STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

WILLIAM TELL SERVICES, LLC,

Plaintiff,

-against-

CAPITAL FINANCIAL PLANNING, LLC, TODD SLINGERLAND, RICHARD AVDOYAN, HOLLY ROTH and JOHN BUFF,

Defendants.

JOHN BUFF,

Defendant and
Third-Party Plaintiff,

-against-

JOSEPH A. VENTURA,

Third-Party Defendant.

Supreme Court Rensselaer County All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI No. 41-0049-2011 Index No. 235776

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Defendants Capital Financial Planning, LLC ("Capital Financial"), Todd Slingerland ("Slingerland"), Richard Avdoyan ("Avdoyan"), and Holly Roth ("Roth") and defendant and third-party plaintiff John Buff ("Buff") move pursuant to CPLR 3212 for summary judgment dismissing plaintiff William Tell Services, LLC's ("William Tell") complaint in this action. William Tell cross-moves for partial summary judgment against Avdoyan, Roth, and Buff on William Tell's first cause of action for breach of a non-compete agreement.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see Vega v Restani Construction Corp., 18 NY3d 499 [2012]; Ferluckaj v Goldman Sachs & Co., 12 NY3d 316 [2009]; Smalls v AJI Industries, Inc., 10 NY3d 733 [2008] Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Smalls v AJI Industries, Inc.,supra, citing Alvarez v Prospect Hosp., supra). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, supra; Alvarez v Prospect Hosp., supra). The Court's function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable

inference, and determine whether there is any triable issue of fact outstanding (see Simpson v Simpson, 222 AD2d 984, 986 [3rd Dept., 1995]; Boyce v Vazquez, 249 AD2d 724, 726 [3rd Dept., 1998]).

In addition, a party's burden on a motion for summary judgement is not satisfied by merely pointing to gaps in its adversary's proof. To succeed, there must be affirmative evidentiary proof demonstrating the movant's right to judgment as a matter of law. Until that condition is met, the strength of the opponent's proof is immaterial (see Antonucci v Emeco Industries, Inc., 223 AD2d 913, 914 [3rd Dept., 1996]; Rothbard v Colgate University, 235 AD2d 675, 678 [3rd Dept., 1997]; Clark v Globe Business Furniture Inc., 237 AD2d 846, 847 [3rd Dept., 1997]; Moffett v Harrison and Burrowes Bridge Contractors Inc., 266 AD2d 652, 654 [3rd Dept., 1999]). "'[A] movant's failure to satisfy his or her burden on a summary judgment motion requires denial of the motion, regardless of the sufficiency of the opposing papers'" (Ames v Paquin, , 40 AD3d 1379 [3rd Dept., 2007], quoting Serrano v Canton, 299 AD2d 703, 705 [2002]).

In order to provide a framework for discussion of the motions, it is necessary to provide a brief summary of the underlying events. Third-party defendant Joseph A. Ventura ("Ventura") is the principal of William Tell. William Tell is described by Ventura as "a diversified domestic liability company [which] has offered clients insurance, securities and tax services since 2000." Under securities laws, a securities broker such as William Tell must be affiliated with a broker-dealer in order to sell securities. In this instance Ventura and William Tell were registered solely as a representative of ING Financial ("ING Financial"), a broker-dealer, and sold ING Financial products. Capital Financial, a competitor of William

Tell, also sold ING products. William Tell and Capital Financial, although competitors, shared office space at their place of business located at 6 Tower Place, Albany, New York. Todd Slingerland is a member of Capital Financial, and holds a Series 24 license which allows him to supervise securities brokers with respect to compliance with securities laws. He was appointed by ING Financial as OSJ (Office of Supervisory Jurisdiction) to exercise supervisory jurisdiction over William Tell. On July 13, 2010 William Tell was placed on what is referred to as "heightened supervision" by ING Financial, allegedly due to customer complaints and "compliance issues". This required Slingerland and one Clare Mertz (an employee of Capital Financial) to meet with Ventura once a week to oversee William Tell's activities.[1] Slingerland maintains that despite the heightened supervision, ING Financial continued to receive complaints concerning William Tell. Slingerland also indicates that William Tell continued to fail to follow compliance procedures; and continued to "have a high risk profile". He indicates that as a consequence of the foregoing, on February 3, 2011, Ventura and William Tell were terminated as registered representatives of ING Financial. Ventura, on the other hand, maintains that Slingerland improperly caused ING to terminate William Tell and Ventura as representatives of ING, and in so doing enabled Capital Financial to acquire all of William Tell's clients and good will.

Holly Roth, Richard Avdoyan and John Buff were hired by William Tell as brokers in connection with the sale of ING Financial products. According to Ventura, Roth was hired in January 2008, Avdoyan in July 2009, and Buff in November 2009. Each was allegedly required to sign confidentiality agreements containing a covenant not to compete

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[1]It also required Slingerland to conduct two audits of William Tell a year (rather than the customary one such annual audit).

with William Tell ("non-compete agreements"), if their affiliation with William Tell ended. It is alleged by the plaintiff that in late 2010 through February 3, 2011 Slingerland successfully recruited Roth, Avdoyan and Bluff to leave William Tell and join Capital Financial, despite being aware of the existence of the non-compete agreements signed by all three said individuals. It is further alleged that Roth, Avdoyan and Buff violated the non-compete agreements by immediately contacting and soliciting William Tell customers. In addition, it is alleged that Buff was fired by William Tell on January 20, 2011 by reason of his refusal to sign another non-compete agreement. Plaintiff maintains that Buff immediately went to work for Capital Financial, and on the same day surreptitiously accessed William Tell's computer servers, copying for his own use and then deleting, 375 files containing confidential proprietary information.

Plaintiff's complaint contains four causes of action. The first cause of action, sounding in breach of contract, against Avdoyan, Roth and Buff, seeks an injunction and damages arising from the alleged breach of the non-compete agreements. The second cause of action, against the same defendants, is for breach of a fiduciary duty owed to the plaintiff. The third cause of action, against Slingerland and Capital Financial is one for tortious inference with contract, alleging that they induced Avdoyan, Roth and Buff to breach the non-compete agreements. The fourth cause of action in one for tortious interference with prospective business advantage against Slingerland, Capital Financial and Buff.

Buff's Motion For Summary Judgment

Plaintiff's First Cause of Action (Breach of Contract)

Initially, Buff contends that the plaintiff should be precluded from any relief under its first cause of action (breach of the non-compete agreement) under principles of judicial estoppel. The doctrine of judicial estoppel precludes a party "'from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding'" (American Association of Bioanalysts v New York State Department of Health, 75 AD3d 939, 947 [3rd Dept., 2010], quoting Maas v Cornell Univ, 253 AD2d 1, 5 [1999], affd 94 NY2d 87 [1999], and citing Matter of Hartsdale Fire Dist. v Eastland Constr., Inc., 65 AD3d 1345, 1346 [2009], lv denied 14 NY3d 701 [2010]). Buff makes reference to statements made in connection with a motion and cross-motion for a preliminary injunction made in 2011 before Acting Supreme Court Justice Christian Hummel, who was then assigned to the instant action. In two separate instances, Ventura and his attorney Wayne Smith denied that William Tell was seeking to enforce a non-compete agreement against Buff. In an affidavit sworn to October 23, 2011, Ventura stated at paragraph 16 "[t]he claims against Buff emanate, not from any non-compete agreement, but spring from his actions on or after January 20, 2011." In an appearance on the record in open court on November 2, 2011, the following colloquy took place between the Court and plaintiff's attorney, Wayne Smith:

> "The Court: Thank you Counselor. Mr. Smith, would you like the last word?
>
> Mr. Smith: Yes. I would like to join Attorney Ash in her comments; and in replying to Attorney Steck's three points that he brought forward, he stated that these clients were not clients

> of Mr. Ventura's, but yet Mr. Ventura brought these clients to IAG (sic).
>
> Further more, he deals with Buff's noncompete. *Mr. Buff has never been sued for violating a noncompete. That was never included in the initial lawsuit.* In fact, when we state in reference that it has nothing to do with noncompete, but actions that occurred after January 20th, we're specifically referring to the fact that the second that he either stole or destroyed these files, he would have, prior to that, had any right to compete with Ventura freely.
>
> We had no objection to that; but the second that he stole or destroyed this information, it became action-able []." (emphasis supplied)

Buff contends that plaintiff should now be estopped from making any claims related to a violation of a non-compete agreement.

The plaintiff maintains that (1) when read in its entirety, the Ventura affidavit establishes that Buff signed a non-compete agreement and that the breach of that agreement arises from Buff's actions after January 20, 2011; and (2) that "to the extent Attorney Smith's comments could be construed otherwise, that was certainly not the intent of the statement." Neither response provides a satisfactory explanation with regard to plaintiff's previous position. The Court observes that the first cause of action of plaintiff's complaint filed on February 15, 2011contains the following allegations:

> "47. Richard Avdoyan, Holly Roth and John Buff all signed Non-Compete Agreements while providing services to [plaintiff]. Both Holly Roth and Richard Avdoyan executed revised Non-Compete Agreements in January, 2011.
>
> "48. Richard Avdoyan, Holly Roth and John Buff have contacted hundreds of [plaintiff's] customers as defined in the independent contractor agreement.
>
> "49. During the course of those solicitations, all three Defendants spread malicious innuendo and misleading

> information concerning [plaintiff] in an effort to convert those clients to [Capital Financial Planning].
>
> "50. The disclosure of this confidential information and the blatant solicitation of clients is in blatant breach of the Non-Compete Agreements and has and will cause irreparable harm to [plaintiff].
>
> "51. The Non-Compete Agreements contained provisions that in the event of a breach or threatened breach of the Non-Compete Agreements that [plaintiff] would be entitled to seek injunctive relief.
>
> "52. As a result, [plaintiff] seeks a permanent injunction enjoining Richard Avdoyan, Holly Roth and John Buff from violating their Non-Compete Agreements, as well as , damages that are difficult to ascertain at this juncture."

Thus, while it appears that both Ventura and his attorney made a representation which was not correct (that the plaintiff was not attempting to enforce the non-compete agreement), the Court observes that the mis-statements of fact were readily verifiable through a quick review of plaintiff's complaint (supra), and could easily have been corrected by opposing counsel at the time.[2] The Court finds the statements were not so egregious as to invoke the doctrine of judicial estoppel.

Buff, in response to a discovery demand of the plaintiff, acknowledged having signed a non-compete agreement. It appears that, to date, neither the original, nor a copy has been produced in the instant action by any party. In support of the instant motion, Buff's attorney argues that "no non-compete agreement has been produced in discovery of this action that would bar Buff from coming to work for [Capital Financial] if [William Tell] lost its

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[2]In addition, from a review of Judge Hummel's decision dated December 14, 2011, it does not appear that the mis-statements of fact played any role in his determination.

affiliation with ING". Buff, however, has not submitted his own affidavit to establish what he knows about the agreement, and whether or not it (or a copy) is in his possession. It is well settled that ordinarily, the affirmation of an attorney who does not have personal knowledge of the facts is without probative value (see Chiarini v County of Ulster, 9 AD3d 769, 770 [3d Dept., 2004]; Morales v. Coram Materials Corp, 51 AD3d 86, 96 [2d Dept., 2008]; Kool-Temp Heating & Cooling, Inc. v Ruzika,6 AD3d 869, 870 [3d Dept., 2004]; Bronson v Algonquin Lodge Association, Inc., 295 AD2d 681, 682 [3d Dept., 2002]).[3]

Buff's argument that a non-compete agreement has not yet been produced, at best, only serves to point out potential deficiencies in plaintiff's proof which, as noted, is insufficient to demonstrate entitlement to summary judgment. In other words, Buff's evidence does not demonstrate prima facie, that the document (or a copy) does not exist. Moreover, as pointed out by the plaintiff, it is theoretically possible that the contents of the agreement could be established through operation of the exception to the Best Evidence Rule (see Schozer v William Penn Life Ins. Co., 84 NY2d 639 [1994]).[4]

The Court concludes that Buff failed to satisfy his burden of proof on the motion.

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[3]There is an exception to the foregoing rule (not applicable here) in instances where the attorney's affirmation is otherwise supported by appropriate sworn deposition testimony (see Ayala v The V & O Press Company, 126 AD2d 229 [2d Dept., 1987]; Volpe v Canfield, 237 AD2d 282, 283 (2d Dept., 1997).

[4]The Court is mindful of Buff's argument that plaintiff's first cause of action is barred by operation of the statute of frauds (see General Obligations Law § 5-701). However this argument pre-supposes that no written agreement exists. To date that has not been established; and as noted, Buff has acknowledged that he did sign a non-compete agreement. Thus, even if a statute of frauds defense was properly pleaded, the Court would find that the issue can not be reached because he has failed to establish the terms and provisions of the non-compete agreement. In this respect the Court has no way of knowing whether or not such agreement violates General Obligations Law § 5-701.

Plaintiff's Second Cause of Action (Breach of Fiduciary Duty)

As stated by the Court of Appeals in Oddo Asset Mgt. v Barclays Bank PLC (19 NY3d 584 [2012]):

> "[] a 'fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'. A fiduciary relationship is 'necessarily fact-specific' and is also 'grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions'. While a contractual relationship is not required for a fiduciary relationship, 'if [the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them'" (id., at 592-593, citations omitted).

The Court is of the view that only Buff himself could provide evidence to demonstrate that in performing services for the plaintiff as an independent contractor, the two parties were engaged in a simple arms-length business relationship, and that no fiduciary relationship had been created, or if created, was not breached. Buff's attorney argues that there was no breach of any fiduciary duty by reason that all of plaintiff's customers who owned ING Financial products were also clients of ING; and therefore the information was not confidential since Capital Financial had complete access to such information through ING. This, however, does not answer the question. Buff has not presented his own affidavit to demonstrate the source of customer information he may have used to contact plaintiff's clients after his termination as an independent contractor of the plaintiff. Trade secret protection may attach to confidential customer lists and customer information in situations where the employee has

engaged in an act such as stealing or memorizing his employer's customer lists (see Walter Karl, Inc. v Wood, 137 AD2d 22, 27 [2d Dept., 1988], citing Reed, Roberts, Assocs. v Strauman, 40 NY2d 303, rearg denied 40 NY2d 918). Of great significance here, plaintiff alleges just that, that Buff acquired customer information by surreptitiously removing and then deleting customer information from the plaintiff's server. The Court finds that Buff failed to satisfy his burden of proof on the motion.

Plaintiff's Fourth Cause of Action (Tortious Interference With Prospective Business Relations)

In Carvel Corp. v Noonan (3 NY3d 182, 191 [2004]), it was stated: "[w]here there has been no breach of an existing contract, but only interference with prospective contract rights[], plaintiff must show more culpable conduct on the part of the defendant"[,] which "must amount to a crime or an independent tort" or that defendant "engage[d] in conduct for the sole purpose of inflicting intentional harm on plaintiff[]" (id., quotations and citations omitted; see also Besicorp Ltd. v Kahn, 290 AD2d 147, 150 [3d Dept., 2002]; Maas v Cornell University, 245 AD2d 728, 731[3d Dept., 1997]; Lerwick v Kelsey, 24 AD3d 918 [3d Dept., 2005]).

Again, as the moving party, Buff shouldered the burden in the first instance of establishing, prima facie, that the cause of action must be dismissed. As a part of the foregoing, and at the very least, Buff should have demonstrated that he did not commit a crime or independent tort and/or perform an act with the sole intention of inflicting harm upon the plaintiff (see Carvel Corp. v Noonan, supra). This he did not do. Instead, Buff's attorney places great reliance upon an affidavit of Todd Slingerland. Slingerland maintains

that once Buff, a registered representative of ING, was terminated as an independent contractor of William Tell (in January 2011), Capital Financial was free to hire him. Slingerland also contends that once ING terminated its association with William Tell, it had a right to assign William Tell's customer accounts to Buff, who by that time was associated with Capital Financial. Even if true, these facts do not fully address the issue, particularly where, as here, plaintiff specifically alleges that Buff copied and then deleted plaintiff's customer lists. The fact that ING Financial lawfully possessed information with respect to the same clients would not necessarily exonerate Buff from wrongdoing. As noted, Buff has not submitted his own affidavit to address these issues. The Court concludes that Buff's motion for summary judgment must be denied.

Plaintiff's Cross-Motion for Summary Judgment Against Buff With Respect to Plaintiff's First Cause of Action (Breach of Contract)

As previously noted, while plaintiff asserts that Buff signed a non-compete agreement, no such agreement is currently before the Court. Although Buff apparently acknowledged having signed one, the Court has no means of knowing the specific terms or conditions of the agreement, which of the terms were allegedly violated, and/or in what manner. Plaintiff has not shown which of its clients Buff contacted, and specifically how such action would constitute a violation of the non-compete agreement. For this reason, the Court finds that plaintiff failed in its burden of proof on the motion. The Court concludes that plaintiff's cross-motion for summary judgment against Buff must be denied.

Cross-Motion For Summary Judgment of Defendants Capital Financial, Todd Slingerland, Richard Avdoyan and Holly Roth

Plaintiff's First Cause of Action (Breach of Contract)

Holly Roth apparently signed three contracts entitled "Confidentiality and Non-Competition Agreement": one dated February 24, 2009, another dated January 10, 2011, and a third dated February 2, 2011. She indicates that the one dated January 10, 2011 was not signed on that date. Rather it was signed by her on February 2, 2011. She indicates that some other person backdated the agreement to make it appear that it was signed on January 10, 2011. While there are two such agreements signed by Richard Avdoyan, one dated January 5, 2011 and one dated February 2, 2011, Avdoyan only recalls having signed one, on February 2, 2011. The dates of the signing of non-compete agreements have significance with regard to (inter alia) whether the ones allegedly signed on February 2, 2011[5] are supported by adequate consideration. It has been held that continued employment of an at-will employee, or forbearance of an employer in discharging an employee, will suffice as consideration to support a covenant not to compete (see Zellner v Stephen D. Conrad, M.D., P.C., 183 AD2d 250, 255-257 [2d Dept., 1992]). However, continued employment must be for a "substantial period" after the non-compete covenant is given (see id.). If, as asserted by the defendants, the non-compete agreements of Roth and Avdoyan dated in January 2011 were actually signed on February 2, 2011, then there would be no continued employment of

[5]This would include the Roth agreement dated January 10, 2011 (which she indicates was signed on February 2, 2011); and the Avdoyan agreement dated January 5, 2011 (which he does not recall signing).

Roth and Avdoyan by William Tell for a substantial time, and arguably no consideration for the covenant not to compete embodied in agreements signed February 2, 2011.

Plaintiff's complaint makes no express mention of the non-compete agreement dated February 24, 2009, which Roth signed as an employee of the plaintiff (before being requested by Joseph Ventura to become an independent contractor), or the ones signed by Roth and Avdoyan, dated February 2, 2011. Read as a whole (including the "wherefore" clause), the complaint appears to focus exclusively on the non-compete agreement of Avdoyan dated January 5, 2011, and the one of Roth dated January 10, 2011. The Court finds that plaintiff's first cause of action is limited to enforcement of these two agreements.

Both Roth and Avdoyan provide a narrative of the events which they claim occurred on February 1st and 2nd, 2011. Roth indicates that she received a telephone call from Joseph Ventura on the evening of February 1, 2011 in which he requested that she meet him at his house the next morning. Avdoyan indicates that on February 1, 2011 at 9:30 p.m. he received a telephone call from Audra Higgins, plaintiff's office manager, who indicated that Mr. Ventura would like him to attend an emergency meeting at Mr. Ventura's house at 11:00 a.m. the next morning. As it happened, there was a significant snow storm in progress on February 2, 2011. At approximately 7:00 a.m. of that day Avdoyan received a telephone call from Joseph Ventura, who insisted that there was an emergency situation which needed to be addressed. Due to the snowstorm, Ventura offered to transport Avdoyan to his house in his motor vehicle, which he did. During the ride over, Ventura informed Avdoyan (among other things) that "[Ventura] was about to be 'fired' and that there were plans for '[Capital Financial Planning] to absorb William Tell'." After arriving at Ventura's home, Ventura

allegedly showed Avdoyan copies of emails of Capital Financial and Slingerland which, Avdoyan maintains, Ventura would have no reason to possess, and which Ventura had surreptitiously obtained. The emails allegedly confirmed that ING would soon terminate plaintiff and Ventura as ING brokers. At approximately 10:30 a.m. Roth, Avdoyan and Ventura traveled in Ventura's vehicle to the law office of Ventura's attorney Smith & Hoke. They arrived at the law office at approximately 11:00 a.m. Attorneys Wayne Smith and John Hoke arrived at 1:00 p.m. Ventura first met alone with the two attorneys. Thereafter Roth and Avdoyan, who had been placed in separate rooms, were each presented with a non-compete agreement which Ventura and attorney Smith requested be signed immediately. Both Avdoyan and Roth initially resisted signing the document, despite pressure allegedly being exerted by Ventura and his attorney. Avdoyan indicates that Ventura remained in the room and stared at him until he relented and signed the document. Roth avers that she informed Ventura that there were numerous provisions of the agreement which she did not like. She stated that she wanted to consult her lawyer; and that she needed more information. She claims that she initially refused to sign, but eventually relented. She states that prior to signing the February 2, 2011 agreement Ventura advised her that he was looking for a new broker-dealer. Both indicate that Ventura stated that they should "trust" him. They also indicate that they did not realize that ING would discharge William Tell the next day, but maintain that Ventura knew this, and that this was the reason why Ventura requested they sign a non-compete agreement the day before this occurred.[6]

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[6]The Avdoyan affidavit appears to be somewhat contradictory with regard to the extent of Avdoyan's knowledge with regard to ING's termination of plaintiff. He maintains that "while Mr. Ventura mentioned that he was 'looking' for a new broker dealer, he never shared with me

The moving defendants did not raise an affirmative defense of duress in their answer. While they do raise an affirmative defense that "the agreements are unenforceable as they were entered into as the result of the parties disparate bargaining power", the Court is of the view that the facts, as presented, are subject to varying interpretation with regard to the degree of coercion allegedly applied by Ventura and his attorney, and the relative bargaining power of Roth and Avdoyan. The Court finds that there is a triable issue of fact with regard to defendant's affirmative defense which precludes the grant of summary judgment.

As part of their motion, Roth and Avdoyan maintain that the non-compete agreements are overly broad, and therefore unenforceable. It is well settled that covenants not to compete must be strictly construed (see Battenkill Veterinary Equine P.C. v Cangelosi, 1 AD3d 856 [3d Dept., 2003]). In order to be enforceable, "the agreement must be reasonable, and it 'is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public'" (Goodman v New York Oncology Hematology, P.C., 101 AD3d 1524, at 1526 [3d Dept., 2012], quoting BDO Seidman v Hirshberg, 93 NY2d at 388-389; see also Zinter Handling, Inc. v Britton, 46 AD3d 998, 1001-1002 [3rd Dept., 2007]).

As noted, the agreements dated February 2, 2011 (signed by Roth and Avdoyan) do not contain a covenant not to compete. The covenant not to compete is found in the Roth

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the fact that he knew that his relationship with ING Financial Partners was over." As noted, however, during the drive over to Ventura's house on the morning of February 2, 2011, Ventura informed him that there were plans that Ventura would be fired, and that Capital Financial would absorb the plaintiff. In addition, Ventura subsequently showed Avdoyan internal emails of Capital Financial which corroborated the foregoing.

agreement dated January 10, 2011, and the Avdoyan agreement dated January 5, 2011. Each such agreement contains the following language:

> "4. During the period of the contract with the Company and for Twenty-four (24) months thereafter, Independent Contractor will not, for himself/herself or on behalf of any other person or entity, compete with the business then done or intended to be done by the Company, with respect to calling upon any customer of the Company for the purpose of soliciting or providing to such customer any products or services which are the same as or similar to those provided or intended to be provided by Company. Customers of the Company shall include customers of the Company existing upon the termination of Independent Contractor's contract, all former customers of Company and all potential customers contacted or solicited by Company during the period of Independent Contractor's contract with company.
>
> "The term 'Customer' shall be defined as, but is not limited to, a client listed under a broker's primary rep code at any time during their contract with the Company regardless of the reason for cessation of contract. The Independent Contractor's 'Customers' under this agreement are those listed at any time under the primary broker rep code [code inserted]. The Company's 'Customers' under this agreement are those listed at any time under the primary broker rep code of [code inserted] 'Customers' listed under a joint rep code are 'Customers' of the Company and Joseph Ventura. Also codes [codes inserted].
>
> "The Independent Contractor further consents that at no time shall the Independent Contractor either directly or indirectly solicit any of the Company's Customers, as defined above, and the Independent Contractor does further agree that for a period of Twenty-four (24) months from the date of cessation of contract, regardless of the reason, that the Independent Contractor will not either directly or indirectly be engaged in, nor in any manner whatsoever, become interested directly or indirectly, either as Independent Contractor, employee, owner, partner, agent, stockholder, director or officer of a corporation or otherwise, in any business of the type and character engaged in by the Company within a 60 mile radius from the Company with any former Independent Contractor; Employee; Leased Employee of the Company; or the

> Dealer/Broker 'ING'. It being understood that by the execution of this Agreement the parties hereto regard the restrictions herein as reasonable and compatible with their respective rights."

The Court, in Scott, Stackrow & Co., C.P.A's, P.C. v Skavina (9 AD3d 805 [3d Dept. 2004]) stated:

> "[] an anticompetitive covenant may prevent the competitive use of client relationships that the employer assisted the employee in developing through the employee's performance of services in the course of employment (see id. at 392; see also Gelder Med. Group v Webber, 41 NY2d 680, 685 [1977]). A covenant will be rejected as overly broad, however, if it seeks to bar the employee from soliciting or providing services to clients with whom the employee never acquired a relationship through his or her employment or if the covenant extends to personal clients recruited through the employee's independent efforts (see BDO Seidman v Hirshberg, supra at 393).
>
> [] "The determination of whether an overly broad restrictive covenant should be enforced to the extent necessary to protect an employer's legitimate interest involves 'a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement' (BDO Seidman v Hirshberg, [93 NY2d 382] supra at 394). Partial enforcement may be justified if an employer demonstrates, in addition to the legitimate business interest that plaintiff has shown here, 'an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct' (id. at 394). Factors weighing against partial enforcement are the imposition of the covenant in connection with hiring or continued employment--as opposed to, for example, imposition in connection with a promotion to a position of responsibility and trust--the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant was overly broad (see id. at 395)." (Scott, Stackrow & Co., C.P.A's, P.C. v Skavina, supra, at 806, 807).

The covenants not to compete here (supra) are overly broad from the standpoint that they purport to prohibit Roth and Avdoyan from soliciting any of plaintiff's clients, regardless of whether or not they had any prior contact or dealings with such clients. In addition, the covenants are overly broad from the standpoint that they prohibit said defendants from contacting clients that they recruited through their independent efforts. Whether or not there can be partial enforcement of these covenants depends upon whether there was "an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct" on the part of Ventura (Scott, Stackrow & Co., C.P.A's, P.C. v Skavina, supra, at 807). Again, because there is a triable issue with regard to the dates when the January 2011 non-compete agreements were actually signed; and if signed on February 2, 2011, the degree of coercion and overreaching, if any, which may have been exerted by Ventura and his attorney at that time, the Court finds that there are triable issues with regard to whether the January 2011 non-compete agreements may be partially enforced.

With regard to the alleged violation of the non-compete agreements, neither Roth or Avdoyan provide information indicating which of William Tell clients were contacted, and/or whether or not proprietary customer information developed and possessed solely by William Tell was utilized when such contacts were made. In this respect, they failed in their burden of proof on the motion. The defendants maintain that even if plaintiff was able to establish that the non-compete agreements were enforceable, plaintiff's request for specific performance and/or injunctive relief is now moot through passage of time. The Court agrees (see H. Meer Dental Supply Co. v Commisso, 269 AD2d 662, 663 [3d Dept., 2000]). However, any cause of action for damages arising out of a prior violation of such agreements

would not be moot. Under all of the circumstances, the Court finds that the cross-motion of Roth and Avdoyan for summary judgment dismissing plaintiff's first cause of action must be denied, except as it relates to a cause of action seeking either specific performance and/or injunctive relief, which will be dismissed as moot.

Plaintiff's Second Cause of Action (Breach of Fiduciary Duty)

Roth indicates that when she joined the plaintiff in January 2008, she was hired as an employee, but in April or May or 2010, at Ventura's request, she became an independent contractor. Avdoyan was hired by the plaintiff in July 2009, and according to Ventura, as an independent contractor. Both acted as securities brokers. Both indicate that while associated with the plaintiff they never used plaintiff's time or resources to compete with the plaintiff. Avdoyan also indicates, with respect to events after February 2, 2011:

> "As the clients had remained with ING Financial Partners, there being no other place to locate those accounts, a letter was sent to ING Financial Partners home office in Des Moines, Iowa to the clients advising that Ventura was no longer affiliated with ING Financial Partners but that they could still have their accounts serviced by myself, Roth or Buff. They were advised that no changes would be made without their permission. The clients whose accounts are held at ING Financial Partners can only be serviced by a financial adviser affiliated with ING Financial Partners".

The Court, in Island Sports Physical Therapy v Kane (84 AD3d 879 [2d Dept., 2011]), presented an overview of the law in this area:

> "[A]n employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties An employee may create a competing business prior to leaving [her or] his employer without breaching any fiduciary duty

> unless [she or] he makes improper use of the employer's time, facilities or proprietary secrets in doing so. In general, an employee may solicit an employer's customers only when the employment relationship has been terminated.
>
> "Further, solicitation of an entity's customers by a former employee or independent contractor is not actionable unless the customer list could be considered a trade secret, or there was wrongful conduct by the employee or independent contractor, such as physically taking or copying files or using confidential information. The use of information about an employer's customers which is based on casual memory is not actionable" (id., at 879-880, quotations and citations omitted)

The affidavit of Todd Slingerland, submitted in connection with the instant cross-motion, indicates that on or after February 3, 2013 Roth and Avdoyan contacted ING customers who had purchased ING product from the plaintiff and asked them to continue as clients of ING. Roth and Avdoyan do not dispute that they contacted some of plaintiff's clients on or after February 3, 2011. They do not specifically indicate the source of the client information which they utilized to make client contacts on and after February 3, 2011. Said defendants failed, in the Court's view, to demonstrate entitlement to summary judgment by clearly showing either that no fiduciary duty was owed to the plaintiff (by reason that their relationship with the plaintiff was nothing more than an arms-length business arrangement); or, in the alternative, that they did not violate such duty with respect to use of plaintiff's confidential customer information. For this reason, summary judgment must be denied as to plaintiff's second cause of action.

Plaintiff's Third Cause of Action (Tortious Interference With A Contract)

The Court now turns to plaintiff's third cause of action against Todd Slingerland and Capital Financial, for tortious interference with a contract. Plaintiff alleges that said

defendants interfered with plaintiff's non-compete agreements with Buff, Roth and Avdoyan. The elements of a cause of action for tortious interference of a contract are "the existence of a valid contract between the plaintiff and [a third party], [the defendant's] knowledge of that contract, and [defendant's] intentional procurement of [the third-party's] breach of the contract without justification, actual breach of the contract, and [plaintiff's] damages resulting from the breach" (Oddo Asset Mgt. v Barclays Bank PLC, 19 NY3d 584, 594-595 [2012], citing Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424, [1996]; see also White Plains Coat & Apron Co., Inc. v Candeias Corp., 8 NY3d 422, at 426 [2007]).

Slingerland, in his supporting affidavit, makes reference to a meeting he had with Buff, Roth and Avdoyan held on February 3, 2011, after plaintiff had been terminated as an ING representative. He indicates:

> " I then gathered John Buff, Holly Roth and Richard Avdoyan and advised them that Ventura was terminated. I gave each of these individuals the option to stay or to leave and join Ventura wherever he may go. Each of them told me they wanted to remain a an independent contractor with ING Financial Partners. I was not aware at that time that defendants Roth and Avdoyan had signed a non-compete agreement on February 2, 2011."

Slingerland does not, however, disavow knowledge of the existence of the Roth and Avdoyan non-compete agreements respectively dated January 10, 2011 and January 5, 2011 (with respect to which, as noted, there is a triable issue with regard to when such agreements were signed). The Court understands the argument being advanced by Slingerland, that as registered representatives of ING Financial, Roth, Avdoyan and Buff had the right to contact ING Financial clients, using the ING Financial database. Nonetheless because there are triable issues with regard to when the January 2011 non-compete agreements were signed,

Slingerland's disclaimer of knowledge of the signing of non-compete agreements on February 2, 2011 does not fully address the extent of his knowledge. In addition, insufficient information is presented with regard to whether Roth or Avdoyan violated the non-compete agreements dated January 2011 and/or whether Slingerland, as alleged, procured such a breach, without justification. On the other hand, he acknowledges that Buff, Roth and Avdoyan contacted ING Financial clients, to encourage them to remain clients of ING Financial, through its affiliation with Capital Financial. As relevant here, breach of the January 2011 non-compete agreements by Roth and Avdoyan could occur in two fundamental ways. First, through "misappropriation and use of confidential customer information" gathered by plaintiff, not included in the ING Financial database (Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina, 9 AD3d 805, supra, at 806). Second, by "exploiting the good will of a client or customer, which had been created and maintained at the employer's expense" (id.). Because insufficient evidence has been presented to negate either of the foregoing issues, the Court finds that Slingerland and Capital Financial did not satisfy their burden of proof on the motion as to plaintiff's third cause of action, which must be denied.

Plaintiff's Fourth Cause of Action (Tortious Interference With Prospective Business Relations)

Turning to plaintiff's fourth cause of action sounding in tortious interference with prospective business relations, as noted above, the Court of Appeals, in Carvel Corp. v Noonan (3 NY3d 182, at 191, supra) indicated that the alleged wrongful acts must amount to a crime, independent tort, or constitute conduct for the sole purpose of inflicting

intentional harm on the plaintiff. The entire focus of this cause of action is on the alleged acts of Buff who plaintiff claims surreptitiously gained access to plaintiff's computers and copies and destroyed 375 digital files. In support of the motion Slingerland indicates the following:

> "I understand that [the plaintiff] alleges that defendant Buff, on or about January 20, 2011, after being discharged as an independent contractor working for [the plaintiff], entered [plaintiff's] computer system by remove access and copied certain computer information which he then used to contact ING customers to urge them to remain customers of ING. I have no knowledge whether or not Mr. Buff ever accessed the computer system of [the plaintiff] inappropriately nor did I ever request Buff to do so. I also never encouraged Buff to use information he obtained from [the plaintiff]).

With respect to Slingerland, the Court finds that he demonstrated, prima facie, that he did not facilitate or encourage Buff to continue to use any such information illegal obtained. Plaintiff failed to demonstrate the existence of a triable issue of fact. For this reason the Court finds that the fourth cause of action must be dismissed as against Slingerland. Because it has not been shown that no other principal and/or employee of Capital Financial collaborated with Buff, the Court finds that the cross-motion, as to Capital Financial, must be denied.

Plaintiff's Cross-Motion For Summary Judgment Against Roth and Avdoyan on its First Cause of action (Breach of Contract)

Plaintiff alleges in its complaint that both Roth and Avdoyan were given positions of trust; were allowed to interact with plaintiff's clients; were entrusted with confidential information; and utilized their fiduciary relationship to exploit plaintiff's good will. Joseph

Ventura indicates that Roth and Avdoyan had earned positions of increased trust and responsibility, Roth by February 2009, and Avdoyan by late 2010. He indicates that "after negotiating the terms of the non-compete agreements" both Roth and Avdoyan signed the non-compete agreements (Roth on January 10, 2011, and Avdoyan on January 5, 2011). Lastly, he avers that on February 2, 2011 Roth and Avdoyan "were invited to a highly confidential meeting where we discussed the future of our company". He maintains that the non-compete agreements Roth and Avdoyan signed that day "reflected the fact that Roth and Avdoyan were being placed in positions of additional trust and responsibility by participating in the planning of the future of out company." The Court finds that Ventura's assertions are non-factual, conclusory and self-serving. With three exceptions[7], he fails to indicate which of his clients were contacted and by whom, and demonstrate what specific confidential information was utilized in making such contacts. In addition, his assertion that each time Roth and Avdoyan signed a non-compete agreement they were promoted to positions of greater trust and authority is factually unsupported. For the the foregoing reasons, the Court finds that plaintiff's cross-motion must also be denied.

The Court has reviewed and considered the remaining arguments and contentions of the parties and finds them to be without merit.

Accordingly it is

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[7]The plaintiff has submitted the affidavits of two clients allegedly contacted by Avdoyan and one client allegedly contacted by Roth and Avdoyan. All three indicated that they intended to remain with plaintiff. While Ventura maintains that the plaintiff has "lost numerous clients", and has annexed a list of approximately 177 such clients, no evidence is presented that the account losses were caused by the actions of Roth or Avdoyan.

ORDERED, that the motion for summary judgment of John Buff to dismiss plaintiff's complaint is denied; and it is

ORDERED, that the cross-motion of Richard Avdoyan and Holly Roth, for summary judgment dismissing plaintiff's first cause of action is denied, except as it relates to relief in the nature of specific performance and/or injunctive relief, as to which relief the motion is granted; and it is further

ORDERED, that the cross-motion of Richard Avdoyan and Holly Roth for summary judgment dismissing plaintiff's second cause of action is denied; and it is

ORDERED, that the cross-motion of Capital Financial Planning, LLC and Todd Slingerland for summary judgment dismissing plaintiff's third cause of action is denied; and it is further

ORDERED, that the cross-motion of Capital Financial Planning, LLC and Todd Slingerland for summary judgment dismissing plaintiff's fourth cause of action is granted as to defendant Todd Slingerland, which cause of action be and hereby is dismissed as against said defendant, but is denied with respect to Capital Financial Planning, LLC; and it is

ORDERED, that plaintiff's cross-motion for partial summary judgment on its first cause of action is denied.

This shall constitute the decision and order. The original decision/order is returned to the attorney for Capital Financial Planning, LLC, Todd Slingerland, Richard Avdoyan and Holly Roth. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry

or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: October 21, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated November 21, 2012;
2. Affidavit of Phillip Steck, Esq. dated November 21, 2012, with exhibits annexed;
3. Affidavit of Todd Slingerland dated November 20, 2012, with exhibit annexed;
4. Notice of Motion dated December 21, 2012;
5. Affirmation of Wayne A. Smith, Jr., Esq. dated December 21, 2012, with exhibits annexed;
6. Affidavit of Joseph A. Ventura dated December 21, 2012, with exhibits annexed;
7. Notice of Motion dated January 24, 2013;
8. Affidavit of Todd Slingerland dated January 23, 2013;
9. Affidavit of Holly Roth dated January 24, 2013;
10. Affidavit of Richard Avdoyan dated January 24, 2013;
11. Affirmation of Jennifer C. Zegarelli, Esq. dated January 24, 2013, with exhibit annexed;
12. Affirmation of Jennifer C. Zegarelli, Esq. dated February 15, 2013, with exhibit annexed;
13. Affidavit of Wayne A. Smith, Jr., Esq. dated February 20, 2013, with exhibits annexed;
14. Affidavit of Joseph A. Ventura dated February 20, 2013, with exhibits annexed;
15. Correspondence of Jennifer C. Zegarelli, Esq. dated February 28, 2013;
16. Affidavit of Joseph A. Ventura dated March 12, 2013;