Stryker Sec. Group, Inc. v Elite Investigations Ltd
2013 NY Slip Op 31839(U)
August 7, 2013
Supreme Court, New York County
Docket Number: 151183/2013
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ______________________ Justice PART 35

Stryker

-v-

Elite

INDEX NO. 151183/13
MOTION DATE 7/22/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ No(s). ______

Answering Affidavits — Exhibits ______ No(s). ______

Replying Affidavits ______ No(s). ______

Upon the foregoing papers, it is ordered that this motion is

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

Motions sequence numbers 001-003 are consolidated for joint disposition herein.
In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff Stryker Security Group, Inc. (sequence 001) pursuant to CPLR 3212 for summary judgment on its complaint, and pursuant to CPLR 3211(a)(1) and (a)(7) for dismissal of the counterclaims of the defendant Elite Investigations Ltd. is denied, except that the portion of the fourth counterclaim for fraud against Stryker premised on the failure to disclose is dismissed, and the seventh counterclaim for a permanent injunction is severed and dismissed; and it is further

ORDERED that the motion by additional counterclaim defendant Anthony Romano (sequence 002), pursuant to CPLR 3211(a)(1), (a)(6) and (a)(7) to dismiss Elite's counterclaims asserted against him is denied, except that the seventh counterclaim for a permanent injunction is severed and dismissed; and it is further

ORDERED that the motion by additional counterclaim defendants William Mlynarick and Hoplite Security Group (sequence 003) pursuant to CPLR 3211(a)(1), (a)(6) and (a)(7) to dismiss Elite's counterclaims asserted against them is granted to the extent that the third counterclaim for tortious interference with business relations and seventh counterclaim for a permanent injunction asserted against Hoplite Security Group are severed and dismissed, and the portion of the fourth counterclaim for fraud against William premised on the failure to disclose is dismissed, and seventh counterclaim asserted against William is severed and dismissed; and it is further

ORDERED that Elite's application to amend its Answer is granted, and Elite shall amend its Answer to include the claims asserted in opposition to the above motions and serve same within 20 days; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: This constitutes the decision and order of the Court. ______, J.S.C.

8/7/13

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---X

STRYKER SECURITY GROUP, INC.,

Plaintiff,

-against-

ELITE INVESTIGATIONS LTD.,

Defendant.

---X

ELITE INVESTIGATIONS LTD.

Defendant/Counterclaim Plaintiff,

-against-

WILLIAM MLYNARICK, ANTHONY ROMANO and
HOPLITE SECURITY GROUP, INC.,

Additional Counterclaim Defendants.

---X

Index No. 151183/2013

Motion Seq. Nos. 001-003

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

In this action to recover monies owed for services rendered, plaintiff Stryker Security Group, Inc. ("Stryker") moves (sequence 001) pursuant to CPLR 3212 for summary judgment on its complaint, and pursuant to CPLR 3211(a)(1) and (a)(7) for dismissal of the counterclaims of the defendant Elite Investigations Ltd. ("Elite") for failure to state a cause of action and on the ground that Stryker's defense to the counterclaims is based on documentary evidence.

By separate motions, additional counterclaim defendant Anthony Romano ("Anthony") moves (sequence 002), and additional counterclaim defendants William Mlynarick ("William") (Stryker's President) and Hoplite Security Group ("Hoplite") move (sequence 003) pursuant to

[1] Motions sequence numbers 001-003 are consolidated for joint disposition herein.

CPLR 3211(a)(1), (a)(6) and (a)(7) to dismiss Elite's counterclaims asserted against them for failure to state a cause of action and on the grounds that Elite improperly interposed counterclaims and their defense is based on documentary evidence.

Factual Background[1]

Elite has been in the security guard and private investigation business for more than 30 years, with accounts with national companies such as Guess USA since 2003 and Equinox since 2008. Elite subcontracts with licensed security guard companies throughout the United States to service its accounts.

Elite hired Anthony as an investigator in May 2006, who later became Vice President of Operations handling national accounts in 2007 (Answer, ¶¶41-48).

In August 2009, Anthony's sister-in-law, Diane L. Baretta (who is allegedly William's wife), formed Stryker (Answer, ¶¶53-54).[2]

On December 2, 2009, Anthony, on behalf of Elite, hired Stryker pursuant to a written agreement (the "Service Agreement") for Stryker to provide the coordination and/or management of security services on behalf of Elite on a per-project basis (the "Services") (Complaint, ¶3).[3] It is alleged that neither Anthony nor William disclosed their family relationship to Elite. Stryker is not a licensed security guard company, and thus, subcontracts with licensed security guard

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[1] The Factual Background is taken from the Complaint and Elite's Answer and Counterclaims.

[2] Anthony asserts that William's wife and Anthony's wife were sisters and that that Elite's owner, Gary Weksler, had knowledge of the relationship as he attended Anthony's daughter's high school graduation party (Anthony's Memorandum of Law, page 3).

[3] Under the Service Agreement, Elite was required to pay Stryker "an amount mutually agreed upon by the parties (the "Fees") within 30 days of [Elite's] defendant's receipt of plaintiff's [Stryker's] invoice. The Service Agreement also provides that "[a]ny amounts not paid within such [30-day] period shall bear interest at the rate of one and a half percent (1.5%) per month." (Complaint, ¶2).

companies in order to provide security services to Elite's clients (Answer, ¶55). Anthony then "methodically removed the security companies with which Elite had subcontracted directly and replaced those companies with Stryker," and Stryker, at an unusually high rate of compensation, eventually "took on the role of a middleman on most Elite national accounts, including the Guess account." (Answer, ¶¶ 59-60).

In August 2010, Anthony (while still employed with Elite) and William formed Hoplite, a security company, where Anthony became its Chief Executive Officer, and applied for a security license in New Jersey, with the intent of competing with Elite (Answer, ¶¶ 61-62).

In March 2011, Anthony signed a Confidentiality, Non-Solicitation And Non-Compete Agreement (the "Non-Compete Agreement") with Elite, wherein he agreed not to solicit Elite's clients during his employment or to solicit Elite's clients or participate in a competitor's business for 12 months subsequent to the termination of his employment (Answer, ¶¶51-52).

Then in June 2012, Anthony purged his computer, shredded Elite's proprietary documents, and resigned from Elite.

Two monthly later, Guess stopped using Elite's services for stores outside of New York. Elite later learned that previously, in April 2012, Anthony handed out Hoplite business cards and solicited business from Elite's subcontractors for Hoplite. Elite also learned from Guess representatives, that in July or August 2012, William spoke to Guess and as a result, Guess decided to give its security business to Stryker. Allegedly, the only opportunity William had to meet the Guess representative was by being introduced by Anthony while Anthony was Elite's Vice President of Operations. Also, Hoplite, through Anthony and William, took for itself the security business for Equinox, a long-standing client of Elite.

As a result of monies due and owing for the Services Stryker provided to Elite, Stryker commenced this action against Elite for breach of contract, unjust enrichment, and account stated.

In response, Elite denies the unjust enrichment claim, admits that it did not pay the invoices totaling $154,645.99, and denies that any such balance is owed to Stryker (Answer, ¶¶ 8, 13-15, 18). Elite also asserts counterclaims against Stryker, and Stryker's President, William, Elite's former employee, Anthony, and Hoplite alleging, *inter alia*, breach of the duty of good faith and fair dealing, tortious interference with business relations, fraud and breach of contract. Elite also seeks to enjoin Stryker, William, Anthony, and Hoplite from soliciting Elite's clients and competing with Elite.

Stryker's Motion (001)

In support of summary judgment, Stryker argues that the undisputed Service Agreement, Elite's admission in its Answer that Stryker provided the services required thereunder, and Elite's admission in its Answer that it did not make payment on the invoices provided by Stryker between June 2012 and October 2012, totaling $154,665.99 demonstrates that Stryker is entitled to summary judgment on its breach of contract claim. Further, according to the Answer and William's affidavit, Stryker conferred a benefit on Elite by coordinating and managing security services on behalf of Elite, and Elite failed to compensate Stryker for such services. Therefore, Stryker is entitled to judgment on its unjust enrichment claim. And, according to the Answer and William's affidavit, Stryker delivered the invoices attached to the complaint *via* mail and email between June and October 2012, Elite received such invoices, and Elite did not object to them or otherwise assert that they were inaccurate. Therefore, Stryker is entitled to judgment on its

account stated claim.

As to Elite's first, second, fourth, and seventh counterclaims for breach of duty of good faith and fair dealing, tortious interference with business relations, fraud, and injunctive relief, Stryker asserts that such claims are inadequately stated, and/or contradicted by the terms of the non-exclusivity provision in the Service Agreement, which permit Stryker to render the same services for the benefit of any third party.

Anthony's Motion (002)

Anthony moves to dismiss Elite's counterclaims asserted against him on the grounds that the fifth and sixth counterclaims for breach of contract and breach of fiduciary duty were not alleged against plaintiff Stryker, and thus, are not properly brought against him pursuant to CPLR 3019. Further, Elite failed to allege that Anthony acted with the sole purpose of harming Elite, used improper or unlawful means in obtaining Equinox's business, or acted with malice to support the third counterclaim for tortious interference with business relations. Elite also failed to allege any material, false misrepresentation or omission, or the specific dates and items of fraud with sufficient particularity (CPLR 3016) to support its fourth counterclaim for fraud and fraudulent inducement, which is impermissibly duplicative of the fifth counterclaim for breach of contract in any event. And, the permanent injunction counterclaim is moot, and barred by the documentary evidence, as the one-year period subsequent to Anthony's termination, as governed by the Non-Compete Agreement, lapsed on March 9, 2013, or would have lapsed during the pendency of this motion if his termination was effective June 2012. Further, Elite has an adequate remedy at law of money damages, and no substantive claims survive to support a request for preliminary injunctive relief.

William and Hoplite's Motion (003)

William and Hoplite seek dismissal of the first counterclaim for breach of the duty of good faith and fair dealing, arguing that (1) this claim is inapplicable to William who did not sign any agreement in his individual capacity to give rise to any implied covenant, and (2) the alleged solicitation of business from Elite's clients was not only consistent with the Non-Exclusivity clause of the Service Agreement, but also did not impact the services or benefit Elite received of Stryker's coordination and management of security guard services. William and Hoplite also argue that the second counterclaim for tortious interference with business relations should be dismissed against William as Elite failed to allege that his actions were performed solely with the intent to harm Elite, or that he used improper/tortious or illegal/criminal means in obtaining Guess's business for Stryker. Simple use of professional persuasion to induce a customer to switch to a competitor is insufficient.

And, it is argued that the third counterclaim for tortious interference with business relations as to Equinox fails for the same reasons, and because there is no claim that William or Hoplite knew about Elite's relationship with Equinox; Anthony's alleged knowledge of such relationship based on his status as a former employee is insufficient as to William and Hoplite. The third counterclaim is also improperly asserted as it is directed only at William, Hoplite, and Anthony, and not at Stryker/plaintiff as required pursuant to CPLR 3019.

Further, the fourth counterclaim for fraud and fraudulent inducement are insufficiently stated against William, and fails to state allegations with the required specificity under CPLR 3016(b). Elite alleged no legal or equitable duty that would have required William to disclose to Elite the indirect familial relationship between himself and Anthony. No such duty exists in an

arms length transaction. And, absent a special relationship, no legal or equitable duty arises between parties to a contract.

Finally, the seventh counterclaim for a permanent injunction lacks merit as the purported Non-Solicitation Agreement does not preclude solicitation, and does not apply to William or Hoplite, as they were not parties to such Agreement. In any event, money damages available to Elite preclude injunctive relief.

Elite's Opposition

Elite opposes summary judgment and dismissal of its counterclaims, arguing that issues exist as to whether Elite's performance under the Service Agreement was excused. Stryker, William, and Anthony fraudulently induced Elite to enter into the Service Agreement by falsely misrepresenting that Stryker was an experienced, licensed company with a national infrastructure that gave Stryker ready access to manpower throughout the United States and Canada. Discovery will show the extent of Stryker's role in the fraudulent inducement. Further, none of the purported documentary evidence completely refutes all of the factual allegations and the Service Agreement annexed to the complaint is a counterfeit. Elite maintained all service agreements in its files, but Anthony shredded Elite's files before his departure. William failed to produce the Service Agreement when requested by Kenneth Grossberger (Elite's Vice President), and agreed to execute a new one; instead, William notified Elite that Stryker would cease providing services. Therefore, issues exist as to whether the Service Agreement produced is authentic, giving rise to a fraud claim. No explanation is given as to why William did not produce the Service Agreement when asked of him in June 2012. Further, William, who is coextensive with Stryker, took advantage of the contacts he made with Elite's clients, used Stryker's relationship of trust to gain

knowledge of Elite's clients, and solicited and stole valuable security work for Guess while performing services for Guess and other clients under the Service Agreement. When William notified Elite on October 4, 2012 that Stryker would not service Elite's clients anymore, Elite began an investigation which revealed that Stryker did not have a license or any security experience.

The use of customer information for a competitive advantage raises issues as to the breach of duty of good faith and fair dealing, and discovery will yield information regarding the extent of the fraud. The Non-Exclusivity provision in the Service Agreement did not permit Stryker to solicit and take from Elite the very clients to whom Stryker was providing services under the Service Agreement. Such breach of fiduciary duty relieves Elite of its performance under the Service Agreement. And, issues of fact exist as to whether Stryker is entitled to its mark-up on the amount above what it paid its subcontractors and whether Elite may recoup the fees it already paid.

And, argues Elite, Stryker provided no factual support of its unjust enrichment claim. Stryker solicited the security business of Guess and fraudulently induced Elite to enter the Service Agreement. Thus, issues exist as to the equitable basis of the unjust enrichment claim.

Further, Elite's various letters indicated Elite's objection to the invoices, and thus, the parties have not agreed on any balance of indebtedness to support Stryker's account stated claim. The Service Agreement does not contain a fee schedule, thus requiring Elite to evaluate the invoices on a case-by-case basis. Elite refused to accept the invoices and required documentation of the amount Stryker paid its subcontractors.

Elite argues that its counterclaims are sufficiently stated (as noted above) and the

affidavits in opposition may be considered to preserve any inartfully pleaded claims. Elite requests leave to replead in the alternative. Further, William, the sole owner, officer and employee of Stryker, acted in furtherance of his own interests, and used Stryker as a vehicle to gain access to Elite's clients to further the business of Hoplite. Thus, William, who exercised dominion and control over Stryker to commit fraud caused injury to Elite sufficient to pierce the corporate veil and hold William liable for breach of the duty of good faith and fair dealing. There are also sufficient facts to support a tortious interference with business relations claim. Elite need not allege that Stryker or William acted for the sole purpose of harming Elite since Stryker and Anthony used dishonest, unfair and improper means, which rose above using mere professional persuasion to convince Guess and Equinox, respectively, to change from Elite to Stryker. William only gained access to Elite's clients which he later stole due to the Service Agreement between Stryker and Elite. And, the fraud counterclaim is adequately supported and specifies that Stryker failed to disclose to Elite the family connection between William (of Stryker) and Anthony (Elite's Vice President), and conveyed that the Service Agreement was an arms length transaction with a licensed, experienced security and private investigation company. William and Anthony falsely portrayed Stryker as a licensed, experienced company, and then became business partners and formed a company to compete directly with Elite while the Service Agreement was still in effect. And, the breach of contract counterclaim arises from Anthony's breach of the Non-Compete Agreement.

Also, argues Elite, the irreparable harm Elite suffered by losing Guess as a client, and the moving defendants' solicitation of additional clients of Elite, supports injunctive relief. The injunction against Hoplite and William is inextricably bound with the injunction sought against

Anthony for breach of his Non-Compete Agreement in stealing clients of Elite. Hoplite is the company through which Anthony breached his Non-Solicitation Agremeent, and William is Anthony's partner in Hoplite.

Finally, pursuant to CPLR 1001, Stryker is a necessary party to the counterclaims to which Elite properly joined as additional parties. CPLR 3019 specifically contemplates that counterclaims may be asserted against "other parties alleged to be liable" who are not plaintiffs, and sets forth the procedure for including in an answer the counterclaim whereupon the person not a party shall become a defendant. Unlike the third counterclaim, the first, second, fourth and seventh counterclaims include Stryker, and all counterclaims against William and Hoplite involve related facts and legal issues that should be resolved in the same action. A third-party complaint may not be an appropriate means for making other persons alleged to be liable parties to the counterclaims, especially where Elite is not seeking contribution or indemnification. However, Elite filed a third-party action against William, Hoplite and Anthony to assert claims that are the subject of the counterclaims that do not include Stryker. The Court may sever the third party action if it finds that such action would unduly burden this action.

Reply by Movants

In reply, Stryker argues that Elite's conclusory assumption that Stryker was complicit in the fraudulent misrepresentations made by its own employee Anthony is insufficient to vitiate Elite's contractual obligations to Stryker. Also, the Service Agreement imposed no duty upon Stryker to refrain from competing with Elite. Thus, Stryker did not breach any duty of the implied covenant of good faith and fair dealing. Further, Stryker is the party that presented the Service Agreement to Elite, so its lack of conformity with Elite's commonly used forms is

reasonable, and insufficient to invalidate the binding Service Agreement. Nor is William's purported failure to execute a new agreement, that William wanted his then attorneys to review, relevant to the issues. Elite's Answer, and William's affidavit, invoices and timesheets of security services provided are sufficient to support the compensation sought in the unjust enrichment claim. And, Elite's correspondence to Stryker never objected to the amounts claimed in the invoices, and conceded there was a balance due Stryker.

Further, Stryker argues, Elite's assertion that Stryker improperly used confidential customer information, raised for the first time in opposition, is insufficient to support its counterclaim for breach of the covenant of good faith and fair dealing. And, the Service Agreement at issue was between Elite and Stryker, not Anthony and William, and the submissions show that other officers of Elite participated in the decision to hire Stryker. Thus, Stryker had no duty to disclose the relationship between William and Anthony. There is no claim that the Service Agreement was created for the purpose of deceiving Elite, that Elite was deceived by the Service Agreement, or that Elite relied on the Service Agreement to its detriment. Nor is there any factual basis for the claim that Stryker and Anthony wholly invented the Service Agreement attached to the complaint. The new allegations regarding Stryker's experience and licensing status are inconsistent with Elite's Answer and thus insufficient to defeat Stryker's motion.

Since the only alleged harm to Elite is having to compete with Stryker in the commercial market for security services, and there is no non-solicitation or non-competition agreement between the parties, injunctive relief is unwarranted.

Anthony, in reply, adds that even if he solicited Equinox or other customers of Elite

(which he denies), such solicitation is not actionable unless the customer list is a trade secret or there was wrongful conduct by the employee such as physically taking or copying the employer's files, factors not present herein. The new allegations by Elite in opposition regarding Stryker's license and experience are insufficient as they are inconsistent with its Answer, and fail to particularize to whom and when the alleged statements were made. And, injunctive relief is unwarranted, as Elite sat on its rights since July 2012 when it discovered Anthony's alleged violation of the Non-Compete Agreement, and since the non-solicitation restrictive period expired in July 2013. Further, courts disfavor restrictive covenants that merely serve to prevent an employee from using skills not unique or extraordinary. Finally, the fifth and sixth counterclaims against Anthony are not only improperly interposed, but do not qualify as third-party claims as they are wholly unrelated to Stryker's money damages claims against Elite.

In their reply, Hoplite and William add that corporate officers, such as William, cannot be held personally liable for contractual obligations of their corporations. Further, Elite did not allege facts to pierce the corporate veil of Stryker to hold William personally liable to Elite. The tortious interference with a business relationship claim also fails because William had no direct relationship with Elite, but was involved in an arms length transaction. Nor is there any allegation that either William or Stryker had knowledge of or anything to do with the relationship between Elite and Equinox. And, the third party complaint was improperly interposed. Elite's claim against William for fraud also fails as there is no claim that William created the Service Agreement to deceive Elite. Finally, Elite provided no basis for binding William to the terms of Anthony's Non-Solicitation Agreement to support its claim for a permanent injunction.

Discussion

Pursuant to CPLR 3211(a)(l), a court may dismiss a cause of action on the ground that a defense thereto is founded upon documentary evidence "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). The test on a CPLR 3211(a)(1) motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez, supra*, 84 NY2d 83, 88; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Nonnon v City of New York*, 9 NY3d 825 [2007]; *Stendig, Inc. v Thom Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). "Affidavits and other evidence may be used freely to preserve inartfully pleaded but potentially meritorious claims" (*Eiseman, citing R.H. Sandbar*, 148 AD2d at 318).

CPLR 3211(a)(6) provides for pre-answer dismissal of a counterclaim on the ground that

"it may not properly be interposed in the action."

Further, on a motion for summary judgment, the proponent of such a motion must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]).

Stryker's Motion for Summary Judgment

As to Stryker's motion for summary judgment on its complaint, Stryker must establish (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages (*VisionChina Media Inc. v Shareholder Representative Services, LLC* 967 NYS2d 338 [1st Dept 2013] *citing Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303, 307, 782 NYS2d 1 [1st Dept 2004]). Here, Stryker established, through the Service Agreement and William's affidavit, that it entered into such Agreement with Elite, which required Stryker to provide coordination and/or management of security services for Elite on a per project basis, and that Stryker performed the services required thereunder. Under the Service Agreement, Elite was obligated to pay Stryker an amount mutually agreed upon by the parties within 30 days of Elite's receipt of the project invoice. Stryker also established, through the admission in Elite's Answer, that Elite failed to pay for certain services billed, and the resulting

damages owed to Stryker. It is noted that the Service Agreement also obligates Elite to pay Stryker's attorneys' fees in connection with collection efforts resulting from Elite's default.

However, Elite raised an issue of fact as to the validity of the Service Agreement. It is "well established that a contract induced by fraudulent representation is voidable, and that the defrauded party has several remedies" including, "defend[ing] an action brought against him [or her] on the contract, setting forth the fraud and rescission as a defense . . . in which the party rescinding or desiring to rescind in effect says, you have induced me to enter into this contract by fraud. I offer you what I received. Give me back that which you received, or if that be impossible pay me its value. . . . If sued upon the contract, he [or she] may counterclaim his [or her] damages" (*VisionChina Media Inc. v Shareholder Representative Services, LLC*, 967 NYS2d 338 *supra*]; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 798 NYS2d 14 [1st Dept 2005] (stating, that a "contract induced by fraud is subject to rescission," "rendering it unenforceable by the culpable party")). A defendant alleging that it was fraudulently induced to execute an instrument must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*NM IQ LLC v OmniSky Corp.*, 31 AD3d 315, 317 [1st Dept 2006], *quoting Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). And, each element of the defense must be pleaded with particularity (CPLR 3016[b]; *see Anos Diner, Inc. v Pitios Gourmet, Ltd.*, 100 AD2d 948, 949, 475 NYS2d 86 [2d Dept 1984]; *Citibank, N.A. v Plapinger, citing Hogan & Co. v Saturn Mgt.*, 78 AD2d 837, *supra*; *Cape Vincent Milk Producers Co-op., Inc. v St. Lawrence Food Corp.*, 43 AD3d 606, 842 NYS2d 594

[3d Dept 2007]).

Here, Elite's Answer, coupled with the affidavits of its President, Joseph Saponaro, and its Executive Vice President, Gary Weksler, warrant further discovery on the issue of whether Stryker, William and/or Anthony fraudulently induced Elite to enter into the Service Agreement with Stryker (fourth counterclaim) (*Nonnon v City of New York*, 9 NY3d 825 [2007] (affidavits may be considered to remedy pleading defects); *Amaro ex rel. Almazan v Gani Realty Corp.*, 60 AD3d 491, 876 NYS2d 1 [1st Dept 2009]).

It is noted that Stryker sought dismissal of the fraudulent inducement claim for failure to state a cause of action and upon documentary evidence. Upon a motion to dismiss a cause of action for failure to state a claim upon which relief can be granted, the facts must be accepted as true and all favorable inferences must be credited to the claimant before determining whether any cognizable legal theory can be discerned (*Stern v Burkle*, 20 Misc 3d 1101(A), 867 NYS2d 20 (Table) [Supreme Court, New York County 2008] *citing Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). Giving Elite the benefit of every possible favorable inference (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 357 NE2d 970 [1976]), the attestations that (1) Anthony misrepresented and portrayed to Elite that William had resources all over the country and an infrastructure, including a security license, to support the level of security services required of Elite, (2) William, which was the sole officer and employee of Stryker, was complicit in Anthony's alleged misrepresentations (*see also discussion, infra*, pp. 21-22),[4] and that (3) Stryker did not have any experience in the security industry or a security

[4] It bears noting that a claim for aiding and abetting fraud requires: (1) a fraud on another, (2) that the defendant knowingly induced or participated (or was complicit) in the fraud, and (3) that plaintiff suffered damage as a result of the fraud (*Gotham Boxing Inc. v Finkel*, 18 Misc 3d 1114(A), 856 NYS2d 498 (Table) [Supreme Court,

license, did not have any preexisting network of relationships with security guard and private investigation companies. Elite claims that it relied on the alleged misrepresentations to its detriment. Further, the documentary evidence submitted fails to refute these claims as a matter of law. Therefore, in light of this Court's finding that dismissal of the fraud and fraudulent inducement counterclaim is unwarranted, and such counterclaim, if proven, relieves Elite's performance under the Service Agreement, summary judgment on Stryker's breach of contract claim is unwarranted at this juncture.

As to the unjust enrichment claim, such a cause of action arises "when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another" (*see Parsa v State of New York*, 64 NY2d 143, 148, 485 NYS2d 27 [1984]). "The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 884 NYS2d 47 [1st 2009]). Thus, Stryker must prove that it conferred a benefit upon the Elite, and that Elite obtained the benefit without adequately compensating Stryker therefor (*Nakamura v Fuji*, 253 AD2d 387 [1st Dept 1998]). This Court's finding that a fraud and/or fraudulent counterclaim has been stated against Stryker precludes a finding in favor of Stryker on its unjust enrichment claim. "Unjust enrichment is a quasi-contract theory of recovery, and 'is an obligation imposed by equity *to prevent injustice*, in the absence of an actual agreement between

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footnote 4, cont'd.

New York County 2008]). Although inartfully stated in the Answer, the allegations satisfy the elements needed to state a claim for aiding and abetting fraud, and thus, dismissal of the claim for fraudulent inducement and fraud is unwarranted at this pleading stage.

the parties concerned" (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 926 NYS2d 494 [1st Dept 2011] *citing IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142, 879 NYS2d 355, 907 NE2d 268 [2009] (emphasis added)). As it cannot be said, as a matter of law at this juncture, that equity and good conscience do not permit Elite to retain what is sought to be recovered, summary judgment on this claim is denied.

As to Stryker's third cause of action for account stated, "where an account is made up and rendered, the one who receives it is bound to examine it, and, if the accounting is admitted as correct, it becomes a stated account and is binding on both parties, the balance being the debt which may be sued for and recovered by law" (*Rosenman Colin Freund Lewis & Cohen v Neuma*, 93 AD2d 745 [lst Dept 1983]). Moreover, "where an account is rendered showing a balance, if the party receiving the account fails to dispute its correctness or completeness, that party will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown" (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165 [1st Dept 1991]). Thus, Stryker must show Elite's receipt and retention of the subject invoices, without proper objection within a reasonable time (*see, e.g., Loheac v Children's Corner Learning Center*, 51 AD3d 476 [1st Dept 2008]; *Ruskin, Moscou, Evans & Faltischek v FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1st Dept 1996]).

Here, Stryker established that from June 2012, through and including October 2012, Stryker emailed Elite invoices (and supporting time sheets) totaling $145,714.70 for the Services. On January 21, 2013, Stryker emailed Elite an invoice for finance charges totaling $8,930.29 (1.5% interest pursuant to the Service Agreement). Additionally, in or about October 2012, a copy of each unpaid invoice and supporting time sheets, were sent to Elite by Federal Express.

Stryker established that Elite retained the invoices without objection and failed to pay Stryker the amount of $154,645.99. Therefore, Stryker established its claim for account stated.

However, in opposition, Elite submitted correspondence indicating (1) a request for a list of outstanding balances" as "there remains an outstanding balance owed to you for services rendered (October 12, 2012), and (2) the "bill for interest" is "not valid" (November 21, 2013, January 21, 2012). Such correspondence does not constitute "an unambiguous admission of the accuracy or completeness of the stated figures, and therefore does not, by itself, constitute an express assent to any balance due. Such evidence being insufficient to establish plaintiff's entitlement to judgment as a matter of law" (*CIT Group/Business Credit, Inc. v Renee Intern. Inc.*, 265 AD2d 251, 697 NYS2d 16 [1st Dept 1999]; *Reid & Priest L.L.P. v Realty Asset Group, Ltd.*, 250 AD2d 380, 673 NYS2d 81 [1st Dept 1998] (denying summary relief on an account stated claim where defendant made partial payments of plaintiff's invoices "since the precise amount due is not thereby established")).

Therefore, based on the above, Stryker's motion for summary judgment on its complaint against Elite is denied.

Dismissal of Counterclaims

First Counterclaim

As to the dismissal of the remaining counterclaims, the Court finds that Elite's first counterclaim for breach of the duty of good faith and fair dealing sufficiently stated as against Stryker, and the documentary evidence, *to wit:* the Service Agreement's non-exclusivity clause, does not refute this claim as a matter of law. "It is axiomatic that all contracts imply a covenant

of good faith and fair dealing in the course of performance (*Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 908 NYS2d 27 [1st Dept 2010] *citing 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153, 746 NYS2d 131 [2002]). Implicit in every contract is a promise of good faith and fair dealing that is breached when a party acts in a manner that—although not expressly forbidden by any contractual provision—would deprive the other party of receiving the benefits under their agreement (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 861 NYS2d 280 [1st Dept 2008]). Elite alleges that it is in the business of providing security and investigative services to companies, such as Guess and Equinox, for profit, and engaged Stryker to facilitate its efforts in this regard. Stryker was hired to coordinate and/or manage such security services on behalf of clients of Elite. Elite essentially alleges that instead of coordinating and/or managing such security services, Stryker frustrated the basic purpose of the Service Agreement by soliciting and taking Elite's clients for itself.

Further, while the Service Agreement states that "nothing in this Agreement will in any way restrict [Stryker's] right to render the same or similar services to or for the benefit of any third parties" (Complaint, Exh. A at ¶ 4), even "an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement" *(Legend Autorama, Ltd. v Audi of America, Inc.*, 100 AD3d 714, 954 NYS2d 141 [2d Dept 2012] *citing Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 302, 765 NYS2d 575 [1st Dept 2003]). While a claim of implied duty of good faith and fair dealing cannot create new duties under a contract or substitute for an insufficient contract claim (*Duration Mun. Fund, L.P. v. J.P. Morgan Securities Inc.*, 25 Misc 3d 1203(A), 899 NYS2d 59 (Table) [Supreme Court, New York County 2009]), and brings to light implicit duties to act in good faith already

contained, although not necessarily specified in the contract, Elite engaged Stryker pursuant to the Service Agreement to coordinate and manage security services for Elite, and any discretion Elite retained to provide services to other parties did not vitiate its obligation to exercise this right in bad faith *(Duration Mun. Fund, L.P., supra)*. Viewing the allegations in Elite's Answer and the affidavits of Elite's officers liberally and in the light most favorable to Elite, it cannot be said Elite failed to state this claim against Stryker, and, as such, dismissal of this claim against Stryker is unwarranted.

As William points out, in order for the implied duty of good faith and fair dealing to stand as a cause of action against him, "there must be an underlying contractual obligation between the parties" (*Duration Mun. Fund, L.P., supra*). Here, the Service Agreement was between Elite and Stryker, and William signed the Service Agreement in his capacity as an officer for Stryker. However, Elite asserts sufficient allegations to merit discovery on the issue of whether the corporate veil should be pierced so as to hold William liable under the Service Agreement. While a "corporation exists independently of its owners, as a separate legal entity" courts will disregard the corporate form and "pierce the corporate veil" whenever necessary "to prevent fraud or to achieve equity" (*Walkovszky v Carlton*, 18 NY2d 414, 276 NYS2d 585 [1966]). "Generally, in order to pierce the corporate veil, it must be established that '(1) the owners [of a corporation] exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury'" *(Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 962 NYS2d 82 [1st Dept 2013]). Elite alleges that William, the sole officer, owner, and employee of Stryker, used the Service Agreement in order to gain access to Elite's clients, and in

furtherance of aiding his own company, Hoplite, which he formed with Anthony. Discovery may yield evidence of William's participation in the alleged fraudulent inducement of Elite to enter into the Service Agreement, and demonstrate William's complete domination of Stryker to commit the alleged fraud, dismissal of the first counterclaim as asserted against William is denied.

Second Counterclaim

As to the second counterclaim for tortious interference with Elite's business relations with Guess, the parties agree that such a claim requires Elite to allege "1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice *or used improper or illegal means that amounted to a crime or independent tort*; and 4) that the defendant's interference caused injury to the relationship with the third party" *(Amaranth LLC v J.P. Morgan Chase & Co.*, 32 Misc 3d 1235(A), 938 NYS2d 225 (Table) [Supreme Court, New York County 2011 [internal citations omitted] (emphasis added)). Stryker's and William's contention that Elite failed to allege that they interfered with Elite's business relationship with Guess for the sole purpose of harming Elite ignores the phrase following the disjunctive "or," *to wit: used improper* or illegal *means that amounted to a* crime or *independent tort*, and here, Elite has stated an independent fraudulent inducement claim and breach of implied duty of good faith and fair dealing claim against Stryker and William. More than simple persuasion has been alleged. Therefore, dismissal of the second counterclaim against Stryker and William is denied.

Third Counterclaim

As to the third counterclaim for tortious interference with business relations, dismissal pursuant to CPLR 3211(a)(6) on the ground that Elite improperly interposed counterclaims under CPLR § 3019(a) is unwarranted.[5] CPLR § 3019(a) provides:

> (a) Subject of counterclaims. A counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable.

Thus, a counterclaim is a claim asserted by a defendant against a plaintiff, a person whom plaintiff represents or a plaintiff and other persons alleged to be liable. It is undisputed that the third counterclaim asserted against William, Anthony and Hoplite is not asserted against plaintiff Stryker. And, it has been held that where one defendant files a counterclaim against another defendant *which does not raise any question with plaintiff*, the other defendant is entitled to dismissal of the counterclaim on ground that it cannot not properly be interposed in the action (emphasis added) (*Kail v Cedric Realty Co.*, 63 NYS2d 461 [Supreme Court, New York County 1946]; *Csicsics v Hallay*, 170 Misc 364, 10 NYS2d 440 [1939] (dismissing the counterclaim interposed reasoning that it "in no way raises any questions with the plaintiff. It involves a controversy between the defendants only. As such it is not authorized); *Linzer v Bal*, 184 Misc 2d 132, 706 NYS2d 831 [Civil Court, New York County] [2000] (dismissing counterclaim against defendant which did not include petitioner's name, and stating that even if there was a "sufficient link to petitioner," the counterclaim was improperly served)). Thus, courts have recognized

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[5] Although William and Hoplite move to dismiss the third counterclaim pursuant to CPLR 3019, Anthony does not.

circumstances warranting an exception to this rule where the counterclaim is "so closely connected with plaintiffs' cause of action that it should be litigated in this action" *(Gettinger v Glasser*, 204 AD 829, 199 NYS 41 [1st Dept 1923]). Here, Stryker's breach of contract claims are subject to Elite's counterclaims for breach of duty of good faith and fair dealing and fraudulent inducement claim (which involve William and Anthony). Therefore, Elite's counterclaim against William (and Anthony) for tortious interference with Elite's business relations with Equinox is sufficiently linked to and raises questions as to Stryker, the company through which William and Anthony allegedly undertook their actions. As such, dismissal of the third counterclaim pursuant to CPLR 3211(a)(6) is unwarranted.

Additionally, as stated above, Elite's failure to allege that William and Anthony acted with the sole purpose of harming Elite does not defeat the third counterclaim, since Elite sufficiently alleges an independent fraudulent inducement claim against William and Anthony. And, as indicated above, William, the sole officer, owner, and employee of Stryker, used Stryker's Service Agreement in order to gain access to Elite's clients, and in furtherance of aiding his own company, Hoplite, which he formed with *Anthony*, who Elite alleges in the third counterclaim had actual knowledge of Elite's relationship with Equinox. Discovery may yield evidence of William's knowledge of Equinox as a client of Elite. However, as to Hoplite, even if discovery yielded that Hoplite had knowledge of Elite's business relationship with Equinox, no other independent tort is alleged against Hoplite. Thus, having failed to allege any facts indicating that Hoplite acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort, dismissal of the third counterclaim is warranted as to Hoplite.

Fourth Counterclaim

As to the fourth counterclaim for fraud and fraudulent inducement against Stryker, William and Anthony, as stated above (*see infra*, pp. 16-17), Elite sufficiently stated a fraudulent inducement claim against these parties based on representations made to Elite that Stryker was an experienced, licensed security company, leading Elite to believe that the Service Agreement was based on an arms-length transaction, when in fact, Stryker was allegedly unlicensed, inexperienced, and run by Anthony's in-laws.

Similarly, to state a *fraud* claim, Elite must allege "misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury' (*Waggoner v Caruso*, 68 AD3d 1, 886 NYS2d 368 [1st Dept 2009]). As indicated above, the allegations and attestations sufficient state a claim for fraud against these parties. Dismissal of the fraud claim on the ground that it is duplicative of the breach of contract counterclaim is unwarranted. A "cause of action for fraud arising out of a contractual relationship may be maintained only where the plaintiff alleges a breach of duty separate from, or in addition to, a breach of the contract" (*Levine v American Intern. Group*, 16 AD3d 250, 792 NYS2d 35 [1st Dept 2005]). A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, *i.e.*, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract (*J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7, 745 NYS2d 634 [Sup. Ct., New York County 2001], *citing, First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291-92, 690 NYS2d 17 [1st Dept 1999]). By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract. For example, if a plaintiff alleges that

it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim (*J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7 *supra*).

Here, contrary to Anthony's contention, Elite does not allege that Anthony entered into a contract with the intention not to perform, which would be insufficient to support a claim for fraud *(see Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323-24, 776 NYS2d 273 [1st Dept 2004]; *Rochelle Assocs. v Fleet Bank*, 230 AD2d 605, 606 [1996], *lv dismissed* 89 NY2d 1030 [1997]). Instead, Elite alleges that Anthony breached his Non-Compete Agreement with Elite by forming Hoplite and soliciting Elite's clients during his employment and after he resigned. The facts giving rise to this claim are different from those alleged in the fourth counterclaim for fraud and fraudulent inducement which pertain to the Stryker Agreement, as opposed to the Service Agreement in the fourth counterclaim.

And, as to the fraud claim based on the failure to disclose the familial relationship between William and Anthony, Elite sufficiently alleged in its Answer and through the affidavits of its officers, that Anthony concealed the close family relationship between him and Stryker's President William in connection with the Service Agreement between Elite and Stryker, and that Elite detrimentally relied upon such omissions.

However, since an omission does not constitute fraud unless there is a fiduciary or "special" relationship between the parties (*Golub v Tanenbaum-Harber Co., Inc.*, 88 AD3d 622, 931 NYS2d 308 [1st Dept 2011]), and no such fiduciary or "special" relationship has been alleged between Elite and William, or Elite and Stryker, the portion of the fraud claim against William

and Stryker premised on the failure to disclose is dismissed.[6]

Fifth and Sixth Counterclaims

As to the fifth counterclaim against Anthony for breach of the Non-Compete Agreement (for forming Hoplite and soliciting Elite's clients during and after his resignation) and for breach of fiduciary duty and loyalty owed to Elite (also for, *inter alia*, forming Hoplite), dismissal pursuant to CPLR 3211(a)(6) on the ground that Elite improperly interposed counterclaims under CPLR § 3019(a) is unwarranted. Contrary to Anthony's contention, these counterclaims are sufficiently linked to and raises questions as to plaintiff Stryker, which although not named in the fifth and sixth counterclaims, is the company through which William and Anthony (through alleged joint participation) allegedly undertook their tortious actions.

Seventh Counterclaim

In support of its claim for permanent injunctive relief against Anthony, Elite alleges that Anthony resigned in June 2012 (Answer, ¶64), and that he should be enjoined from soliciting Elite's clients for one year following his termination of employment pursuant to the Non-Compete Agreement (in which Anthony acknowledged, the breach thereof would constitute irreparable harm (¶3)). In order to prevail on an application for injunctive relief, the movant must show: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor" (*Doe v Axelrod*, 73 NY2d 748, 750, 536 NYS2d [1988]; *Housing Works, Inc. v*

[6] To the extent the fourth counterclaim alleges that Anthony and William "fabricated a false and fraudulent service agreement" which "misrepresents the obligations of Stryker" (Answer, ¶106) is vague and conclusory, and lacks the required specificity to support a fraud claim.

City of New York, 255 AD2d 209, 213, 680 NYS2d 487, 491 [1st Dept 1998]). And, the possibility that money damages may be adequate does not prevent injunctive relief (*Bashein v Landau*, 96 AD2d 479, 465 NYS2d 178 [1st Dept 1983]). As to William and Stryker, although they are not parties to the Non-Compete Agreement, Elite has asserted sufficient facts to show a likelihood of ultimate success on the merits of its counterclaims against these parties, irreparable injury if injunctive relief is denied, that the balance of the equities tips in Elite's favor.

However, although Elite has satisfied these elements, as of the date of this decision, the one year non-compete period expired in June 2013, thereby rendering this cause of action moot (*see Digitronics Inventioneering Corp. v Jameson*, 11 AD3d 783, 783 NYS2d 678 [3d Dept 2004] (holding that appeal from the lower court's August 29, 2003 denial of plaintiff/employer's request to enjoin defendant from seeking employment in plaintiff's industry for a period of one year from April 28, 2003 was "rendered moot because more than one year has elapsed from the date that defendant terminated his employment with plaintiff")).

Therefore, dismissal of the seventh counterclaim for a permanent injunction is warranted.

Amend Counterclaims

"It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1st Dept 2011] citing CPLR 3025[b] and *Solomon Holding Corp. v Golia*, 55 A.D.3d 507, 868 N.Y.S.2d 612 [2008]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" (*Kocourek citing Cherebin v Empress Ambulance Serv., Inc.*, 43

AD3d 364, 365, 841 NYS2d 277 [2007], *quoting Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, 444 NYS2d 571 [1981]). There is no indication that the additional counter claim defendants would suffer any prejudice from the amendment sought herein.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff Stryker Security Group, Inc. (sequence 001) pursuant to CPLR 3212 for summary judgment on its complaint, and pursuant to CPLR 3211(a)(1) and (a)(7) for dismissal of the counterclaims of the defendant Elite Investigations Ltd. is denied, except that to the extent that the portion of the fourth counterclaim for fraud against Stryker premised on the failure to disclose is dismissed, and the seventh counterclaim for a permanent injunction is severed and dismissed; and it is further

ORDERED that the motion by additional counterclaim defendant Anthony Romano (sequence 002), pursuant to CPLR 3211(a)(1), (a)(6) and (a)(7) to dismiss Elite's counterclaims asserted against him is denied, except that the seventh counterclaim for a permanent injunction is severed and dismissed; and it is further

ORDERED that the motion by additional counterclaim defendant and additional counterclaim defendants William Mlynarick and Hoplite Security Group (sequence 003) pursuant to CPLR 3211(a)(1), (a)(6) and (a)(7) to dismiss Elite's counterclaims asserted against them is granted to the extent that the third counterclaim for tortious interference with business relations and seventh counterclaim for a permanent injunction as asserted against Hoplite Security Group are severed and dismissed, and the portion of the fourth counterclaim against William premised

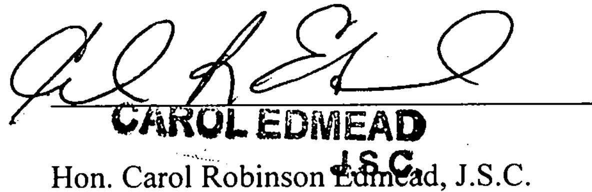
on the failure to disclose is dismissed, and seventh counterclaim asserted against William is severed and dismissed; and it is further

ORDERED that Elite's application to amend its Answer is granted, and Elite shall amend its Answer to include the claims asserted in opposition to the above motions and serve same within 20 days; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 7, 2013



Hon. Carol Robinson Edmead, J.S.C.