

<b>Nigam v Linium LLC</b>
2018 NY Slip Op 30728(U)
April 25, 2018
Supreme Court, New York County
Docket Number: 654809/2017
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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RAKESH NIGAM, IMAGINEERS GROUP, INC.,

Plaintiff,

- v -

LINIUM LLC, TARGETST8, INC., LINIUM CONSULTING LLC,  
STEPHEN SHYN

Defendant.

INDEX NO. 654809/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 26, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40

were read on this application to/for \_\_\_\_\_ Dismiss \_\_\_\_\_

HON. BARRY R. OSTRAGER:

Plaintiff and Counterclaim-Defendant Rakesh Nigam (“Nigam”) is a former employee of Defendants and Counterclaim-Plaintiffs Crossbridge Consulting, Inc. (“Crossbridge”) (f/k/a Crossbridge Consulting LLC, and n/k/a TargetSt8 Consulting, Inc.) and Stephen Shyn (“Shyn”), the principal of the Defendant entities. Plaintiffs allege causes of action sounding in defamation, tortious interference, and breaches of various agreements. Defendants filed the Second Amended Answer and Counterclaims alleging breach of fiduciary duty and tortious interference with contract. Plaintiff and Counterclaim-Defendant Nigam moves to dismiss the counterclaims asserted against him pursuant to CPLR § 3211(a)(1) and (a)(7).

### Factual Allegations

In January 2014, Nigam became an employee, officer, and shareholder of Crossbridge. During the time that Nigam worked for Crossbridge, the business was restructured such that TargetSt8, Inc. (“Target”) became the indirect parent of Crossbridge, and Nigam became an employee, officer, and shareholder of Target.<sup>1</sup> Crossbridge/Target is in the business of providing various consulting services to banks and other financial services companies.

In December 2014, Nigam and the other shareholders executed a Shareholders Agreement which provides that a departing shareholder can form or join a business to compete with Crossbridge/Target, without restriction, immediately upon the shareholder’s resignation, if the shareholder opts to receive less money for the repurchase of the shareholder’s stock.

Since at least 2012, Crossbridge/Target had been providing consulting services to Barclays pursuant to a Master Services Agreement (the “MSA”) between Barclays and Sente Partners LLC, a company wholly owned by Crossbridge/Target. The MSA contains a non-recruitment provision that restricts both parties from soliciting the employees of the other for one year following a project’s conclusion.

On January 12, 2016, Nigam sent an email to the other shareholders of Crossbridge/Target, stating that he was terminating his employment and resigning as an officer and shareholder. On February 1, 2016, the parties executed a Stock Redemption Agreement in which Nigam opted for the ability to compete with Crossbridge/Target in exchange for a lower redemption price for the shares he sold back to Crossbridge/Target. The parties also executed a Separation Agreement which provided, *inter alia*, that Nigam’s employment with Crossbridge/Target was terminated effective January 22, 2016, ten days after he sent his

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<sup>1</sup> For the purpose of simplicity, this Decision and Order will refer to these entities collectively as “Crossbridge/Target”

resignation letter. Shortly after his resignation, Nigam started a competing venture, Imagineers Group, Inc.

Defendants' counterclaims do not allege, nor could they, that Nigam's competing venture was facially improper. It is undisputed that Nigam had opted to compete against Crossbridge/Target after his resignation in exchange for a lower redemption price for his Crossbridge/Target stock. Instead, the counterclaims allege that Nigam, during the ten-day period between his sending a resignation letter and his official termination on January 22, 2016, secretly communicated with Barclays, a Crossbridge/Target client, in order to solicit business for his future competing venture. This allegation forms the basis of the breach of fiduciary duty counterclaim.

The second counterclaim is for tortious interference with the Master Services Agreement ("MSA") between Barclays and Sente Partners LLC, a company wholly owned by Crossbridge/Target. Section 2.3 of the MSA contains a non-recruitment provision providing that Barclays may not solicit an employee of Crossbridge/Target who worked on a project for Barclays within one year following that person's last day of work on the project. (*See* Master Services Agreement [NYSCEF Doc. 30]). Counterclaimants allege that, prior to the expiration of the one-year non-recruitment period, Nigam started working for Barclays in direct competition to Crossbridge/Target, and therefore, that Nigam induced Barclays to breach the MSA by soliciting him for hire.

### Legal Analysis

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable

inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Id.* at 87-88. To state a claim for breach of fiduciary duty, the complaint must “allege the misconduct complained of in *sufficient detail* to inform the defendants of the substance of the claims.” *Bernstein v. Kelso & Co.*, 231 A.D.2d 314, 320 (1st Dep’t 1997). The pleading requirements of CPLR 3016(b) do not strictly require specificity “in situations where it may be impossible to state in detail the circumstances constituting a fraud.” *Id.* (internal quotations omitted). This rule is particularly applicable in cases where the facts constituting fraud or breach of fiduciary duty are necessarily “peculiarly within the knowledge of the [defrauding] party.” *Kaufman v. Cohen*, 307 A.D.2d 113, 121 (1st Dep’t 2003) (internal quotations omitted).

#### **Breach of Fiduciary Duty**

Counterclaimants allege that Nigam breached his fiduciary duty by soliciting work from Barclays for his future competing venture while still employed by Crossbridge/Target. Counterclaimants point to a January 12, 2016 email exchange between Nigam, Ralph Orciuoli (a Barclays employee), and Orciuoli’s assistant, in which Orciuoli directs his assistant to use two of Nigam’s email accounts when contacting him. Nigam’s email responds by indicating that both his Crossbridge email and Barclays email should be used “[f]or now at least.” (January 12, 2016 Email [NYSCEF Doc. 39]). Counterclaimants argue that it is reasonable to infer from this exchange that Nigam had indicated to Orciuoli, prior to sending his resignation letter to Crossbridge/Target shareholders, that he was leaving the firm. Counterclaimants further argue that it is reasonable to infer that Nigam not only informed Orciuoli that he was resigning, but that he was starting a competing venture, and thus, tried to solicit future work from Orciuoli and Barclays. It is also alleged that shortly after Nigam’s departure from Crossbridge/Target,

Barclays stopped communicating substantively with the firm and stopped responding to Shyn's emails. Finally, Barclays did, allegedly, retain Nigam after he started his competing venture.

While the Court agrees that several inferential leaps are necessary for counterclaimants to *prove* their claim for breach of fiduciary duty on the evidence thus far submitted, it is equally true that the Court must accord the claimants every possible favorable inference on a CPLR 3211(a)(7) motion, and that claimants must merely allege facts which, *if proven*, state a cognizable legal claim. The inferences that counterclaimants ask this Court to make are not entirely unreasonable on their face, and, in any event, the facts constituting the breach of fiduciary duty are "peculiarly within the knowledge of the [defrauding] party." *Kaufman*, 307 A.D.2d at 121. Thus, discovery is necessary to determine the degree to which counterclaimants' allegations are supported by the actual facts. Therefore, Counterclaim-Defendant's motion to dismiss the breach of fiduciary duty counterclaim is denied without prejudice to renew following discovery.

### **Tortious Interference**

Counterclaimants allege that Nigam tortuously interfered with the MSA between Barclays and Sente Partners LLC, a company wholly owned by Crossbridge/Target. Section 2.6 of the MSA provides:

Unless otherwise agreed by the parties in writing, neither party shall Solicit any of the other party's Restricted Employees during the service period of the relevant work order and twelve (12) months after the date the relevant Work Order is completed. The parties hereby acknowledge and agree that this clause 2.6 does not apply to any Restricted Employee that the Recruiting Party reasonably believes to be responding to its general recruitment campaigns (including without limitation, any advertisement published in any form by the recruiting party or its agents).

**Solicit** means that a party (the Recruiting Party) has **targeted** a specific employee or group of employees from the other party **and taken positive steps to solicit** such employee or employees to become and employee or contractor of the

Recruiting Party.... (Master Services Agreement [NYSCEF Doc. 30]) (emphasis added).

Counterclaimants argue that Nigam induced Barclays to breach Section 2.6 of the MSA by inducing Barclays to hire him within twelve months of working on a Barclays project. The Court accepts the allegation that Nigam took steps to induce Barclays to hire him as a consultant, however, such would not amount to a breach of the MSA and is not what counterclaimants contend. Counterclaimants ask the Court to accept that Nigam contacted Barclays in order to induce Barclays to take “positive steps” to target and “solicit” him to become a contractor of Barclays. The allegation that Nigam contacted Barclays to induce Barclays to take positive steps to solicit him as a contractor, instead of merely contacting Barclays to induce Barclays to hire him directly, defies logic. Therefore, Counterclaim-Defendant’s motion to dismiss the tortious interference counterclaim is granted.

Accordingly, it is hereby

ORDERED that Counterclaim-Defendant’s motion to dismiss the counterclaims is granted as to the counterclaim for tortious interference with contract, and denied as to the counterclaim for breach of fiduciary duty without prejudice to renew following discovery; it is further

ORDERED that Counterclaim-Defendant reply to the remaining counterclaim within twenty days of this decision and order; it is further

ORDERED that the parties appear for a compliance conference on July 17, 2018 at 10:30 a.m.

4/25/2018

DATE



BARRY R. OSTRAGER, J.S.C.

**BARRY R. OSTRAGER**  
JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

DO NOT POST

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: