Falcon Envtl. Servs., Inc. v American Falconry Servs., LLC
2013 NY Slip Op 33203(U)
December 24, 2013
Supreme Court, Wayne County
Docket Number: 75467/2013
Judge: John B. Nesbitt

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

FALCON ENVIRONMENTAL SERVICES, INC.

Plaintiff,

-vs-

Index No. 75467

2013

AMERICAN FALCONRY SERVICES, LLC., and STUART ROSSELL, Individually and in his capacity as an officer of American Falconry Services, LLC

Defendant.

APPEARANCES: BOND, SCHOENECK & KING, PLLC
(James Holahan, Esq., Jeffrey F.Allen, Esq., and Louis Jim, Esq., of counsel)
Attorneys for Plaintiff

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Attorney for Defendant

MEMORANDUM - DECISION

John B. Nesbitt, J.

I. PROLOGUE

At issue are two motions. First, the plaintiff and defendants jointly move for judicial determination regarding discovery of data on computers seized by the County Sheriff pursuant to court order. Second, plaintiff moves to dismiss defendant's counterclaim founded upon Labor Law §740, which makes actionable employer retaliations against employees in the statutorily specified circumstances.

The ancient art and practice of falconry provides the milieu for the instant litigation. This "sport of kings" finds modern commercial application, because these birds of prey (also known as "raptors") eradicate scavengers, such as rodents and foul (seagulls), that plague landfills and airports, as well as agricultural and recreational operations. The plaintiff, Falcon Environmental Services, Inc.

("FES"), a New York corporation,[1] employs falconry as a primary component of the wildlife management and control services supplied to its customers, together with other techniques such as pyrotechnic devices, trapping, trained dogs, and wildlife exclusion products (Plaintiff's First Amended Complaint [3/26/2013] ("FAC") at §6-7). FES conducts its business throughout Canada and the United States. Mark Adam, a Canadian resident, is the Chief Executive Officer of FES(Adam Aff. ¶1 [7/30/2013];Rossell Aff ¶5 [3/12/2013]). Locally, Seneca Meadows and High Acres landfills were FES customers for many years (Adam Aff. ¶5 [7/30/2012]).

FES hired defendant Stuart Rossell in the spring of 1998 and employed him continuously until January 31, 2013, when he submitted his immediate resignation by e-mail to CEO Adam (Adam Aff ¶4 [7/30/2013]). Rossell came to FES with no small experience. He had been a practicing falconer since 1976 and employed as such since 1982 in both Great Britain and the United States, training hundreds of hawks and falcons (Rossell Aff ¶3 [3/12/2013]). He also taught falconry in England and Scotland during the 1980's and early 1990's, and in Southern California in the mid-1990's (Id. at ¶19) Rossell is recognized as a master falconer by the United States Fish and Wildlife Service, and specially licensed to purchase, sell, possess, and train falcons for nuisance abatement purposes under the Migratory Bird Treaty Act (Id. at ¶4). Rossell served FES as manager of its US operations, superintending projects from New Jersey to California (Adam Aff ¶10 [7/30/2013]). His base of operation with FES was his home at 700 Turner Road, Town of Arcadia, Wayne County. Rossell also used this location to continue his broader interest in falconry, including the breeding, training, and housing of falcons, which conveniently provided a source for the birds used in FES operations.

II. PRE-LITIGATION

A. Fracture and Termination of Employment Relationship

The relationship between Rossell and Mark Adam, FES's CEO, went radioactive within a single twenty-four hour period, when, at 4:43 p.m. on January 31, 2013, Adam received an email from Rossell immediately resigning from FES's employ (FAC ¶15 [3/26/2013]). That email read:

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[1] "Plaintiff FES was founded in 1989 and presently has offices and does business in Canada and the United States. In 1998, FES incorporated in New York, and its corporate office and principal place of business is located at 186 US Oval, Plattsburgh, New York 12903."

> "This e-mail serves as notice of my resignation from FES effective immediately. I regret it has come to this but your attempts last year to get me involved with the illegal smuggling of Gyrfalcons into Canada from the US, to the extent that I had to offer to quit my job rather than go through with it, made it clear to me that I cannot continue to work for an employer that takes such a cavalier attitude to the laws of this country or is willing to risk sending one of his own employees to jail. Further, your recent 'position,' as you put it, that you would not reimburse me when I gave up my vacation at a moment's notice and over the entire Christmas period to make sure the company's best interests were met was the final straw (Rossell Aff. Ex. A [8/16/2013])."[2]

The next day, on February 1st, representatives of two independently owned and managed regional landfills - Seneca Meadows and High Acres - notified Adam that they were terminating their business relationships with FES (FAC ¶17).

As indicated above, Seneca Meadows and High Acres had been FES customers for many years, with Rossell being the main face-to-face, on-site FES contact and hands-on service provider in both cases. By the end of 2012, the FES contracts with the landfills had expired but FES services continued apparently on an at will basis on the same or similar terms. In its complaint, FES alleges that it "was engaged in negotiations to renew or continue its contractual and business relationship with Seneca Meadows and High Acres" (FAC ¶73)[3]. At the time or not long after FES was notified that the landfills would not continue with FES services, FES learned that the landfills had contracted with defendant American Falconry Services, LLC.(AFS) to provide the services that FES had been providing to the landfills. AFS is a limited liability company formed by Rossell in October 2013.

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[2] This e-mail may have not come as a complete surprise to Adam, as he alleges that sometime in January 2013 he "discovered" a January 11, 2013 letter from Rossell to the Chief of the Federal Explosives Licensing Center (ATF) conveying Rossell's plans to sever employment with FES and inquiring about licensing of his new business for use of explosive devices (Adam Aff ¶ 9 and Ex D [7/30/2013]).

[3] The complaint also states that "Adam had assigned Rossell to assist him in that endeavor" (Id.). In their answer, defendants "deny information and belief sufficient to form a belief as to the truth of the allegation that FES was engaged in negotiations to renew or continue its contractual and business relationship with Seneca Meadows and High Acres and deny that Adam had assigned Rossell to assist him in that endeavor except to confirm with Rossell that no modifications had been made to certain buildings at Seneca Meadows" (Answer ¶73 [4/15/2013], attached as Ex. A to Allen Affirmation [5/8/2013] supporting Notice of Motion to Dismiss Counterclaim [5/8/2013]).

According to FES, the formation of AFS and its subsequent contracting with Seneca Meadows and High Acres to provide the nuisance abatement services that FES had been providing was nothing less than a buccaneer highjacking of FES business.[4] Indeed, "but for [Rossell's] interference," FES claims that "Seneca Meadows and High Acres would have continued their business relationships or contracts with FES" (FAC ¶124). Rossell's usurpation of the landfill business, alleges FES, was the result of unfair competitive advantage achieved only through Rossell's actionable disloyalty as a FES employee and misappropriation of FES's confidential and proprietary information, including trade secrets, as well as misuse of FES tangible property, including equipment and birds (FAC ¶122). FES alleges that Rossell exploited his position as an FES employee by opening, or at least engaging in, discussions with the landfills about future abatement services through his own company. With regard to High Acres, it is claimed that a High Acres' representative provided Rossell with specific information about the bid price that High Acres would find acceptable, information that gave Rossell an inside track in the bidding process, which Rossell used in submitting his successful bid for the abatement program. (FAC ¶71,72). FES claims that Rossell never notified FES of the bidding information he has received from the landfills, and that he was now a competitor of FES for the landfill business (FAC ¶74). Indeed, according to FES, these actions by Rossell breached not only his general duty of loyalty to his employer, but the specific duty assigned to him of assisting FES CEO Adam in renewing the landfill contracts (FAC ¶73).

While admitting that AFS entered into contracts with High Acres and Seneca Meadows to operate their nuisance abatement programs following his resignation from FES on January 31, 2013, Rossell vehemently disputes Adam's allegations that he was a disloyal employee or misused in any way any of FES's confidential or proprietary information. Indeed, Rossell states that the seeds were planted for his parting of the ways with FES back in 2009 when Adam purchased 7 gyrfalcons in the United States with the purpose of exporting them to Canada (Rossell Aff ¶11 [3/12/2013]). Rossell understood (and apparently Adam as well) that gyrfalcons cannot be exported from the United States

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[4] "Upon information and belief, Rossell's sudden resignation was a part of a plan that he had devised more than four months earlier (when he incorporated American Falconry) to seize FES's business at Seneca Meadows and High Acres" (Adam Aff. ¶18 [3/4/2013]).

unless they are bred at a facility registered pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")." The breeders from which Adam purchased the gyrfalcons were not CITES registered, but planned to become CITES registered in the near future, at which time the birds could be legally exported. When two of the three breeders subsequently determined that it would be too difficult to become CITES registered, Rossell alleges that Adam began to explore ways to illegally smuggle the birds into Canada (Answer & Counterclaim ("A&C"¶139). Adam allegedly approached Rossell about assisting him in doing so, but Rossell refused (Id. at ¶141). Rossell states that he told Adam "that he [Rossell] could not be involved in illegally smuggling birds, as I [Rossell] could lose my permits and possibly go to jail" (Rossell Aff ¶12 [3/12/2013]).[5]

According to Rossell, Adam persisted with the issue. Rossell alleges that Adam requested that he come to FES's 2011 Christmas party in Toronto, and there Adam again asked Rossell to assist him in getting the birds across the border. Rossell again refused, stating he "would not have anything to do with it" (Rossell Aff ¶ 13 [3/12/2013]; A&C ¶142 [4/15/2013]). Rossell alleges that he thought the issue was settled until Adam raised the matter again in the spring of 2012. By that time, says Rossell, Adam's plan had evolved to minimize Rossell's involvement and, with hope, assuage Rossell's qualms. The gyrfalcons were at that time being taken care of at Rossell's home. Adam planned to have the birds picked up and transported across the border into Canada by someone other than Rossell. This person would remove the USFWS bands fitted to the birds and replace the bands with Canadian bands Adam had obtained for that very purpose. Adam allegedly told Rossell that he was familiar with some of the Canadian custom agents, and one in particular, who would be receptive to a story that he had driven into the United States to recover a lost bird, that he had the other birds with him when he entered the US for that purpose, and was now returning to the Canada with mission accomplished (Rossell Aff ¶14-15 [3/12/2013]).[6]

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[5] Rossell alleges his recalcitrance in participating in Adam's alleged scheme reflected the probable consequential effects of getting caught: "My permits are what allow me to earn a living and feed my family, and I [Rossell] was not going to jeopardize them" (id).

[6] Rossell alleges further that (1) "multiple people" were involved in Adam's plan; (2) that another former employee of FES told Rossell that Adam had requested that he also participate in the

Adam's alleged plan still presented a problem for Rossell. The birds intended to be taken into Canada were listed on Rossell's permit and would have to be accounted for. To do that Rossell would have to file forms with the USFWS stating that the birds had been lost or had died (Rossell Aff ¶14 [3/12/2013]). This necessity brought Rossell back to his initial objection - the repercussions of having participated in a criminal conspiracy to smuggle birds across the international border if the enterprise were discovered - as well as the moral one of violating the laws of his profession. Seeing that the plan was coming to fruition, Rossell says he dug his heels in. According to Rossell, Adam notified him of a specific day he intended to pick up the birds at Rossell's residence. On that day, Adam called Rossell and asked that Rossell drive the birds to the border and transfer the birds to Adam there. Adam would then remove the American bands and replace them with the Canadian bands and continue over the border, counting on winks from the Canadian custom authorities. Rossell alleges that he told Adam during that telephone call that he was refusing to allow this to go any further and "informed [Adam] that he could fire me if he wanted, but the birds would not be leaving my premises even if he came and picked them up" (Rossell Aff ¶14-17 [3/12/2013]).

After Rossell's alleged refusal to deliver the birds to Adam, the plan to transport the birds to Canada apparently ended, as did any cordial relationship between Rossell and Adam. Rossell states that he decided in May of 2012 to leave FES (Rossell Aff ¶ 10 [3/12/2013]). According to Rossell: "Adam's treatment of me was consistently and overwhelmingly demeaning and negative after I refused to assist in smuggling the gyrfalcons. His actions made my working conditions wholly intolerable for any reasonable person and left me no choice but to quit and seek other employment" (Rossell Aff ¶18 [7/16/2013]).

In the fall of 2012, Rossell formed AFS, for the ostensible purpose of opening a falconry school. Rossell states that he was aware that FES's contract with Seneca Meadows was coming up for renewal at the end of 2012. Coincidentally, according to Rossell, over the Christmas and New Year holiday period that year, he was working daily at Seneca Meadows covering for an injured employee. The Seneca Meadows employee assigned to oversee the bird abatement program supposedly used the occasion to volunteer information to Rossell. The information volunteered was

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plan, and (3) that Adam told Rossell that the plan involved at least one Canadian customs agent" (Rossell Aff ¶ 5-9 [7/16/2013]); Rossell Aff .¶ 18 [3/12/2013])

that Seneca Meadows was not happy with the cost of the current FES program, that it was receptive to other proposals, and in fact had already received one from another bird abatement company. The record does not reveal what Rossell's immediate response was to this information, although it appears that he did not communicate it to FES. Rossell does state that in January 2013 he again spoke to the same Seneca Meadows employee and informed him that he would be leaving FES and starting his own business. Shortly thereafter, claims Rossell, Seneca Meadows contacted him asking whether he would be willing to submit a bid for its bird abatement program (Rossell Aff ¶21-22 [3/26/2013]). Rossell did so, and it was accepted by Seneca Meadows.

A similar situation occurred with High Acres Landfill. In January 2013 he informed a High Acres employee that he was leaving FES and would be taking those falcons that belonged to him. The employee responded by informing Rossell that High Acres' contract had expired in 2011, which was news to Rossell, as he believed that there was still a contract in place (Rossell Aff ¶24-25 [3/26/2013]). The employee - apparently one with some authority in the matter - invited Rossell to submit a bid, explaining that if he kept the price around $260,000, the contract would not have to be put out for competitive bid. Rossell apparently did not convey this information to FES, which did not then know that Rossell was intending to leave and become a competitor. Rossell responded to the High Acres invitation by submitting a bid in the suggested amount, which was accepted by High Acres. With both Seneca Meadows and High Acres, Rossell emphatically denies that he solicited the business or used FES information to garner the same. In both instances, Rossell claims that the information necessary to secure the business came from the customers and his long experience in the field" (Rossell Aff ¶23-26 [3/26/2013]).[7] While Rossell may have submitted bids while he was

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[7] "23. I created a bid for the Seneca Meadows program from scratch, based solely on my estimates of what I though the project would cost to run. I did not use any FES information in creating this bid.

24. ... I was not soliciting business from High Acres, as I believed it was still under contract with FES.

25. ... This [High Acres] bid was not based on any FES information, but was based on the information [High Acres] provided me.

26 . ... Seneca Meadows and High Acres were looking for alternative providers and they specifically asked me to submit bids ..."

a FES employee,[8] he claims he did not actually enter into contracts with Seneca Meadows and High Acres until February 2013 (Answer & Counterclaim ¶18 [4/15/2013]).

B. Post- Resignation Attempt to Settle Affairs

After Rossell submitted his resignation, a "series of communications ensued' wherein "Rossell and Adam arranged for Rossell to return all of the FES Property to FES" (FAC ¶24]).[9] According to Rossell, he initiated this process by providing Adam a list of FES property that was in his possession (Rossell Aff ¶28 [3/12/2013]). This list consisted of tangible property then located at Rossell's home and the High Acres and Seneca Meadows landfills. (Id. at Exhibit C). It was arranged between Rossell and Adam that the FES property would be delivered to FES on February 12, 2013, at the High Acres landfill in Perinton, New York (FAC ¶26); Rossell Aff ¶28 [3/12/2013]). The delivery took place at the agreed time and place.

FES claims that Rossell did not return all of its property. Primary among the items not returned were a number of birds and two computers, and what is denominated "FES Records, " that being data Rossell "created, acquired, used, and stored" consisting of "(1) correspondence; (2) documents; (3) permits; (3) invoices; (4) client documents and related information about scope of services rendered and contact information; (5) banking records and other financial documents; (6) titles, registrations, and other evidence of FES's ownership of vehicles and other business equipment; and "various other documents relating to the operation of FES's business," which "were stored in both hard copy and in electronic format using FES computers and related storage devices."

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[8] Rossell does not tell us when he submitted his bids, but if one credits Adam's assertion that he was informed by Seneca Meadows and High Acres on February 1, 2013 - the day after Rossell's resignation on January 31, 2013 - that FES's services would no longer be needed, then one could infer that Rossell's bids had already been communicated to, and perhaps accepted, prior to his resignation from FES. Rossell essentially concedes this fact with respect to Seneca Meadows when he admits in his Answer & Counterclaim the allegations in paragraph 69 of the First Amended Complaint that "Rossell, while still an FES employee, submitted a bid for American Falconry to operate the bird abatement program at Seneca Meadows, and that bid was accepted."

[9] The Answer & Counterclaim ¶24 [4/15/2013] responds by denying the same upon information and belief, stating that "the term 'FES Property is too broadly defined to permit Defendants to assess the truth of the allegations set forth in paragraph 24 of the First Amended Complaint.'

(FAC ¶21,22)[10]

FES claims no hard copy records or electronically stored information was returned by Rossell, either at the February 12th meeting or otherwise. The omission to return the computers ostensibly containing much of this information was, and remains, a matter of great importance to FES. As stated in its First Amended Complaint:

> "34. These computers were used regularly by Rossell and others to conduct FES's business and, upon information and belief, contain confidential and proprietary information, and trade secrets, owned by FES. More specifically, the information contained on the computers and related devices pertains to FES, its clients and prospective clients, its business plans and strategies, its costs, pricing, and other financial information, its customized templates for client communications, service offers, and proposals, and years of communications between and among FES representatives, clients, prospects, vendors and other business contacts.
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> ...
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> 37. Upon information and belief, Defendants have continued to use these computers and FES's confidential and proprietary information and trade secrets to support and advance the business of his company, American Falconry Services, Inc., and to render services to former FES clients, including Seneca Meadows and High Acres. (FAC ¶34,37).

FES also claims that Rossell failed to return most of the birds owned by FES and deployed to FES operations managed by Rossell in the United States.

> 63. At the property exchange that occurred on February 12, 2013, Rossell only returned three (3) birds to FES. Including the three birds that Rossell returned, FES currently has in its possession only twenty (21) of the birds it purchased from Rossell and other raptor breeders from 2006 to the present. This is significantly less than the roughly sixty (60) surviving birds that FES purchased from Rossell. Accordingly, there are approximately forty-four (44) missing birds that are believed to be in defendant' possession or subject to their control. Neither Rossell nor American Falconry have rights to these birds, and their continued failure and refusal to return them to FES is causing damage to FES and depreciating the value of the birds. The birds, by their very nature, are perishable and have a varying, but finite,

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[10] The First Amended Complaint attaches Exhibit A described as a "Complete List of Property Belonging To FES That Rossell Has Failed and Refused to Return, and is Wrongfully in Custody and Control of Rossell,"which list 44 particular birds, two computers with related peripherals and software, items used to maintain the birds, as well as equipment, tools, and miscellaneous inventory associated with the bird abatement business.

useful working life span" (FAC ¶63)[11]

From FES's perspective, the items returned by Rossell on February 12, 2013, did not include the most significant property to which FES claims ownership - that essential to its operations - the birds necessary to provide its services and the information necessary to maintain those services and customer relationships, the property most valuable, vulnerable, and perhaps (in some cases) irreplaceable.

II. LITIGATION HISTORY

A. Order of Seizure

Litigation commenced on March 8, 2013, with the filing of a Summons and Complaint by FES, along with an application for an *ex parte* Order of Seizure pursuant to CPLR 7102. This Court granted the requested Order of Seizure *ex parte*, which directed the Sheriff to seize the two computers and thirty-two birds, as well a AFT license and DSTM Log Book. Simultaneously, the Court issued an Order To Show Cause containing a Temporary Restraining Order that required defendants to maintain this property without alteration unless otherwise seized pursuant to the Order of Seizure. The Wayne County Sheriff seized, among other items, the two computers, but did not take custody of the birds. Lieutenant Sklenar was concerned about his Department's ability to care for the birds. On March 11th, the Deputy contacted the U.S. Fish and Wildlife Service (the "USFWS") about his concerns. The Chief of the USFWS Migratory Bird Permit Branch (Region 5) counseled against seizure of the birds, and by letter dated the same day states that her "office does not support the immediate removal of migratory birds from Mr. Stuart Rossell ..." Four reasons were given: (1) several of the birds were incubating eggs and their removal may cause incidental damage; (2) the transfer had not been coordinated with USFWS; (3) the Sheriff did not have a permit to possess the birds and Rossell did; and (4) transfer would not otherwise be in the birds' best interests.

On March 26th, FES moved to modify the Order of Seizure so to strike the portions of the order related to seizure of the birds. On April 1st, this Court vacated its Order to that extent, and granted a preliminary injunction that, among other things, left the birds in Rossell's care and custody

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[11] FES alleges that ""[t]he value of the forty-four (44) missing birds is about $126,700" (Id at ¶64)

with certain restrictions. On April 6th, the Court received a letter dated April 4th from the United States Attorney for the Western District of New York summarizing the federal laws regarding the possession, use, transfer and sale of migratory birds. The letter concluded by stating that, "[c]onsistent with its earlier recommendation, the [USFWS] supports the amended Order of Seizure allowing the birds to remain in the Defendants' care at this time. [USFWS] also asks that the Court take judicial notice of the cited federal laws and regulations as it contemplates any judicial remedy."

B. The Complaint and Answer

1. Replevin and Conversion

FES advances seven causes of action against Rossell and AFS in its complaint.[12] The first and second causes of action allege wrongful detention of FES property remedial under common law theories of replevin and conversion (FAC ¶75-89). The property at issue primarily consists of the birds and the two computers, as well as proprietary FES information electronically stored on those computers and printed records.[13]

> "Replevin and conversion are governed by the same rules of substantive law, although different damage rules apply. When the value rather than the return of the chattel is awarded in a replevin action, value is determined as of the time of trial rather than the time of the taking as is generally the case in conversion ...
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> The key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it in derogation of plaintiff's rights" (2 NY PJI3d 3.10, at 111 [2013])(citations omitted).

(a) Demand For Return of Property

At the outset, defendants take issue with allegation that "FES has demanded the return of its property and Rossell has refused to return it"(FAC ¶19) and that the demand included return of "the FES Records, in his custody and control" (FAC ¶23). Rossell alleges that it was he who initially contacted Adam about return of FES property, that he prepared a list of FES property in his possession and sent it on to Rossell, "who never objected to or made additions to such list," and that Rossell returned all the property on the list on February 12, 2013 (A&C ¶19,23).

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[12]The "complaint" in this discussion refers to the First Amended Complaint dated March 26, 2013.

[13] "[T]he type of data that [defendant] allegedly took possession of - electronic records that were stored on a computer and were indistinguishable from printed documents - is subject to a claim of conversion in New York" (*Thyroff v Nationwide Mutual Ins Co*, 8 NY3d 283, 29-293 [2007]).

(b) The Birds

Rossell claims that the birds now remaining in his possession are his and not FES's. Both FES and Rossell ground their arguments in support of their respective positions on this issue on a 2006 contract between FES and Rossell, which was verbally agreed to on December 1, 2006, memorialized in writing the same date, and signed shortly thereafter by Adam, as President of FES, and Rossell, individually. This contract contemplated adding to the ten birds FES had previously purchased from Rossell so to have a total of twenty birds available for FES projects. This contract provided in pertinent part:

> • Falcon Environmental Services (FES) agrees to pay [Rossell] immediately $8,000 in exchange for 10 raptors (2 male peregrines, 4 male gyr/sakers and 4 female gyr/sakers (in good health and currently being used in FES bird control programs). See Note 1 on page 2 [which identified certain birds by name and band number].
> • FES agrees to pay the feeding cost of [Rossell's] falcon breeding project (approximately $6,000 per year).
> • You [Russell] will keep ownership of the breeding stock;
> • At no charge to FES, at all times throughout the year, you [Russell] agree to keep a flying group of 20 suitable raptors (no more than 50% of the saker falcons used on any landfill contract) from your own stock of birds for FES projects;
> • These 20 birds can be used anywhere FES has a need for them;
> • Of these 20 birds you [Russell] can switch them out (at your discretion) to your breeding program as long as it does not compromise the contract;
> • Replacement of the 20 birds due to loss, death, etc. is [Rossell's] responsibility;
> • Looking forward (2007 onward) FES agrees to pay you [Russell] $8,000 per year in exchange for $10,000 worth of falcons (a variety of sakers, lanners, hybrids, etc.);
> • As long as you [Russell] have them, if FES requires more falcons above and beyond this agreement, you [Russell] will provide them to FES at 80% of the going market rate. (Adam Aff Ex D [3/4/2013])

There appears to be no allegation by any party that, prior to January 30, 2013, either FES or Rossell failed to perform or violated the 2006 contract.[14] FES states that the three birds that Rossell

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[14] FES does allege contractual violations occurring on January 30, 2013 when: "Rossell, in his capacity as FES's employee and at FES's expense, traveled to the FES sites in New Jersey. During his visits to the FES sites, without notice to FES and in violation of the December 2006 Agreement, Rossell exchanged the healthy vibrant birds that were being used at those sites for birds of lower quality and health. Rossell's unauthorized exchange also resulted in the removal of trained birds from FES sites, which were replaced with untrained and inferior birds... Upon information and belief, during his January 30, 2013 visit, Rossell removed birds from the New Jersey sites that FES

returned to FES in February was well short of "the roughly sixty (60) surviving birds that FES purchased from Rossell."Inasmuch as "FES currently has in its possess only twenty-one (21) of the birds it purchased from Rossell and other raptor breeders from 2006 to the present," this leaves "approximately forty-four (44) missing birds that are believed to be in defendants' possession or subject to their control" (FAC ¶63).

Rossell denies that FES purchased sixty birds from him, but rather forty five birds from 2006 to 2012 of an approximate value of $59,400 (Rossell Aff ¶39 [3/12/2013]). "[A]ll of [these birds were either lost or killed in the course of their duties." Such an "attrition rate is not unusual," given that "[b]ird abatement is dangerous for the birds of prey which perform it" (Id. at ¶39,40). Rossell argues that the "2006 contract does not require me to provide FES with replacements when a bird is lost or dies, and specifically says that I retain ownership of all birds beyond the $10,000 worth that I must provide to FES each year" (Id at ¶41). As such, Rossell denies that he "possess[es] any birds he does not have rights to" and denies that he "failed or refused to return any birds owned by FES (A&C ¶63).[15]

(c) The Computers

FES claims ownership of two computers that Rossell did not return to FES and which were taken into the custody by the Sheriff pursuant to the Order of Seizure. FES's argument is straightforward. These computers were purchased with FES funds by a FES employee (Rossell) and used for FES purposes with no agreement or understanding that the computers were to be anything other than FES property (Adam Aff ¶28-31 [3/4/2013]; FAC ¶30-35). These computers contain data that contains "confidential and proprietary information, and trade secrets, owned by FES" (Adam Aff ¶30, FAC ¶34).

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had purchased and owned" (FAC ¶ 61, 62). Rossell categorically denies these allegations (A&C ¶61,62)

[15] Rossell states that FES retains ownership of five birds (Pink, Aretha, Sheila, Elana and Susio), which were "all birds which it purchased" (Rossell Aff Ex D [3/12/2013]). Ostensibly, therefore, if Rossell is to be credited, these birds were among those returned to FES on February 12th or otherwise in FES possession or control after Rossell's January 31st resignation.

Rossell responds that these two computers were purchased to replace computers he had purchased prior to his FES employment thereafter used by him for employment purposes as well as personal business. When these computers reached the end of their useful life, FES purchased replacements. Rossell states that it was "always" his " understanding" that he could keep these computers when he left FES, "as recompense for the computers that [he] has provided at the beginning of [his] employment" (Rossell Aff ¶31). Having now left FES, "the computers in question [now] belong to Rossell" (A&C ¶ 31).

As for the information on at least one of the computers, Rossell concedes that there is "FES documents on it."[16] He explains:

> "I was an FES employee for many years and did a lot of work from home. I have no desire to keep any of these documents. If Adam had ever asked me for them, I would have gladly turned them over. They are of no use to me. I am an experienced falconer and have been since long before my employment with FES. Nothing I use in my profession is proprietary to FES. The animal practices and techniques are either widely known or methods that I have developed over my many years as a falconer" (Rossell Aff ¶35 [3/12/2013]).

2. Unjust Enrichment

FES's third cause of action alleges that Rossell and AFS are wrongfully withholding and using FES property to advance "their own personal and/or professional purposes without compensating FES," and by denying that property to FES, it is "harmed financially and otherwise" (FAS ¶93,94). As such, Rossell and AFS are "unjustly enriched" warranting judgment that would order "transfer and return" of the property and enjoining further use thereof (id at ¶95,96). Rossell and AFS deny these allegations.[17]

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[16]Rossell does not concede that the information is confidential, proprietary, or contains trade secrets, but denies knowledge or information sufficient to form a belief as to the truth of those allegations by FES (A&C ¶34).

[17] 2 NY PJI 4:2, at 795-796 (2013)explains the nature of this type of claim:

> "An action for unjust enrichment is an equitable one sounding in quasi-contract and, thus, the court determines what facts, if proved, would result in unjust enrichment. Once that determination is made, it is for the jury to determine whether the facts are as claimed, and whether there was actually a net benefit conferred on defendant ...

3. Misappropriation of Business and Trade Secrets

FES's fourth cause of action alleges that Rossell and AFS knowingly and wrongfully misappropriated FES's "confidential information and trade secrets" and are exploiting the same to FES's detriment (FAC ¶97-102). The complaint alleges that its customer contracts, pricing, and commission information are the type of information legally protected under a trade secret theory.[18]

> A trade secret has been defined as consisting of any formula, pattern, device or compilation of information that is used in one's business, and which give him or her an opportunity to obtain an advantage over competitors who do not know or use it, The term "secret" has two related connotations: (1) substantial exclusivity of knowledge of the formula, process, device or compilation of information; and (2) employment of precautionary measures to preserve such exclusive knowledge by limiting legitimate access by other others.
>
> The factors to be considered in evaluating a trade secret claim include 1) the extent to which the information is known outside of the business; 2) the extent to which it is known by employees and other involved in the business; 3) the extent of measures taken by the business to guard the secrecy of the information; 4) the value of the information to the business and its competitors; 5) the amount of effort or money expended by the business in developing the information; 6) the ease or

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> An action to recover for unjust enrichment rests upon the equitable principle that a person shall not be allowed to enrich himself or herself unjustly or at the expense of another, and sounds in restitution or quasi-contract. The action is predicated on an obligation the law creates in the absence of an agreement. The essential inquiry in unjust enrichment cases is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. It is not necessary to show a wrongful act on defendant's part. Unjust enrichment is not a catchall cause of action to be used when others fail, and it may not be asserted where it merely duplicates or replaces a conventional contract or tort claim. It is available only in unusual situations when, although defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from defendant to plaintiff. A typical unjust enrichment case is one in which defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled" (citations omitted).

[18] "More specifically, the information contained on the computers and related devices pertains to FES, its clients and prospective clients, its business plans and strategies, its costs, pricing, and other financial information, its customized templates for client communication, service officers and proposals, and years of communications between FES representatives, clients, prospects, vendors and other business contacts" (FAC ¶34).

difficulty with which the information could be properly acquired or duplicated by others" (2 NY PJI 3:58, at 582 (2013).

Rossell has denied knowledge or information sufficient to form a belief as to the truth of the allegation that the computers contain FES confidential and proprietary information and/or trade secrets (A&C ¶34). What Rossell does deny is that he used FES information, however classified, to the detriment of FES or to further his own interests. He claims that High Acres and Seneca Meadows solicited him to submit bids once they learned he was leaving FES and the bids were based on information supplied by the landfills (Rossell Aff ¶25 [3/12/2013]). Further, he claims that his knowledge and experience as a falconer wholly apart from his FES employment provided the informational base necessary to engage in the nuisance bird abatement business (id at ¶35).

4. Unfair Competition

FES's fifth cause of action alleges an "unfair competition" cause of action. This claim is based upon defendant's alleged "misappropriation of the knowledge, skill, expenditures, labor, and customer goodwill of FES," including its "confidential and proprietary information, including but not limited to their trade secrets" (FAC ¶103-107). New York recognizes a cause of action for unfair competition upon a misappropriation theory, when what appropriated involves the taking and use of a commercial advantage or goodwill of competitor (*see, ITC Ltd. v Punchgini, Inc.*, 9 NY2d 467 [2008]). "The principle that one may not misappropriate the results of the skill, expenditures and labors of a competitor is predicated on the concept that no one is entitled 'to reap where it has not sown'" (2 NY PJI 3:58, at 586). To fit within this doctrine, FES must claim that Rossell is wrongfully exploiting the expertise, investment, and goodwill of FES in the relevant service market to his own advantage and to the detriment of his former employer. Again, Rossell claims that any success he may have comes from his own expertise, know-how, and acumen in the commercial use of falconry apart from any derived from FES.

5. Breach of Contract

FES's sixth cause of action alleges that Rossell breached the 2006 contract between he and Adam concerning the purchase and maintenance birds to used in FES operations. From the present record, it appears that this relates to the number and identity of birds in possession of FES after the February 12th meeting. As indicated, FES claims that there should be approximately sixty surviving

birds of those purchased from Rossell, and that most thereof have not been delivered to FES. Also, FES claims that Rossell substituted inferior birds for those purchased by FES the day before his resignation. Rossell denies both claims, stating that any bird purchased by FES was either returned, died, or was lost, and that he had no contractual obligation to replace dead or lost birds. Further, Rossell claims that no substitution of birds occurred as alleged by FES.

6. Breach of Fiduciary Duty

FES's seventh cause of action alleges that, "[a]s an employee of FES, Rossell was a fiduciary of FES" (FAC ¶114). This fiduciary relationship imposed upon Rossell a duty of "undivided and unqualified loyalty," which (1) "prohibited [him] from acting in any manner contrary to the interests of FES," (2) "required [him] to make truthful and complete disclosures to FES", and forbade him from obtaining "an improper personal or business advantage at FES's expense." (id at ¶115-116). FES alleges that Rossell breached this duty (1) "by failing to disclose to FES information about High Acres and Seneca Meadows' bidding processes" and (2) "by soliciting Seneca Meadows and High Acres while still employed by FES" (id at 117-118). Accordingly, argues FES, it "is entitled to recover from Defendants all damages that FES has sustained and all gains, profits and advantages obtained by Defendants as a result of his breach of his fiduciary duties to FES, including the forfeiture by Rossell of all compensation he received from FES after he committed his first disloyal act" (id at 118). Defendants neither admit or deny such of the allegations as constitute statements of law, but deny he breached any duty to FES (A&C ¶115-119).

Trimarco v Data Treasury Corp., 30324-2003, NYLJ 1202626313379, at 71-73 (Sup. Ct., Suffolk Co, decided October 30, 2013) gives a good summary of the principles of law applicable here:

> "[Under New York Law, the unqualified duty of loyalty requires that [corporate] officers and directors adhere to fiduciary standards of conduct and exercise their responsibilities in good faith when undertaking any corporate action. Such duty arises because such parties stand in a fiduciary relationship to the corporate body and owe their undivided and unqualified loyalty thereto. This duty also applies to persons in positions of management to the entities they serve. In fulfilling such duties, a corporate officer, director or manager may not assume or engage in the promotion of personal interests which are incompatible with the superior interest of the corporation. Specifically, a corporate officer or director may not, without consent, divert and exploit for personal benefit any opportunity that should be deemed an asset of the corporation. ...

> These principles apply to employees, as well as agents of corporate entities, in that they are both prohibited from acting in any manner inconsistent with their agency or trust and are, therefore, bound in all instances, to exercise the utmost good faith and loyalty in the performance of their tasks. ... An employee also owes a fiduciary duty to its employer not to seek to divert the corporation's opportunities to himself." (citations omitted).

7. Interference With Prospective Economic Relations

FES's eighth cause of action again focuses on Seneca Meadows and High Acres. FES alleges that Rossell and AFS wrongfully interfered with its business relationships with these entities by submitting bids to them and by using FES information in doing so (FAC ¶122-125). Defendants deny these claims (A&C ¶122-125). To succeed in its claim, FES must satisfy the elements of such claim:

> "The elements of interference with a prospective contract or business relationship are: (1) defendant's knowledge of plaintiff's business opportunity with another party; defendant's intentional interference with that opportunity, (3) defendant's use of wrongful means or sole purpose of inflicting harm, (4) a showing that the contract or prospective business relationship would have been entered into but for defendant's interference, and (5) resulting damage" (2 NY PJI 3:57, at 570 [2013]).

III. THE PRESENT MOTIONS

A. Protocol For Discovery and Review of Electronically Stored Information

By joint motion filed August 2, 2013, the parties moved this court for an order setting the protocol for the discovery and review of electronically stored information ('EIS"). The basis of such request derives from the March 8, 2013 Order of Seizure, where this Court, among other things, ordered the Sheriff to seizure of specific computers, related equipment, and software and:

> "retain custody of the [seized computers], but permit Plaintiff's forensic expert, D4, LLC, to make forensic images of the hard drives in the computers and the contents of any other data storage device seized for evidence preservation purposes only with the Sheriff being directed and obligated to retain the duplicate forensic images and *permit review or analysis by the parties only in accordance with a forensic protocol agreed upon by the parties or as ordered by the Court"* (Adam Aff ¶3 Ex A [7/30/2013])(emphasis added)

The parties have agreed to a forensic protocol for reviewing the EIS in all respects except two: (1) e-mails associated with e-mail addresses Srossell61@rochester.rr.com and Srossell@cs.com

and (2) sub-folders listed on the "List of Disputed Subfolders," which has been submitted to the Court.[19] Plaintiff proposes the following protocol with regard to the review and disclosure of the disputed EIS:

> a. Copies of the documents in the subfolders listed on the List of Disputed Subfolders, and the e-mails associated with the e-mail addresses Srossell61@rochester.rr.com and Srossell 61@cs.com, initially will be provided to counsel for Defendants counsel;
> b. Defendants' counsel will review these materials and remove only materials subject to the attorney-client privilege or attorney work product doctrine;
> c. Defendants counsel will create a privilege log identifying the privileged documents with sufficient detail to allow Plaintiff, and the Court as necessary, to identify the document listed and assess the propriety of the privilege assertion;
> d. Thereafter, counsel for Plaintiff may review the non-privileged documents, Plaintiff's counsel will notify Defendants' counsel of those documents it deems responsive to its discovery demands or relevant to this action.
> e. Both parties than will be provided with copies of all discoverable documents and have an opportunity to assert any applicable objections.
> f. Neither Plaintiff nor Plaintiff's counsel will be entitled to retain any documents that both parties agree pertain to Defendant Rossell's purely personal or private affairs. In the event of a dispute regarding the 'purely personal or 'purely private' nature of a document, the parties will endeavor in good faith to resolve the dispute and, if they are unable, present the dispute to the Court for resolution through appropriate procedural mechanisms (FAS's Position Statement p.2 [7/30/2013]).

Defendants' proposal with regard to an EIS review protocol differs as follows:

> • Counsel for Defendants is to be provided with copies of all documents located in the Disputed Subfolders (the "Personal Documents") and with copies of all e-mails sent to or from the Personal Addresses (the "Personal E-Mails").[20]
> • Counsel for Defendants will review the Personal Documents and the Personal e-mails in consultation with Defendants. Copies of all non-privileged documents and/or e-mails which are discoverable will be provided to Counsel for Plaintiff, in accord with Defendants' discovery obligations and the Protective Order agreed to by the parties (Defendants' Memorandum of Law p. 3 [8/2/2013]).

The disputed subfolders contains data and information that defendants' claim is "likely [to] contain personal and/or high confidential business information not likely to lead to the discovery of

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[19] These two categories of data for which the parties have not agreed upon a protocol for disclosure will be referred to as the "disputed EIS."

[20] The e-mail addresses are the same as specified in Plaintiff's proposed protocol.

admissible evidence" (Defendants' Memorandum of Law p.2 [8/2/2012]). Defendant's take the same position relative the two disputed e-mail accounts.

On the other hand, FES reasons that its

> "counsel should be allowed to review the Disputed EIS because: FES owns the Seized Computers on which the EIS is stored; Rossell used the Seized Computers to conduct FES business; Rossell used the Srossssell61 E-mail Addresses to Conduct FES business; FES used the Srossell61 E-Mail addresses to interfere with FES's business as alleged in the Complaint; Defendant AFS has no personal privacy interests; and Rossell's personal privacy interests are trumped by FES's legitimate business interests" (FES's Position Statement p.2-3 [7/30/2012])."

FES emphasizes that it

> is not requesting the production of purely personal or private EIS contained on the Seized Computers. Rather, Plaintiff merely requests the opportunity for its counsel to review the Disputed EIS so that a determination of discoverability and relevance may be made by both parties, and the Court as necessary, in a fair and efficient manner" (Id. at fn. 1)

Rossell and AFS argue, however, that its proposal more appropriately balances "the interests of all parties" by "protect[ing] Mr. Rossell's privacy interest while simultaneously ensuring that Plaintiff is provided with all discoverable documents" (Defendants' Memorandum of Law p.3.4). They explain:

> "... Mr. Rossell has a privacy interest which would be seriously violated by permitting Plaintiff or its counsel unfettered access to his personal e-mails and documents. Defendants do not deny that Plaintiff has a right to any documents or e-mails in the Disputed Subfolders or sent to or from the Personal Addresses that are non-privileged and responsive to Plaintiff's discovery requests. Defendant's counsel is fully capable of reviewing the Personal Documents and the Personal E-Mails and ensuring that Defendants' counsel is fully capable of reviewing the Personal Documents and Personal E-Mails and ensuring that Defendant's discovery obligations are complied with. Plaintiff has not articulated any reason why Defendants' counsel cannot be trusted to complete this task" (id at 3-4

Of course, merely invoking one's privacy interest does not define its scope or bar its invasion. To paraphrase Justice Black, we may like our privacy as well as the person, but nevertheless be compelled to admit that government may invade it unless prohibited by some specific provision of law (*Griswold v Connecticut*, 381 U.S. 481, 510 (1965)(Black, J., dissenting).

Assuming FES has some proprietary interest in the seized computers and e-mail accounts, guidance may be drawn from *United States v Finazzo*, 2013 WL 619572 (E.D.N.Y. 2012):

> "In assessing an employee's reasonable expectation of privacy in a work computer or e-mail account, courts have increasingly turned to a set of four factors: '(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?' *In re the Reserve Fund Secs & Deriv. Litig.*, 275 F.R.D. 154, 160 (S.D.N.Y 2011)(quoting *In re Asia Global Crossing, LTD.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005)). Although the test is only advisory, because it is "widely adopted" by many courts, it is a good framework with which to conduct this highly fact-dependent analysis. *In re the Reserve Fund Secs & Deriv. Litg.*, 275 F.R.D. at 160 & n.2 (collecting cases)" (id at 7).

The analysis suggested by the *Asia Global Crossing* case has been followed not only by the federal courts in New York, but its state courts as well (see *e.g. Scott v Beth Israel Medical Center, Inc.*, 17 Misc.3d 934, 940-941 (Sup. Ct., N.Y. Co. 2007). Applying these standards, this Court has no difficulty in finding a protected privacy interest that prohibits unfiltered disclosure of the contents of the computers in this case. As observed, "courts have been loathe to sanction an intrusive examination of an opponent's computer hard disk as a matter of course" (*Schreiber v Schreiber*, 29 Misc.3d 171, 180 (Sup. Ct., Kings Co. 2010). Accordingly, the Court approves the protocol proposed by the defendants. Of course, the fact that the disputed EIS and e-mails will not be disclosed to plaintiff as a matter of course does not mean that they are not discoverable through the disclosure process set out in the CPLR. Counsel for defendants shall assiduously abide their obligations in this regard. Should any disputes arise, this Court will conduct an in-camera review of the challenged material upon proper application.

Lastly, the Court grants the motion of Plaintiffs to dismiss the counterclaim pursuant to CPLR 3211(a)(7). The Court finds the pleadings insufficient to state a claim under Labor Law §740. Without gainsaying the salutary public policies underlying the Migratory Bird Treaty Act, the alleged acts do not arise to the level of "a substantial and specific danger to the public health or safety" as that phrase has been judicially construed and applied.

Dated: December 24, 2013
Lyons, New York

JOHN B. NESBITT
Acting Supreme Court Justice