on conclusory, unsworn allegations, submits no evidence on this motion in support of his contention that defendants fraudulently concealed the receipt of the fees. The breach of fiduciary duty cause of action must accordingly be dismissed.

– Breach of Implied Contract and Covenant of Good Faith and Fair Dealing

Plaintiff alleges that Holland and Knight breached an implied contract to compensate plaintiff reasonably for the work he performed, not to demote him based on age or upon "refusal to remain silent in the face of egregious financial irregularities" in the firm's accounts, and not to wrongfully expel him from the partnership without cause and without payment of reasonable compensation. (Compl., ¶ 87.) Plaintiff thus repeats the allegations on which his breach of contract, discrimination, and other causes of action are based.

The implied contract claim may not be maintained, as the Partnership Agreement, an express contract, governs the relations between plaintiff and the partnership. (See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388-389 [1987].) The covenant of good faith and fair dealing claim may not be maintained, as the duty of good faith and fair dealing does not create new contractual rights between the parties, "and no obligation can be implied that would be inconsistent with other terms of the contractual relationship." (Dalton v Educational Testing Serv., 87 NY2d 384, 389, quoting Murphy v American Home Prods. Corp., 58 NY2d 293, 304 [1983] [internal quotation marks omitted]. See Phoenix Racing, Ltd. v Lebanon Val. Auto

[1]The parties dispute whether the Connecticut or New York statute of limitations applies to this claim. For purposes of this motion, the court accepts plaintiff's contention that the New York statute applies.

Racing Corp., 53 F Supp 2d 199 [ND NY 1999][applying New York law].)

– Fraudulent Inducement

Plaintiff's cause of action for fraudulent inducement is based on the allegations that defendants falsely represented to plaintiff "that he would have the opportunity to head the Firm's Labor & Employment practice;" that he would have the option to retire at 62 with repayment of capital and Schedule C benefits or to continue to practice until age 70; that he would not be subjected to unwarranted reductions in his compensation; that he would not be expelled without cause; and that required compensation would be paid to him upon expulsion. (Compl., ¶ 90.) This cause of action further alleges that by these representations, defendants fraudulently induced plaintiff to join Holland & Knight and to forego other job opportunities (id.), and that Holland & Knight "never intended to fulfill its promises to Plaintiff." (Id., ¶ 91.)

The allegations underlying this cause of action thus largely amount to a claim that defendants did not intend to perform the contract. It is, of course, well settled that "[a] fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." (First Bank of the Ams. v Motor Car Funding, Inc., 257 AD2d 287, 291 [1st Dept 1999]. Accord Manas v VMS Assocs., LLC, 53 AD3d 451, 453 [1st Dept 2008].) To the extent that the cause of action is based on the independent allegation that plaintiff was offered the opportunity to head the firm's labor and employment practice, a mere offer of an "opportunity" is insufficiently specific to support a fraud claim. This cause of action must accordingly be dismissed.

– Fraud and Misrepresentation

This cause of action alleges that defendants concealed and "defrauded the Firm's accounts" of the five million dollars in attorney's fees received from the Haight Gardner partners upon the combination of the firms, and thereby "defrauded Plaintiff of substantial monetary compensation." (Compl., ¶¶ 96-97.) The fraud cause of action, to the extent based on these allegations, must be dismissed for the reasons stated in connection with dismissal of the breach of fiduciary cause of action based on the same allegations.

The fraud cause of action also pleads a laundry list of other conduct by which defendants alleged defrauded plaintiff, including "disparaging [plaintiff] to his clients and prospective new employers, . . . misrepresenting the circumstances of Plaintiff's departure from the Firm to other partners and to third parties, and . . . otherwise seeking to prevent Plaintiff from continuing in the practice of law." (Compl., ¶ 97.) These allegations are unsupported by any evidence, and do not on their face support a fraud cause of action.

The fraud claim must accordingly be dismissed. The court notes that contrary to plaintiff's contention, defendants have not neglected to move for dismissal of this cause of action. (See D.'s Memo. In Support at 22, n 16.)

– Conversion and Unjust Enrichment

Plaintiff's cause of action for conversion and unjust enrichment was pleaded based on the allegations that defendants retained plaintiff's furniture upon his expulsion from the firm, and wrongfully retained the Schedule C benefits and mandatory compensation to which plaintiff is entitled. (Compl., ¶¶ 103-104.) In opposition to defendants' motion, plaintiff appears to seek to maintain the conversion claim based solely on the retention of the furniture, and the unjust enrichment claim based on the denial of monetary benefits and compensation. (See P.'s Memo.

In Opp. at 30.)

The conversion claim must be dismissed, as plaintiff fails to make any showing that he demanded the return of the furniture. (See generally State of New York v Seventh Regiment Fund, 98 NY2d 249, 260 [2002]; Matter of Rausman [Kohav], 50 AD3d 909 [2d Dept 2008].) The unjust enrichment claim must be dismissed as duplicative of the breach of contract claim.

– Tortious Interference with Contract

Plaintiff's final claim for tortious interference with contract asserts that defendants tortiously interfered with plaintiff's rights under three contracts: the Asset Agreement, a contract with a New Jersey law firm that allegedly offered plaintiff a partnership before he joined Holland & Knight, and an oral contract with a Chicago law firm that allegedly offered him a partnership shortly before he was expelled from Holland & Knight. (Compl., ¶ 108.) The allegedly wrongful conduct on which this claim is based includes defendants' concealment of the five million dollars in attorney's fees earned by the Haight Gardner partners prior to the combination, plaintiff's without cause, allegedly discriminatory expulsion from Holland & Knight, defendants' non-payment of Schedule C benefits, and disparaging statements to the Chicago law firm to induce it to withdraw its partnership offer to plaintiff. (Id.)

As is readily apparent, these allegations largely duplicate those on which the breach of contract and discrimination causes of action are based. They also utterly fail on their face to support a cause of action for either tortious interference with contract or tortious interference with prospective economic relations, and are regrettably typical of the license that plaintiff has taken in pleading the complaint.

To the extent that this cause of action is based on a claim that defendants caused the

withdrawal of the Chicago law firm's offer, even assuming arguendo that a tortious interference claim may be based on interference with an offer, plaintiff fails to make any showing that defendants engaged in the "wrongful means" necessary to support such a cause of action. (See Steiner Sports Mktg., Inc. v Weinreb, 88 AD3d 482 [1st Dept 2011]; see generally Carvel Corp. v Noonan, 3 NY3d 182, 190-191 [2004].)

Defendant's Counterclaims

Defendant partnership asserts counterclaims for breach of contract, breach of fiduciary duty, money had and received, and unjust enrichment, all of which are based on plaintiff's failure to cooperate with billing of clients of the firm during the nine months before his expulsion, and his billing for and collection of such fees from clients after the expulsion. (Ans., ¶¶ 17-33.)

It is well settled that law partners are bound by a fiduciary duty. (Graubard Mollen Dannett & Horowitz v Moskovitz, 86 NY2d 112, 118 [1995].) As a fiduciary, "a partner must consider his or her partners' welfare, and refrain from acting for purely private gain." (Gibbs v Breed, Abbott & Morgan, 271 AD2d 180, 184 [1st Dept 2000] [internal quotation marks and citation omitted].) "A partner breaches his fiduciary duty where that partner diverts for non-partnership purposes monies belonging to the partnership." (Matter of Monetary Group v Barnett, 2 F3d 1098, 1104 [11th Cir 1993] [applying New York law].) A law firm partner may thus breach his or her fiduciary duty by failure to record, or to facilitate the firm's collection of fees for, billable hours for work performed while a partner at the firm. (See Jackson & Nash LLP v E. Timothy McAuliffe PLLC, 79 AD3d 663 [1st Dept 2010], appeal dismissed 16 NY3d 824 [2011].)

As held above, defendants make a prima facie showing that plaintiff refused to cooperate

with billing in the nine months prior to his expulsion, and in fact collected fees that would otherwise have been due the firm. Plaintiff does not rebut this showing, as he does not dispute his non-cooperation, and does not submit evidence to support his claim that he was paid by clients only for work performed after his expulsion. (See supra at 4-5.) Nor does plaintiff deny that the clients for which he performed services were clients of the firm, and that the firm was entitled to bill for such services.

Rather, plaintiff claims that he never saw, and was not bound by, the terms of the firm's Office Manual which contained a provision requiring lawyers at the firm to promptly submit time slips. (Office Manual § 892, Ex. B to Cannon Aff. In Opp. To P.'s Motion.) He also claims that he did not otherwise have a legal obligation to submit time sheets. (P.'s Memo. In Support at 14-15.)[2] This contention misapprehends the basis for defendant's breach of fiduciary cause of action, which is not merely that plaintiff failed to perform the clerical duty of submitting time sheets, but that he failed to cooperate with billing for clients of the firm and diverted fees from the firm.

Plaintiff's further contention that the statute of limitations bars defendant's breach of fiduciary counterclaim is unavailing. The court declines to consider this contention as it was not raised until plaintiff's reply on his own motion, to which defendants had no opportunity to

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[2]Although plaintiff claims, in moving for summary judgment on his breach of contract cause of action, that the Asset Agreement, not the Partnership Agreement, governs the rights of the partners, here he claims that section 7 of the Partnership Agreement sets forth all of the professional responsibilities of the Class B partners and is silent as to any obligation to submit time sheets. (See P.'s Memo. In Support at 14.) This contention ignores section 20 of the Partnership Agreement which provides that the Managing Partner shall establish an office manual for the firm which may prescribe billing practices, among other things.

respond.[3] (See Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1982].)

The court accordingly holds, on the undisputed factual record, that defendant partnership is entitled to summary judgment as to liability on its breach of fiduciary duty counterclaim. As the record does not establish the full amount of fees diverted from defendant partnership, an accounting and assessment of damages on this counterclaim must be held. While defendant also seeks disgorgement of fees paid to plaintiff during the period of his disloyalty, it has not addressed the recent body of New York law on this issue. Determination of the disgorgement claim will accordingly be deferred pending proper briefing at the assessment hearing. Defendant's remaining counterclaims will be dismissed as duplicative of the breach of fiduciary counterclaim.

Discovery

Plaintiff's final claim is that discovery is needed to oppose defendants' summary judgment motion.[4] Plaintiff does not make any showing on the instant motion of "unusual or unanticipated circumstances," since the filing of the note of issue, that would warrant further discovery. (See 22 NYCRR § 202.21[e].) Plaintiff's assertion that the filing of the summary judgment motion itself constitutes an unanticipated circumstance merits no discussion.

The court has considered plaintiff's remaining contentions and finds them to be without

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[3]Plaintiff's opposition to defendants' motion for summary judgment refers to plaintiff's own motion for summary judgment for a full discussion of the grounds for plaintiff's opposition. (P.'s Memo. In Opp. at 32.) Plaintiff's moving papers on his own motion do not raise the statute of limitations. (P.'s Memo. In Support at 12-16.) The statute of limitations is raised for the first time in plaintiff's reply on his own motion (see P.'s Reply Memo. at 10), served nearly two months after defendants' reply memorandum on their motion.

[4]While plaintiff claims that a motion to vacate the note of issue is pending, the court's records do not show any outstanding motion.

merit.

It is accordingly hereby ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted to the extent that it is ORDERED that the complaint is dismissed in its entirety; and it is further

ORDERED that defendant Holland & Knight LLP is awarded summary judgment as to liability on its second counterclaim for breach of fiduciary duty; and it is further

ORDERED that defendant Holland & Knight LLP's first counterclaim for breach of contract, third counterclaim for money had and received, and fourth counterclaim for unjust enrichment are dismissed as duplicative of defendant's second counterclaim for breach of fiduciary duty; and it is further

ORDERED that an accounting and assessment of damages is directed of: 1) all fees or other compensation earned by plaintiff, and all billable hours accrued, for work performed by plaintiff for clients of Holland & Knight LLP in the period from March through November 2002, while he was still a partner at said firm; and 2) all fees or other compensation received by plaintiff from clients, before or after his expulsion, for the aforesaid work; and it is further

ORDERED that the assessment of damages shall include hearing of whether and, if so, to what extent, plaintiff is required to disgorge fees or other compensation, as a result of his breach of fiduciary duty; and it is further

ORDERED that the accounting and assessment is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by

the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that the action is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403, or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry on the Clerk of the Judicial Support Office to arrange a date for the reference to a Special Referee.

This constitutes the decision and order of the court.

Dated: New York, New York
December 9, 2011

MARCY FRIEDMAN, J.S.C.