SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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LORD SECURITIES CORPORATION,

Plaintiff,

-against-

BENJAMIN B. ABEDINE,

Defendant.

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Index No.: 653853/2014

Mtn Seq. No. 003

DECISION AND ORDER

JEFFREY K. OING, J.:

Defendant, Benjamin B. Abedine moves, pursuant to CPLR 3211 (a)(1), (5), and (7), to dismiss the second amended complaint ("amended complaint") based on documentary evidence, collateral estoppel, and for failure to state a cause of action.

Background

This action arises out of the dissolution of the business relationship between plaintiff, Lord Securities Corporation, and nonparty Broad Street Contract Services ("Broad Street"), who for several years jointly provided certain services related to special purpose vehicles ("SPVs"), through which both companies' clients conducted securitized investment transactions (Amended Complaint, ¶ 3). Defendant is plaintiff's former managing director and consultant, and a current officer of Broad Street (Id.). Plaintiff is also the claimant in a parallel arbitration proceeding commenced before the American Arbitration Association ("AAA") against Broad Street and nonparty Peter H. Sorensen

("Sorensen"), regarding the Equity Ownership Services Agreement ("EOSA"), dated September 21, 2005, among plaintiff, Broad Street, and Sorensen (Id., ¶ 2).

Plaintiff alleges that both the arbitration proceeding and this action arise from the plan among defendant, Sorensen, and Broad Street to take plaintiff's clients and set up a competing business in violation of the EOSA and the consulting agreement between defendant and plaintiff, dated May 1, 2014 (Id., ¶¶ 3-5, 10-11).

A. Plaintiff and Broad Street's Business

Plaintiff and Broad Street were both owned by Sorensen until 2005 when Sorensen sold plaintiff to a company known as Computershare (Amended Complaint, ¶ 19). As part of the sale, the parties entered into the EOSA, under which Broad Street and Sorensen agreed to provide ownership services for the SPVs managed by plaintiff, specifically to nominally hold the equity of each SPV for any securitized transactions and providing various other related services (Id., ¶¶ 20-21). The SPVs themselves were otherwise "managed and administered" by plaintiff (Id., ¶ 23). Plaintiff alleges that it bore "100% of the cost" of keeping Broad Street's and the individual SPVs' records, and agreed to provide equity ownership services through agreements with its clients (Id., ¶ 24). Broad Street received an annual

fee directly from plaintiff for providing those services, and otherwise had no separate staff other than its officers (Id., ¶¶ 24-25).

B. Abedine's Departure and Alleged Theft of Information

In 2008, Computershare sold plaintiff to TMF-Group (Amended Complaint, ¶ 26). As a result of tensions with TMF-Group, defendant resigned as plaintiff's managing director on December 6, 2013, but continued to perform his duties through April 30, 2014 (Id., ¶¶ 26-27). During this interim period, defendant allegedly removed all of plaintiff's personnel from Broad Street who had been acting as officers, and removed the minute book containing transaction information related to the SPVs from plaintiff's premises (Id., ¶¶ 28-29).

As of May 1, 2014, plaintiff and defendant had entered into a three-month consulting agreement, for which defendant received $450,000 (Id., ¶ 31). The agreement provided, in relevant part, the following provisions:

* The agreement defined the "Company" as "[plaintiff]" (Abedine Aff., Ex. 3, consulting agreement at 1), except for sections 7-29, under which it expanded the definition of "Company" to include plaintiff, Broad Street, TMF-Group and any other affiliated entities (Id., § 7.1);

* During the term of the agreement, defendant agreed not to "engage in any activities or businesses which conflict or compete with the activities and businesses of [plaintiff] or [defendant's]

provision of the Services,[1] or which constitute an actual or potential breach by [defendant] of any of the Restrictive Covenants," referring to sections 7, 8, 9, and 10 (Id., § 3);

* defendant also agreed not to, "without prior written consent of the Company," use or disclose any confidential information learned during his time as an employee of plaintiff, during his time as a consultant, or at any other time if it became available to him by virtue of his position as a consultant (Id., § 7.2). Confidential information included, but was not limited to, "customer requirements and specifications ... computer software or data of any sort developed or compiled by the Company, formulae or any other information relating to the Company's services ...." (Id.). Any records containing such information were "and [would] remain the Company's property" (Id., § 7.3);

* Except when working on behalf of plaintiff, Broad Street, and TMF-Group, defendant could not use any confidential records, and upon the termination of the agreement or at the Company's request "[would] immediately deliver to the Company ... all Confidential Records and all other Company property in [his] possession or control" (Id.).

* For the term of the agreement, and for one year following the term date, i.e. until July 31, 2015, defendant would not "without prior written consent of the company" solicit, induce, or entice any of plaintiff or Broad Street's clients, vendors, or employees to provide "Competing Products and Services" or change their relationship with plaintiff or Broad Street, employ any employees of plaintiff and Broad Street, or "offer to provide any competing Products and Services to any other

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[1]"Services" is defined in a separate exhibit to the agreement, which the parties have not provided, as well as "such other duties pertaining to the Company's business as the Company and Consultant may from time to time agree upon" (Id., § 2).

party, including existing and potential customers and clients of the Company" (Id., § 8);

* "Competing Products and Services" was defined as any services performed or provided by defendant in his capacity either as managing director or as a consultant to any "existing and potential" clients or customers of plaintiff and Broad Street (Id., § 8 [c]);

* In the event of a breach, plaintiff's rights and remedies included specific performance of the confidentiality and solicitation provisions (Id., § 11.3 [a]), also defined as the "Restrictive Covenants," and an accounting and recovery of "all compensation, profits, monies, accruals, increments or other benefits derived or received by [defendant] or any associated party deriving such benefits" (Id., § 11.3).

At some time after defendant became a consultant, plaintiff claims that defendant convinced Sorensen to help him set up a competing business against plaintiff and to "raid [plaintiff's] business" (Amended Complaint, ¶¶ 39-40). On June 10, 2014, Sorensen, allegedly with defendant's assistance, demanded that plaintiff surrender the books and records of Broad Street and the SPVs to defendant by July 1, 2014 (Id., ¶¶ 41-42). Plaintiff claims that it was required to possess these documents under its agreements with its clients (Id., ¶ 43). When plaintiff refused to turn over the documents, defendant took stock certificates from plaintiff's safe, and other confidential records stored on a flash drive from plaintiff's offices (Id., ¶¶ 45-46). Plaintiff claims that defendant took the records in furtherance of his

conspiracy with Sorensen to open a competing business and potentially extort payment for the return of the records (Id., ¶ 47). Defendant allegedly told the officers of plaintiff and TMF-Group that he would "take all of [plaintiff's] business away" (Id., ¶ 48). Further, on September 4, 2014, Broad Street opened a new office in the same building in which plaintiff had its offices with new contact information (Id., ¶¶ 49). Previously, Broad Street did not have an office or contact information separate from plaintiff (Id.). The missing documents prevented plaintiff from providing services to existing or prospective clients (Id., ¶ 51).

C. The Arbitration Proceeding

On December 12, 2014, plaintiff commenced an AAA arbitration proceeding against Broad Street and Sorensen claiming breach of the EOSA, conversion, breach of fiduciary duty, unfair competition, and conspiracy regarding defendant's removal of the records from plaintiff's office, and tortious interference with the consulting agreement (Biel Affirm., Ex. 6, Statement of Claim at 13-17).

During the pendency of the arbitration, plaintiff alleges that defendant's improper conduct continued. Plaintiff asserts that defendant, using confidential information gleaned from the documents he took and in violation of the Restrictive Covenants,

reached out to some of plaintiff's clients in an attempt to divert business from and compete with plaintiff (Amended Complaint, ¶¶ 53-60, 64-67). Plaintiff further alleges that defendant would not have been able to divert its business absent access to confidential information that he removed from plaintiff's offices (Amended Complaint, ¶¶ 62, 68-69). Specifically:

> Defendant contacted Client 1 and stated that Broad Street would be replacing the officers and directors of the related SPV, rendering plaintiff unable to continue to provide services to the SPV (Amended Complaint, ¶¶ 53-54; Beil Affirm., Ex. 8 at 6);
>
> On February 12, 2015, Broad Street, through defendant, reached out to Client 2 after being uninvolved with Client 2 for 15 years and inquired about who held the equity ownership of Client 2's SPV (Amended Complaint, ¶¶ 55-56; Beil Affirm., Ex. 8 at 6);
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> On March 16, 2015, defendant contacted Client 3 and told it that Broad Street was no longer affiliated with plaintiff and any future payments and correspondence should be sent directly to Broad Street, as well as requesting the tax returns for Client 3's SPV (Amended Complaint, ¶¶ 57-59; Beil Affirm., Ex. 8 at 6). Client 3 ultimately terminated its relationship with plaintiff (Amended Complaint, ¶ 59; Beil Affirm., Ex. 8 at 6);
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> At some point, defendant contacted Client 4 and directed "it to send dividends from its SPV to Broad Street," despite plaintiff's claimed right to the dividends (Amended Complaint, ¶ 60);
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> In January 2015, defendant emailed Client 5 in connection with tax filings for three SPVs without copying plaintiff on the same email, and attempted to obtain Client 5's business even after being informed that another accountant had been retained (Amended Complaint, ¶ 64; Beil Affirm., Ex. 9 at 1598);

> On September 18, 2014, defendant emailed Client 6 without copying plaintiff in order to offer tax consulting services (Amended Complaint, ¶ 65; Beil Affirm., Ex. 9 at 1596);
>
> On March 8, 2015, defendant emailed Client 7 regarding its two SPVs and reminded it that tax returns for the SPVs were due shortly (Amended Complaint, ¶ 66; Beil Affirm., Ex. 9 at 1600-1601). Defendant apparently later told Albert Fioravanti, plaintiff's employee, that "Sorensen would appoint new officers for the SPVs so that [defendant] could proceed with filing" extensions for those returns (Amended Complaint, ¶ 67). Client 7 had arranged for another accounting firm, and plaintiff alleges that the confusion caused by defendant's actions wasted plaintiff's time and money (Id., ¶ 67).

In addition to these alleged solicitations, defendant, acting on behalf of Broad Street, interfered with plaintiff's business by holding on to equity ownership of several SPVs after plaintiff requested that Broad Street transfer the equity to plaintiff's new equity ownership services provider (Amended Complaint, ¶¶ 70-71; Beil Affirm., Ex. 8 at 7). Further, defendant refused to sign a shareholder consent form to elect independent directors to a newly formed SPV, a request that Broad Street had previously regularly fulfilled (Amended Complaint, ¶ 71; Beil Affirm., Ex. 8 at 6-7).

As a result of defendant's, Broad Street's, and Sorensen's alleged misconduct, plaintiff sought a preliminary injunction before the AAA on May 14, 2015. In addition, it sought an order requiring Broad Street to transfer any outstanding equity

interests it was holding in those SPVs seeking transfers, to transfer any SPV records in Broad Street's, Sorensen's, or defendant's possession to plaintiff, to sign the consent and process any future requests made through plaintiff, and to toll the confidentiality and solicitation provisions of the EOSA for fourteen and a half months after the termination of the EOSA or the expiration of the confidentiality provision (Beil Affirm., Ex. 8 at 1-2). Plaintiff later defined the SPV records as:

> any and all documents and/or information utilized by Respondents to provide services to [plaintiff] and [plaintiff's] clients or taken by Respondents through its agent, [defendant], including but not limited to, all notes, analyses, studies, SPV ownership documents and certificates, SPV tax returns, limited liability company membership interest certificates, partnership or limited partnership interest certificates, BSCS certificates, BSCS minutes, BSCS checkbooks, and any and all documents related thereto, documents saved in [defendant's] flash drive and any other documents, electronic or otherwise, created by [defendant], employees or agents of Respondents and employees or agents of [plaintiff]

(Beil Affirm., Ex. 10, AAA Panel Decision at 3).

On October 5, 2015, the Panel decided plaintiff's motion. In doing so, the Panel found that, under the EOSA, Broad Street was holding nominal equity ownership interests in certain SPVs for plaintiff's benefit, for which Broad Street received an annual fee (Beil Affirm., Ex. 10, AAA Panel Decision at 4). Further, the Panel found that Broad Street had properly terminated the EOSA, that the EOSA required Broad Street to hand

over ownership of the SPVs when the EOSA was terminated, and that the confidentiality provisions of the EOSA did not apply to any information held by, among others, defendant, as an officer of Broad Street, or Sorensen (Id.). Based on these findings, the Panel ordered Broad Street and Sorensen to turn over any outstanding equity interest to plaintiff, demonstrating that plaintiff had an interest in them, to comply with future requests from Lord as to certain SPVs, and to turn over "any non Broad, SPV-related documents in the possession, custody, or control of Broad and its agents" (Id. at 5). The Panel did not require the return of any of the other documents that plaintiff sought, including the Broad Street minute book and related documents alleged to have been improperly taken by defendant. The Panel denied all other claims for relief (Id.).

D. Further Arbitration Proceedings

On June 27, 2016, while this motion was pending, the Panel rendered a final award on plaintiff's claim (Mintz letter, dated June 30, 2016, Ex. 1). As such, the remaining issues relevant to this action were whether defendant's communications with Client 3 was a tortious interference with plaintiff's contract with Client 3, whether Broad Street's conduct tortiously interfered with one of plaintiff's prospective business opportunities, and whether Broad Street, through defendant, tortiously interfered with

plaintiff's contract with Client 4 by seeking to divert dividend payments (Id. at 2-3). In summary, the Panel held that defendant's request that Client 3 send payment to Broad Street constituted tortious interference and otherwise denied the remaining relevant claims (Id. at 3-4).

E. The Second Amended Complaint

Plaintiff's present amended complaint alleges breach of the consulting agreement, conversion of the allegedly stolen records, replevin of the same records, unfair competition, conspiracy/ aiding and abetting liability, tortious interference with plaintiff's contracts with its clients, and tortious interference with plaintiff's prospective business relations.

Discussion

As an initial matter, defendant argues that plaintiff's claims cannot stand because it is collaterally estopped from asserting them by the findings made in the underlying arbitration. That argument is unavailing. Collateral estoppel "precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point" (Kaufman v Eli Lilly & Co., 65 NY2d 449, 455 [1985] [internal quotation marks and citation omitted]).

Here, defendant argues that plaintiff is collaterally estopped from asserting the claims in this action because the Panel held plaintiff breached the EOSA by withholding payment, instead of defendant's conduct, perpetrated on behalf of Broad Street. While defendant is correct that Lord raised the issues of whether Broad Street had tortiously interfered with defendant's contract with plaintiff and whether defendant had breached that contract, none of the Panel's findings address defendant's duties, or the allegations that spring from the consulting agreement. Thus, collateral estoppel is not applicable (Kaufman v Eli Lilly & Co., 65 NY2d at 455 ["the identical issue necessarily must have been decided in the prior action and be decisive of the present action"]).

Accordingly, that branch of the motion to dismiss the amended complaint on the ground of collateral estoppel is denied.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (Leon v Martinez, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (Id. at 87-88). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either

inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692 [1st Dept 1994]). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d at 88). "In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Id. [internal quotation marks and citations omitted]).

I. Breach of the Consulting Agreement (First Cause of Action)

The first cause of action purports to allege a claim for breach of the consulting agreement. Breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]). Restrictive covenants, such as those at issue in this case, must be strictly construed (Elite Promotional Mktg., Inc. v Stumacher, 8 AD3d 525, 526 [2d Dept 2004]).

Here, plaintiff claims that defendant breached the confidentiality and solicitation provisions of the consulting agreement, specifically Sections 3, 7, and 8, by removing and retaining documents from plaintiff's offices that belonged in its exclusive possession, and trying to compete with plaintiff's "asset securitization and structured finance services business" (Amended Complaint, ¶ 78).

a. Section 3

As defendant correctly points out, section 3 of the consulting agreement applies only during the term of the agreement itself (Beil Affirm., Ex. 3, Consulting Agreement, § 3 ["During Consultant's rendering of services hereunder ..."]). Here, however, of the many ways in which defendant is alleged to have breached the consulting agreement, only the removal of documents from plaintiff's offices occurred while the agreement was in effect (Amended Complaint, ¶ 46).

While defendant argues that plaintiff did not have the right to possess the records in the first instance, the amended complaint alleges, without dispute, that the stock and member interest certificates were taken from plaintiff's safe, and additional records were taken from its office (Id.). Plaintiff also alleges that the records properly belonged in its possession because it was required to hold the records pursuant to its

client agreements (Id., ¶ 43). Further, Section 3 of the consulting agreement prohibited defendant from "engag[ing] in any activities or businesses that conflict or compete with the activities and businesses of the Company[2] or [defendant's] provision of services" (Beil Affirm., Ex. 3, Consulting Agreement, § 3). Finally, plaintiff alleges that "[defendant's] wrongful removal and retention of those records have harmed and will continue to harm [plaintiff] in the performance of its management and administrative functions" (Amended Complaint, ¶ 79). Thus, on its face, the amended complaint sufficiently sets for allegations that the loss of the records impacted plaintiff's ability to maintain its business.

Defendant claims that he was merely acting as an agent for Broad Street, and therefore plaintiff's claim lies with Broad Street. Defendant relies on Cruz v NYNEX Info. Resources, 263 AD2d 285, 291 (1st Dept 2000) to support this proposition. His reliance is misplaced because Cruz is factually distinguishable. There, the Appellate Division, First Department, held that an agent was not liable for a contractual breach because he was not personally liable under the contract (Cruz v NYNEX Info. Resources, 263 AD2d 285, 291 [1st Dept 2000]). Here, by

[2] "Company" in Section 3 is defined as "[plaintiff]" (Beil Affirm., Ex. 3, Consulting Agreement at 1).

contrast, defendant is alleged to have breached his own contract with plaintiff, under which he could be held personally liable. Based on the foregoing, in liberally construing the amended complaint, plaintiff has sufficiently alleged facts to state a cause of action for breach of Section 3 of the consulting agreement.

b. Sections 7 and 8

Plaintiff also claims that defendant's conduct violated the confidentiality and solicitation provisions of Sections 7 and 8 of the consulting agreement (Beil Affirm., Ex. 3, §§ 7-8). Relying on the definition of "Company" in Sections 7 and 8, which include both Broad Street and plaintiff, defendant argues that when acting on behalf of either entity, he cannot be said to be in breach of either provision.

The principle is well settled that a court may interpret the unambiguous terms of a contract (see e.g. Maysek & Moran v Warburg & Co., 284 AD2d 203, 204 [1st Dept 2001]). Such terms, however, are not ambiguous "merely because the parties interpret them differently" (Mount Vernon Fire Ins. Co. v Creative Hous., 88 NY2d 347, 352 [1996]). When interpreting a contract, a court should not read the contract in a way that renders any provision or clause meaningless (see e.g. Warner v Kaplan, 71 AD3d 1, 5 [1st Dept 2009]).

Section 7.2 provides that defendant may not "use or disclose to any third person, without the prior written consent of the Company, any Confidential Information of the Company" (Beil Affirm., Ex. 3, Consulting Agreement, § 7.2). Similarly, section 8 provides that defendant "shall not, without the prior written consent of the Company" engage in solicitation as provided for in that section (Id., § 8). Clearly, both sections require prior written consent of the "Company", without specifying the individual entities that are included in the definition of the "Company." Thus, for any use of confidential information or solicitation, which plaintiff plainly alleges here, defendant must have the prior written consent of all entities that are a part of the affected "Company." To read the contract otherwise would render the prohibitions on use of confidential information meaningless as to plaintiff, as well as the specific definition of Company in Section 7.1. Further, plaintiff's allegations indicate that it has not given defendant permission to use the information in the records or to solicit business as he is alleged to have done. Finally, as set forth, supra, plaintiff has sufficiently alleged damages.

Accordingly, that branch of defendant's motion to dismiss the first cause of action for breach of contract is denied.

II. Conversion (Second Cause of Action)

The second cause of action purports to allege a claim for conversion. "Two 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" (Komolov v Segal, 144 AD3d 487, 488 [1st Dept 2016] [internal quotation marks and citation omitted]).

Here, plaintiff claims that it has a right to possess the records described, supra, and that defendant interfered with that right "by intentionally, and without authority, exercising control over those documents" (Amended Complaint, ¶¶ 84-86). Assuming, arguendo, that plaintiff states a cause of action for conversion, such a claim relies on the same conduct as the breach of contract claim and is thus impermissibly duplicative (see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 389 [1987] ["a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated"]). "[T]ort liability arises out of catastrophic consequences that ... flow from [a party]'s failure to perform its contractual obligations with due care. It does not result from an injury that ... is solely financial and not typical of [harm] arising from tort" (Verizon N.Y., Inc. v Optical Communications Group, Inc., 91 AD3d 176, 182 [1st Dept 2011]

[internal quotation marks and citations omitted]). Where the "plaintiff is essentially seeking enforcement of the bargain," as plaintiff does here, "the action should proceed under a contract theory" (Sommer v Federal Signal Corp., 79 NY2d 540, 552 [1992]).

Accordingly, that branch of defendant's motion to dismiss the second cause of action for conversion is granted, and it is dismissed.

III. Replevin (Third Cause of Action)

The third cause of action purports to allege a claim for replevin. On a claim for replevin, "the plaintiff need only establish a superior possessory right in the chattel to that of the defendant" (Pivar v Graduate School of Figurative Art of N.Y. Academy of Art, 290 AD2d 212, 213 [1st Dept 2002] [internal quotation marks and citation omitted]).

Here, plaintiff alleges an "immediate and superior right to possess" the records (Amended Complaint, ¶ 90). Defendant seeks dismissal based upon his contention that under the EOSA Broad Street, not plaintiff, had a superior right to the records. Defendant, however, cannot cloak himself with immunity by utilizing the terms of the EOSA because he is not a party to that agreement. Further, defendant cannot assert a superior right in the documents because under the consulting agreement any right to them belongs to Broad Street or plaintiff. Notwithstanding this

finding, plaintiff seeks the return of such documents "to the extent not already returned under the AAA injunction" (Amended Complaint, ¶ 93). Under the terms of the Panel's October 5, 2015 order, all documents to which plaintiff is entitled were ordered to be returned (Beil Affirm., Ex. 10 at 5). Plaintiff does not presently allege that defendant is currently in possession of any of the records. Plaintiff does not appear to proffer any opposition to that branch of defendant's motion seeking to dismiss the replevin claim.

Accordingly, that branch of defendant's motion to dismiss the third cause of action for replevin is granted, and it is dismissed.

IV. Unfair Competition (Fourth Cause of Action)

The fourth cause of action purports to state a claim for unfair competition. The "misappropriation theory" of unfair competition "prohibits a defendant from using a plaintiff's property right or commercial advantage ... to compete unfairly against the plaintiff in New York" (ITC Ltd. v Punchgini, Inc., 9 NY3d 467, 478 [2007]; see also Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48, 56 [1st Dept 2015] ["Allegations of a bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information can give rise to a cause of action for unfair

competition"] [internal quotation marks and citation omitted]). The commercial advantage must "belong[] exclusively to [the plaintiff]" (LoPresti v Massachusetts Mut. Life Ins. Co., 30 AD3d 474, 476 [2d Dept 2006]).

Plaintiff alleges that defendant's actions in taking the records and forming a competing business with it constitute unfair competition (Amended Complaint, ¶¶ 95-97). Specifically, plaintiff argues that the act enabling defendant and Broad Street's unfair competition is the theft of the minute book, stock certificates, and other confidential documents from plaintiff's offices, in which it had a possessory interest and which defendant used to solicit plaintiff's clients (Amended Complaint, ¶¶ 45-46, 96; Plaintiff's Memo. at 20-21). The underlying conduct by defendant, namely taking the records and soliciting plaintiff's clients, however, is the same conduct alleged to have caused a breach of the consulting agreement. Thus, as with the conversion claim, the unfair competition claim is duplicative of the breach of contract claim and, as such, it must be dismissed (cf., Fada Int. Corp. v Cheung, 57 AD3d 406 [1st Dept 2008] [dismissing breach of contract claim where duplicative of misappropriation of confidential information claim]).

Plaintiff's reliance on Electrolux Corp. v Val-Worth, Inc., 6 NY2d 556 (1959) is unavailing. In that case, the defendant was not merely contracting to use the plaintiff's "trade name and mark ... in the sale of 'rebuilt Electrolux' vacuum cleaners[,]" but was also doing so as a cover to sell machines made by Electrolux's competitors and to disparage repaired Electrolux machines (Id. at 567). Such behavior is clearly extra-contractual where, as here, defendant's alleged unfair competition states a breach of the consulting agreement alone.

Accordingly, that branch of the motion to dismiss the fourth cause of action for unfair competition is granted, and that claim is dismissed.

V. Conspiracy/Aiding and Abetting Liability (Fifth Cause of Action)

The fifth cause of action purports to allege a claim based on conspiracy and/or aiding and abetting. Plaintiff claims that defendant, Sorensen, and Broad Street entered into an agreement "to steal [plaintiff's] property and raid [its] clients and business, in breach of [defendant's] duties under the [c]onsulting [a]greement," and that defendant "knowingly rendered substantial assistance to Sorensen and Broad Street in their conversion of [plaintiff's] property" (Amended Complaint, ¶¶ 99-100).

New York does not recognize civil conspiracy as an independent tort (see e.g. Shared Communications Servs. of ESR, Inc. v Goldman Sachs & Co., 23 AD3d 162, 163 [1st Dept 2005]). "Accordingly, a claim alleging conspiracy to commit a tort stands or falls with the underlying tort" (Dickinson v Igoni, 76 AD3d 943, 945 [2d Dept 2010]). While conspiracy to commit a tort is not a cause of action (Johnson v Law Off. of Kenneth B. Schwartz, 145 AD3d 608, 611 [1st Dept 2016]), a claim for aiding and abetting tortious interference is permitted (see e.g. Roberts v 112 Duane Assoc. LLC, 32 AD3d 366, 367 [1st Dept 2006]).

In liberally construing this claim, and reviewing the relevant allegations, supra, plaintiff sufficiently states a claim for aiding and abetting tortious interference.

Accordingly, that branch of the motion to dismiss the fifth cause of action for conspiracy and/or aiding and abetting liability is granted only to the extent that it seeks to allege a conspiracy, and is otherwise denied.

VI. Tortious Interference with Contract (Sixth Cause of Action)

"In a contract interference case ... the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (White Plains Coat & Apron Co., Inc. v Cintas Corp., 8 NY3d 422, 426 [2007]).

Here, plaintiff alleges that defendant tortiously interfered with its contracts with its clients by removing the records and "refusing to honor proper requests by [plaintiff's] clients to transfer equity ownership of the SPVs after Broad Street's termination of the EOSA" (Amended Complaint, ¶ 105). Plaintiff also alleges that defendant improperly communicated with plaintiff's clients subsequent to the termination of the consulting agreement in a way that interfered with plaintiff's business (Id., ¶¶ 53-60, 64-67).

The parties litigated part of plaintiff's allegations of tortious interference in the arbitration proceeding, specifically defendant's contacts with Client 3 (Mintz letter, dated June 30, 2016, Ex. 1 at 3-4). The Panel found that defendant's contacts with Client 3 were improper and constituted tortious interference with plaintiff's contract with Client 3 (Id.). Defendant has subsequently admitted that his conduct in that circumstance was improper (Beil letter, dated July 15, 2016, at 3). These facts, coupled with plaintiff's detailed allegations regarding defendant's other actions, are sufficient at this pre-answer stage to plead a claim for tortious interference with contract.

Accordingly, that branch of the motion to dismiss the sixth cause of action for tortious interference with contract is denied.

VII. Tortious Interference with Prospective Business Relations (Seventh Cause of Action)

The seventh cause of action purports to state a claim for tortious interference with prospective business relations. A claim for tortious interference with prospective business relations requires allegations that "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (Thome v Alexander & Louisa Calder Found., 70 AD3d 88, 108 [1st Dept 2009]).

Here, plaintiff argues that it contemplated offering equity ownership services to its clients for newly created SPVs, but was unable to do so because defendant removed the records from its offices (Amended Complaint, ¶¶ 108-111). A review of plaintiff's allegations regarding defendant's alleged tortious interference, however, demonstrate they are too "vague and conclusory" to survive this pre-answer dismissal motion (BDCM Fund Adviser, LLC v Zenni, 103 AD3d 475, 478 [1st Dept 2013]). Here, the amended complaint alleges that plaintiff contemplated offering ownership services to a number of its clients related to prospective SPVs, but does not provide any details as to what specific opportunities were lost, or which clients were involved, even to

the extent of numbering them, if necessary, to protect confidential information (see Learning Annex Holdings, LLC v Gittelman, 48 AD3d 211, 211 [1st Dept 2008] ["The record evidence establishes that plaintiff's cause of action for tortious interference with prospective business relations is not viable since plaintiff has failed to identify any specific customers it would have obtained but for defendant's actions"]). Moreover, the amended complaint fails to set forth allegations of "disinterested malevolence" so as to eliminate the defense of economic interest (Kantor v Bernstein, 225 AD2d 500, 501 [1st Dept 1996]).

Accordingly, that branch of the motion to dismiss the seventh cause of action for tortious interference with prospective business relations is granted, and that claim is dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted only to the extent of dismissing the second, third, fourth, and seventh causes of action, and the fifth cause of action to the extent that it alleges conspiracy, and they are dismissed; and it is further

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ORDERED that defendant is directed to serve an answer to the second amended complaint within ten (10) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel shall appear in Part 48 (Room 242, 60 Centre Street) on April 11, 2017 at 11 a.m. for a preliminary conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/20/17

HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.