[* 1]

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

PRESENT: HON. PAUL WOOTEN Justice PART 7

MICHAEL MEIER,

Plaintiff,

-against-

DOUGLAS ELLIMAN REALTY LLC, d/b/a PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE, LENNY DANIEL SPORN, MEIR MICKEY ROTH, and ROTH SPORN GROUP, LLC.,

Defendants.

INDEX NO. 111046/09

MOTION SEQ. NO. 002

The following papers, numbered 1 to 4, were read on this motion by plaintiff to strike the answer.

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

Cross-Motion: ■ Yes ☐ No

Before the Court is a motion by Michael Meier (plaintiff), pursuant to CPLR 3126, to strike the answer of defendants Lenny Danie Sporn (Sporn), Meir Mickey Roth (Roth) and Roth Sporn Group, LLC (RSG) (collectively, the "Roth Sporn defendants"), for preclusion, costs and legal fees. Plaintiff also moves for dismissal of the first and second counterclaims asserted in the Roth Sporn defendants' answer pursuant to CPLR 3211(a)(3) and (7), and for sanctions pursuant to 22 NYCRR § 130-1.1. Also before the Court is a cross-motion by the Roth Sporn defendants, pursuant to CPLR 3124, to compel discovery from plaintiff.

Subsequent to the filing of the abovementioned motions, the Roth Sporn defendants withdrew their cross-motion, as well as the second counterclaim contained within their answer (*see* Transcript dated August 10, 2011, p. 4, 9). Additionally, by letter, plaintiff withdrew the portions of his motion made pursuant to CPLR 3126. Accordingly, the only issues left before the Court are the portions of plaintiff's motion seeking to dismiss the Roth Sporn defendants'

first counterclaim, as well as plaintiff's request for the imposition of sanctions against the Roth Sporn defendants for bringing said counterclaim.

STANDARD

Motion to Dismiss

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

The defense that a party lacks capacity to sue is waived if not raised in a pre-answer motion or in a responsive pleadings (*see Lance Intern, Inc. v First Nat. City Bank*, 86 AD3d 479 [1st Dept 2011]; CPLR 3211[e]). A motion to dismiss, pursuant to CPLR 3211(a)(3), will be granted when the movant establishes that the party asserting the claim lacks the legal capacity to sue. "The issue of lack of capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal if timely raised as a defense" (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [international citation omitted]). The doctrine of legal capacity "concerns a litigant's power to appear and bring its grievance before the court" (*id.* at 279).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by

the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino,* 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64).

Sanctions

Part 130 of the Rules of the Chief Administrator permits courts to sanction attorneys for engaging in frivolous conduct, which includes conduct: (1) "completely without merit in law"; (2) "undertaken primarily to... harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (*see* 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]).

DISCUSSION

The first counterclaim asserted by the Roth Sporn defendants alleges misappropriation of trade secrets and/or conversion of the database of real property listings by plaintiff. Plaintiff avers that while providing brokerage services to Douglas Elliman as an independent contractor, he compiled his own personal database of listings and information for his own benefit, and said listing was not required by Douglas Elliman, nor was it owned by Douglas Elliman. He also maintains that the Roth Sporn defendants lack standing to assert this counterclaim as they are not plaintiff's employer, nor do the Roth Sporn defendants have standing to sue on behalf of Douglas Elliman. In opposition, the Roth Sporn defendants proffer that the database was property of RSG, a limited liability company formed by a 'team' of brokers working for Douglas Elliman, consisting of the plaintiff, Sporn and Roth (*see* Meier Affidavit, ¶11). The Roth Sporn defendants point to an employment agreement, dated October 31, 2006, in support of their

position on the issue of standing (*see* Aff. in Opposition, exhibit S). The agreement states that plaintiff was "recruited and hired by Mickey Roth to do work with Prudential Douglas Elliman as a broker" (*id.*). In reviewing the record, the Court finds that plaintiff has failed to establish that the Roth Sporn defendants lack standing to assert the counterclaim, thus the portion of plaintiff's motion pursuant to CPLR 3211(a)(3) is denied.

The type of misconduct that is the essence of conversion is "the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*State v Seventh Regiment Fund, Inc.*, 98 NY2d 249, 259 [1st Dept 2002]). Intangible property, such as computerized client lists, have been recognized as property that is susceptible to conversion, however in order to sustain a cause of action for conversion where the property in question is intangible in nature, a plaintiff must allege that the defendant did something to exclude the plaintiff from exercising their rights over the information (*see Trustforte Corp. v Eisen*, 10 Misc3d 1064[A], 2005 NY SlipOp52116[U], *2 [Sup Ct, NY County 2005]; *see also Shmueli v Corcoran Group*, 9 Misc3d 589 [Sup Ct, NY County 2005]).

A trade secret is defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 123 [1st Dept 1998], quoting Restatement of Torts § 757, comment b). To be a trade secret, the information must be secret (*Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]). This is an essential requisite for legal protection against misappropriation of a trade secret. Where the information at issue could be easily acquired and duplicated, it is not a trade secret (*id.*). Further, customer lists will not be entitled to trade secret protection "where the names and addresses of customers are readily ascertainable" and "publicly available" (*ENV Servs., Inc. v Alesia*, 10 Misc 3d 1054[A], 2005 NY Slip Op 51947[U], *6 [Sup Ct, Nassau County 2005]). The issue of whether a trade secret is secret is generally a question of fact (*Ashland Mgt. v Janien*,

82 NY2d at 407).

The Roth Sporn defendants proffer that after plaintiff's employment was terminated he "removed the database and otherwise destroyed all copies thereof" excluding them from accessing it (Affirmation of Benjamin Brissi, Esq. in Opposition [Aff. in Opposition], ¶ 28; Roth Sporn defendants' Answer, exhibit P, ¶ 42). Plaintiff maintains that the Roth Sporn defendants counterclaim does not state a cause of action against him as he is the rightful owner of the database. In support of his position plaintiff cites to *Shmueli v NRT N.Y., Inc.* where the First Department recognized, *inter alia*, plaintiff's claim against the defendant brokerage house for conversion of her computerized real estate customer lists (68 AD3d 479 [1st Dept 2009]). Plaintiff also proffers that he merely made a copy of the real estate property database and did not destroy it, thus the Roth Sporn defendants still have access to it. After reviewing the record, the Court finds that the Roth Sporn defendants allege the requisite elements in their counterclaim such that it states a cognizable cause of action against plaintiff for alleged conversion of the database of real property listings and/or misappropriation of a trade secret. On a CPLR 3211(a)(7) motion the Court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). "Whether a [party] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). As such plaintiff's motion is denied.

Moreover, the Court finds that the Roth Sporn defendants' conduct in bringing the first counterclaim was not frivolous within the meaning of 22 NYCRR § 130-1.1, and therefore the portion of plaintiff's motion seeking the imposition of sanctions against the Roth Sporn defendants is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff Michael Meier's motion to dismiss the Roth Sporn defendants' first counterclaim, pursuant to CPLR 3211(a)(3) and (7), and for sanctions pursuant to 22 NYCRR § 130-1.1, is denied; and it is further,

ORDERED that the cross-motion brought by the Roth Sporn defendants to compel is permitted to be withdrawn; and it is further,

ORDERED that plaintiff Michael Meier's counsel is directed to serve a copy of this Order with Notice of Entry upon all parties.

This Constitutes the Decision and Order of the Court.

Dated: 3-22-13

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**