

<b>Gogotech II LLC v Habib</b>
2017 NY Slip Op 30495(U)
March 13, 2017
Supreme Court, New York County
Docket Number: 653997/2016
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

GOGOTECH II LLC & FACTORYOUTLETSTORE LLC,

Plaintiffs,

-against-

MOHAMMAD MAKSUD HABIB & NAWAB CENTRAL INC.,

Defendants.

Index No.: 653997/2016  
**DECISION/ORDER**  
Motion Sequence No. 01

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants’ pre-answer motion to dismiss under 3211 (a) (1) and 3211 (a) (7).

<b>Papers</b>	<b>Numbered</b>
Defendants’ Notice of Motion .....	1
Plaintiffs’ Affirmation in Opposition.....	2
Plaintiffs’ Memorandum of Law in Opposition.....	3
Defendants’ Reply .....	4

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Gerald Lebovits, J.

Plaintiffs commenced this action on August 1, 2016, asserting three causes of action — breach of contract, breach of duty of loyalty, and misappropriation of trade secrets — against defendants for forming a competing business while defendant Mohammad Maksud Habib was employed by plaintiff Gogotech II LLC. On October 6, 2016, defendants filed this pre-answer motion to dismiss the complaint under CPLR 3211 (a) (1) and 3211 (a) (7). On November 14, 2016, plaintiffs filed their amended complaint adding two causes of action — unfair competition and tortious interference. (Plaintiffs’ Affirmation in Opposition, Exhibit B.)<sup>1</sup>

Beginning in 2010, Habib worked for Gogotech and was involved in “purchasing products and business development.” (Plaintiffs’ Affirmation in Opposition, Exhibit B.) Plaintiffs operate an e-commerce business and sell consumer products on their retail website. (*Id.*) According to plaintiffs, defendant Nawab Central Inc. also operates an e-commerce business selling consumer products through multiple websites and platforms. (*Id.*)

<sup>1</sup> Plaintiff may amend its complaint as of right under CPLR 3025 (a) and 3211 (f) as long as defendant’s motion to dismiss is still pending. (*Perez v Wegman Cos., Inc.*, 162 AD2d 959, 959 [4th Dept 1990]; *accord Empire Blue Cross and Blue Shield v. Various Underwriters*, 5 Misc 3d 1024 [A], \*1-2, 2004 NY Slip Op. 51528[U], \*1-2, 2004 WL 2813184, at \*1-2 [Sup Ct, NY County 2004].)

**Defendants’ Motion to Dismiss under CPLR 3211 (a) (1)**

Defendants’ CPLR 3211 (a) (1) motion is denied. On a CPLR 3211 (a) (1) motion to dismiss, a defendant has the “burden of showing that the relied-upon documentary evidence ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.’” (*Fortis Fin. Servs. v Finmat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] [citations omitted]; *Accord Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994].) The documentary evidence must “be unambiguous and of undisputed authenticity.” (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010], quoting Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22.) Judicial records, mortgages, deeds, and contracts qualify as documentary evidence. (*Fontanetta*, 73 AD3d at 84.) Affidavits, examination before trial (EBT) transcripts, emails, and medical records are not the type of documentary evidence acceptable under CPLR 3211 (a) (1). (*Id.* at 85.) Affidavits and summary notes do not constitute documentary evidence within the meaning of the rule; they raise issues of credibility for a jury to decide. (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014].)

In support of their motion to dismiss based on documentary evidence, defendants provide a confidentiality agreement dated January 4, 2013, signed by Habib and Gogotech, and an affidavit by Habib. (Defendants’ Notice of Motion, Exhibit B.) The court may consider only the confidentiality agreement. The court may not consider defendant’s affidavit as documentary evidence. (*See Art & Fashion Group Corp.*, 120 AD3d at 438.)

The agreement provides that the

“[e]mployee [Habib] shall also not use the Confidential Information in any manner except as necessary to perform his or her duties as an employee of the Company [Gogotech]. Upon termination of Employee’s employment for any reason, Employee shall immediately turn over to the Company all Confidential Information in his/her possession or control.” (Defendants’ Notice of Motion, Exhibit B.)

The agreement also provides that “[a]ll provisions of this Agreement shall perpetually survive the expiration of the termination of Employee’s employment with the Company.” (*Id.*)

The parties disagree about the meaning of the agreement. Plaintiffs argue that the agreement does not prevent Habib from pursuing similar employment in the online retail industry. (Plaintiffs’ Memorandum of Law in Opposition.) Rather, according to plaintiffs, it seeks to prevent Habib from using plaintiffs’ alleged proprietary information to engage in the online retail business with the same vendors as plaintiffs. (*Id.*)

As plaintiffs allege in their amended complaint:

“Upon information and belief, Defendants have been operating this competing business through the use of Gogotech’s Confidential

Information. By way of example only, Defendant Habib represented Garmin for Gogotech and dealt directly with senior managers within Garmin to source product for FOS [plaintiff FactoryOutletStore]. While he was still employed by Gogotech, Defendant Habib used Gogotech's Confidential Information to obtain business with Garmin for Defendant Nawab Central Inc. that allowed Nawab Central Inc. to compete directly with FOS. Similarly, while he was still employed by Gogotech, Defendant Habib directed, managed and/or assisted Defendant Nawab Central Inc. in launching BargainFactoryMall.com and offering the same or substantially similar merchandise for sale as sold by plaintiffs, including products from Plaintiffs' leading brands such as Braun, Garmin, Phillips Norelco, Oral-B, Remington and Sonicare." (Plaintiffs' Affirmation in Opposition, Exhibit B, ¶¶ 17-20.)

Defendants argue that the agreement is invalid because it prevents Habib from earning a living in the industry in which he works. (Defendants' Notice of Motion.) The court need not decide, at this time, the meaning of the agreement. (*See Fortis Fin. Servs.*, 290 AD2d at 383 ["On a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'"]). The agreement does not conclusively resolve plaintiffs' claims. Defendants' CPLR 3211 (a) (1) motion is denied.

#### **Defendants' Motion to Dismiss under CPLR 3211 (a) (7)**

Defendants' CPLR 3211 (a) (7) motion to dismiss is denied in part and granted in part. On a CPLR 3211 (a) (7) motion to dismiss, the court determines only whether the facts, as a plaintiff alleges, fit within any cognizable legal theory. (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014] ["When documentary evidence is submitted by a defendant, the standard morphs from whether the plaintiff has stated a cause of action to whether he or she has one."].) A court must accept as true the facts alleged in a complaint and give a plaintiff the benefit of every possible favorable inference. (*Nonnon*, 9 NY3d at 827; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006].)

According to defendants, Habib began working for Gogotech in 2010. His job, according to Habib, was a purchasing manager. (Defendants' Notice of Motion.)

According to plaintiffs, on January 4, 2013, as part of his employment, Habib signed a confidentiality agreement in which he agreed to keep confidential "all proprietary information about Gogotech, FOS or any other affiliate, including but not limited to financial data, pricing information, contacts with vendors, customer and prospective customer lists and marketing techniques." (Plaintiffs' Affirmation in Opposition, Exhibit B.) While employed by Gogotech, Habib formed Nawab Central to compete with FOS. (*Id.*) Defendants then allegedly used the confidential information Habib learned during his employment with plaintiffs to run defendants' business. (*Id.*)

### Plaintiffs' First Cause of Action

An action for breach of contract requires proof of (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages. (*WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021, 1024 [Sup Ct, NY County 1999].) According to the facts plaintiffs allege, plaintiffs have adequately alleged that a contract exists between the parties, plaintiffs' performance, Habib's breach, and damages. (Plaintiffs' Affirmation in Opposition, Exhibit B.) Defendants' motion to dismiss the first cause of action is denied.

### Plaintiffs' Second Cause of Action

An action for breach of a duty of loyalty requires proof of (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) a showing that the breach was a substantial factor in causing an identifiable loss. (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008].) A claim alleging breach of a trust must be pleaded with particularity. (CPLR 3016 [b].) A plaintiff pleads a claim with particularity when the facts provided are sufficient to permit a reasonable inference of the alleged conduct. (*Bernstein v Kelso & Co.*, 231 AD2d 314, 320 [1st Dept 1997].)

As against Habib, plaintiffs have adequately alleged a fiduciary duty, a breach of that duty, and that the breach was a substantial factor in causing an identifiable loss. (Plaintiffs' Affirmation in Opposition, Exhibit B.)

A claim for aiding and abetting a breach of fiduciary duty requires a showing (1) of a breach by a fiduciary of obligations to another; (2) that the defendant knowingly induced or participated in the breach; and (3) that plaintiff suffered damage as a result of the breach. (*Ullico Cas. Co. v Wilson, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 11 [1st Dept 2008]; *Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003].)

In their complaint, plaintiffs allege that

“Defendant Nawab Central Inc. aided and abetted Defendant Habib’s breaches of loyalty by, inter alia, knowingly and intentionally colluding with Defendant Habib to develop, operate and/or maintain the BargainFactoryMall.com web site and web presences on third-party e-commerce platforms in competition with Plaintiffs while Defendant was still employed by Plaintiffs. As a direct and proximate result, Plaintiffs have suffered damages in an amount to be proven at trial.” (Plaintiffs’ Affirmation in Opposition, Exhibit B, ¶¶ 40-41.)

As against Nawab, plaintiffs have adequately alleged a breach by Habib, knowledge and participation by Nawab, and damages resulting from the breach. Defendants’ motion to dismiss the second cause of action is denied.

### Plaintiffs' Third Cause of Action

To establish misappropriation of trade secrets, plaintiff must allege that “(1) it possessed a trade secret; and (2) that defendants are using such trade secret in breach [of] a duty of loyalty or as a result of discovery by improper means.” (*1-800 Postcards, Inc. v AD Die Cutting & Finishing Inc.*, 28 Misc 3d 1216 [A], \*2, 2010 NY Slip Op 51368 [U], \*2, 2010 WL 3020705, at \*2 [Sup Ct, NY County 2010].) As against Habib, plaintiffs adequately allege that they possess a trade secret. Plaintiffs also allege that in using plaintiffs’ trade secrets, Habib breached his duty of loyalty. (Plaintiffs’ Affirmation in Opposition, Exhibit B.)

Generally, an aiding-and-abetting claim must assert that the defendants had “actual or constructive knowledge of the misconduct and substantially assisted therein.” (*Liberman v Worden*, 268 AD2d 337, 338 [1st Dept 2000].) In their complaint, plaintiffs allege that “[w]hile employed by Gogotech, Defendant Habib formed Defendant Nawab Central Inc. to compete directly with FOS . . . . [and] [u]pon information and belief, Defendants have been operating this competing business through the use of Gogotech’s Confidential Information.” (Plaintiffs’ Affirmation in Opposition, Exhibit B.) Also, by employing Habib, Nawab “aided and abetted the misappropriation of [plaintiffs’] trade secrets.” (*Id.*) As against Nawab, plaintiffs adequately allege aiding and abetting the misappropriation of their trade secrets. Defendants’ motion to dismiss the third cause of action is denied.

### Plaintiffs' Fourth Cause of Action

An action for unfair competition requires that a plaintiff allege “the bad faith misappropriation of a commercial advantage which belonged exclusively to [the plaintiff].” (*LoPresti v Mass. Mut. Life Ins. Co.*, 30 AD3d 474, 476 [2d Dept 2012]; *accord Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 [1st Dept 2012].) Plaintiffs have alleged that “Gogotech expended significant time, money and resources to develop the Confidential Information upon which Plaintiffs’ competitive advantages are based.” (Plaintiffs’ Affirmation in Opposition, Exhibit B, ¶ 53.) Plaintiffs, however, have not alleged that the commercial advantage belonged exclusively to them. (*See Ahead Realty LLC*, 92 AD3d at 425.) Given this deficiency in the pleading, defendants’ motion to dismiss the fourth cause of action as against both defendants is granted.

### Plaintiffs' Fifth Cause of Action

To state a claim for tortious interference with a contract, the complaint must allege “(1) the existence of a valid contract between plaintiff and a third party; (2) the defendant’s knowledge of that contract; (3) the defendant’s intentional procuring of the breach, and (4) damages.” (*Foster v Churchill*, 87 NY2d 744, 749-750 [1996].) Plaintiffs need not allege that “defendants had actual knowledge of the third-party’s obligation to the plaintiffs. It is sufficient that the plaintiffs allege that defendants knew of the existence of a valid contract . . . .” (*Monex Fin. Servs. Ltd. v Dynamic Currency Conversion, Inc.*, 19 Misc 3d 1113 [A], \*8, 2008 NY Slip Op 50674 [U], \*8, 2008 WL 880209, at \*8 [Sup Ct, Nassau County 2008].) Plaintiffs allege that there was “a valid and binding contract between Gogotech and Defendant Habib in the Confidentiality Agreement.” (Plaintiffs’ Affirmation in Opposition, Exhibit B, ¶ 61.) Plaintiffs

further allege that Nawab knew about the agreement and that Nawab “knowingly, intentionally and unjustifiably interfered with Defendant Habib’s performance of the covenants in the Confidentiality Agreement” and that, as a result, plaintiffs suffered damages. (Plaintiffs’ Affirmation in Opposition, Exhibit B, ¶¶ 63-66.) Defendants’ motion to dismiss the fifth cause of action is denied.

Accordingly, it is

ORDERED that defendants’ motion to dismiss is denied in part and granted in part to the extent that plaintiffs’ fourth cause of action — unfair competition — is dismissed and the other remaining causes of action remain; and it is further

ORDERED that defendants serve a copy of this decision and order with notice of entry on all parties and on the County Clerk’s Office, which is directed to enter judgment accordingly; and it is further

ORDERED that defendants must serve and file its answer within 20 days of service with notice of entry.

Dated: March 13, 2017



J.S.C.

**HON. GERALD LEBOVITS**  
J.S.C.