SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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CHRISTOPHER HUGHES

Plaintiff,

- v -

TSR, INC.,

Defendant.

INDEX NO. 651753/2020

MOTION DATE 07/31/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion for SUMMARY JUDGMENT.

After outside investors took control of defendant TSR, Inc. (TSR or the Company) and replaced its board of directors, the Company terminated the employment of its Chief Executive Officer (plaintiff Christopher Hughes), asserting that he committed various misdeeds that warranted his dismissal for "Cause" (as defined in his employment agreement). Plaintiff alleges that his termination was *without* cause and that the Company therefore must make severance payments required under the employment agreement. Plaintiffs brings claims for breach of contract and breach of the duty of good faith and fair dealing. In response, the Company asserts various counterclaims arising out of alleged misconduct by plaintiff before and after his termination.

Plaintiff moves, prior to the start of discovery, for an order (1) granting him summary judgment on each of his causes of action, (2) dismissing TSR's counterclaims with prejudice, (3) ordering TSR to pay him the amounts due under the employment agreement, and (4) setting this matter down for a hearing on damages.

For the reasons set forth below, the motion for summary judgment is denied.

FACTUAL BACKGROUND

Background of the Shareholder Dispute

TSR was founded in 1969 by plaintiff's father and became a publicly traded company soon thereafter (complaint [NYSCEF Doc No. 2], ¶ 7). TSR's business is providing contract computer programming services to its customers through technical computer personnel who supplement the clients' own in-house professional (*id.*, ¶ 8). Plaintiff was employed by TSR for 34 years, and was the CEO from July 2017 until he was terminated on February 29, 2020 (*id.*, ¶ 9).

Prior to June 2018, Joseph and Winifred Hughes – plaintiff's parents – owned a significant percentage of TSR stock (*id.*, ¶ 10). In the beginning of 2018, James Hughes, plaintiff's brother, communicated with potential investors Tajuddin Haslani (Haslani), Dan Zeff, and Robert Fitzgerald (Fitzgerald) (collectively, the new investors) about possibly selling TSR (*id.*, ¶ 11). Subsequently, James Hughes, acting as proxy for the Hughes brothers' parents, agreed to sell their 41.8% share of TSR stock to the new investors (*id.*, ¶ 13).

After learning of this transaction, and continuing through August and into the early fall, TSR and its board of directors (the Board), with plaintiff acting on behalf of the minority shareholders, took steps to prevent a takeover of TSR (*id.*, ¶¶ 15-16). These steps included expanding the Board, adopting a shareholders' rights agreement, and changing TSR's by-laws to limit the ability of shareholders to call a special meeting (*id.*).

As a result of the disputes between TSR and the new investors, several lawsuits were filed, including a shareholder class action filed against TSR, plaintiff and the Board alleging that TSR and the Board had not taken sufficient steps to resist the take-over, and a suit by the Company

against the new investors (*id.*, ¶ 17). In August 2019, TSR and the new investors reached an agreement to settle the litigation and resolve outstanding issues relating to ownership and control of the Company. Pursuant to the terms of the settlement agreement, TSR and plaintiff had the opportunity to repurchase the TSR shares then owned by the new investors, make a settlement payment by October 21, 2019, and reappoint the members of the Board whose terms were about to expire at the annual meeting scheduled for October 23, 2019 (*id.*, ¶¶ 18-19). If TSR did not complete this repurchase, the new investors could nominate its preferred candidates to the Board (*id.*, ¶ 20).

TSR was unable to complete the repurchase by the deadline, and the new investors' proposed candidates for the Board, H. Timothy Eriksen (Eriksen) and Bradley M. Tirpak (Tirpak), became members of the TSR Board, joining the existing directors at that time: plaintiff, William Kelly (Kelly), Brian Mangan (Mangan), Joseph Pennacchio (Pennacchio), and Eric Stein (Stein) (*id.*, ¶¶ 21-22).

TSR and plaintiff had a second deadline of December 30, 2019 to repurchase the new investors' stake, but TSR was again unable to complete the transaction. Accordingly, pursuant to the terms of the settlement agreement, on December 30, 2019, plaintiff, Kelly, Mangan, Pennacchio, and Stein resigned from the Board, and Fitzgerald became a member of the Board, joining the two remaining board members, Eriksen and Tirpak (*id.*, ¶¶ 23-25).

The Employment Agreement

On August 9, 2018, plaintiff and TSR entered into an Amended and Restated Employment Agreement (the Employment Agreement [NYSCEF Doc No. 3]) (complaint, ¶ 26). Plaintiff contends that the Employment Agreement was approved by the members of the TSR Board at a meeting held on August 9, 2018, after being negotiated at arm's length after extensive discussions

by members of the Compensation Committee of the Board, led by Board member Raymond Roel (*id.*, ¶ 28).

Pursuant to paragraph 6 (a) of the Employment Agreement, plaintiff can be terminated for "Cause," which is narrowly defined as plaintiff (i) being convicted of any crime constituting a felony; (ii) engaging in "willful misconduct that is materially injurious to" TSR; (iii) committing "an act of fraud" against TSR; or (iv) materially breaching any term of the Employment Agreement or any written policy established by TSR's Board of Directors, and failing to correct any such breach within ten days after written notice of commission thereof.

Paragraph 6 (a) of the Employment Agreement further provides that "no act or failure to act" by plaintiff would be considered "willful" unless done, or omitted to be done, by plaintiff in "bad faith," and that any act or failure to act based upon authority given by the Board, or upon the advice of counsel for TSR, "shall be conclusively presumed to be done, or omitted to be done, by [plaintiff] in good faith."

Finally, paragraph 6 (a) of the Employment Agreement requires that plaintiff cannot be terminated for cause unless and until a resolution is duly adopted by the board of directors of TSR finding that, "in the good faith opinion of such Board, the conduct or events described in any of the subparagraphs (i) through (iv) above have been engaged in or occurred, as applicable."

Pursuant to paragraph 6 (d) of the Employment Agreement, if plaintiff is terminated for cause, he is entitled to his salary for the remainder of the month in which the termination takes effect, but no severance payment.

Pursuant to paragraph 7 (a) of the Employment Agreement, if, within one year after a "Change in Control," plaintiff's employment is terminated or he resigns for "Good Reason," he is entitled to a severance payment equal to approximately twice his annual salary and twice his bonus

for the current fiscal year or paid in the prior fiscal year. As defined by paragraph 7 (b) (v), "Change in Control" means, inter alia, "the Incumbent Directors of the Corporation for any reason cease to constitute at least a majority of the Board." Plaintiff alleges that the changes to the composition of the Board effective December 30, 2019, constituted a "Change in Control" as defined under Paragraph 7 (b) (v) of the Agreement, because the incumbent directors at the time the Employment Agreement was executed are no longer on the Board, and thus cannot possibly continue to be a majority of the Board (complaint, ¶ 36).

Plaintiff's Allegations That TSR Breached the Employment Agreement

Plaintiff alleges that, while he was employed by TSR, he acted in the best interests of the Company, complied with all Company policies and practices, sought guidance from counsel and the Board, and acted in accordance with such guidance (*id.*, ¶ 37). Plaintiff asserts that the new investors and the Board members they had appointed (i.e., Eriksen, Fitzgerald, and Tirpak) nevertheless were determined to push him out of the Company (*id.*, ¶ 38).

According to plaintiff, the attempts to wrest control of TSR from him began in June 2018, when Haslani expressed interest in buying TSR to James Hughes, and stated that he wanted to renegotiate the terms of plaintiff's then-operative employment agreement (*id.*, ¶ 39). In the fall of 2018, Zeff suggested to TSR that plaintiff should be terminated, and the new investors criticized plaintiff's management in public statements issued in the context of the proxy and shareholder disputes (*id.*, ¶ 40).

On January 16, 2020, Eriksen and Tirpak convened a meeting with plaintiff at the offices of TSR's counsel in New York City to discuss his future with TSR. Eriksen and Tirpak indicated that the current Board did not have faith in plaintiff, and suggested arranging for plaintiff to leave on an amicable basis, but reiterated their request to renegotiate the terms of the Employment

Agreement, in particular the terms relating to the severance payment to which plaintiff would be entitled (*id*., ¶¶ 42-43). Plaintiff refused and, over the next week, plaintiff had several follow-up telephone calls with Tirpak. In those calls, according to Hughes, Tirpak suggested that plaintiff accept a severance payment far lower than that to which he is allegedly entitled under the Employment Agreement or risk being terminated for cause, in which case he would receive no severance payment beyond the current month's salary (*id*, ¶ 45). When Plaintiff pressed Tirpak on the basis for the threatened termination for cause, Tirpak declined to provide details, and explained that the Board was commencing an investigation into possible grounds for termination, including an alleged breach of fiduciary duty (*id*., ¶¶ 46, 49).

Plaintiff avers that, rather than pay him the severance owed under the Employment Agreement, TSR sought to avoid its obligations to him by attempting to terminate his employment before he tendered his resignation (*id*., ¶ 54). By telephone call to plaintiff's counsel on February 28, 2020, TSR orally notified plaintiff that he was terminated for cause (*id*., ¶ 55). By letter dated March 11, 2020, TSR notified plaintiff by a letter sent by certified mail (as required under the Employment Agreement) that he had been terminated for cause, effective February 29, 2020 (*id*., ¶ 58).

By letter dated March 2, 2020, plaintiff notified TSR that, pursuant to paragraph 7 (c) of the Employment Agreement, due to the diminution of his duties, he was giving notice to the Company of his intention to resign for good reason if the acts or omissions were not cured, and rejecting the purported termination for cause (*id*., ¶ 57).

Plaintiff alleges that TSR did not comply with the provisions of the Employment Agreement governing the circumstances under which he could be terminated for cause, nor the requirements for how such termination would be effected (*id*., ¶ 59).

The complaint contains two causes of action. In the first cause of action for breach of contract, plaintiff alleges that TSR breached the Employment Agreement by terminating him without cause and refusing to honor the agreement's requirement for severance payments. In his second cause of action, plaintiff alleges that TSR breached the duty of good faith and fair dealing by failing to comply with its obligations under the Employment Agreement, and by relying on pretext as grounds to terminate him in order to avoid its obligations to pay the severance owed.

TSR's Allegations

In its answer and counterclaims, TSR provides a counterstatement of facts, in which it asserts that plaintiff breached the Employment Agreement, and that it is bringing its counteraction for damages, declaratory and injunctive relief related to plaintiff's breach of contract, breach of confidentiality, breach of fiduciary duty, tortious interference with prospective and business relations, and the potential exploitation of TSR's valuable confidential and proprietary information to obtain a competitive advantage.

TSR alleges that, over the course of four decades, it has developed confidential and proprietary information, including but not limited to an extensive and proprietary client list; a proprietary database of employees and independent contractors; and trade secrets involving data processing, computer services and other technical information used in furtherance of service to its clients, employees and consultants (answer, ¶ 6). TSR asserts that it took measures to guard the confidentiality of such information including but not limited to having employees sign a confidentiality agreement (*id.*, ¶ 7). Accordingly, when plaintiff signed the Employment Agreement, he also executed a Maintenance of Confidence and Non-Compete Agreement (the Confidence/Non-Compete Agreement) which, according to TSR, survived the term of plaintiff's employment (*id.*, ¶¶ 8-9).

TSR contends that plaintiff was terminated for cause because he violated paragraph 6 of the Employment Agreement by "engaging in willful misconduct that is materially injurious to the Corporation," or "materially breach[ing] any term of this Agreement or any written policy established by the Board and fail[ing] to correct such breach within ten days after written notice of commission thereof" (*id.*, ¶ 11). TSR alleges that the basis for plaintiff's termination includes, but is not limited to, plaintiff's "willful violation of Company policies concerning the electronic transfer of Company records and expense reporting and his misuse of Company funds for personal use spanning several years and breach of fiduciary duty so as to devalue the Company or serve his own personal benefit to the detriment of the Company to whom he owed a duty of care and loyalty" (*id.*, ¶ 12).

Specifically, TSR contends that, between December 2019 through January 2020, plaintiff sent 100+ documents, containing trade secrets, proprietary financial information, or similar materials without prior proper authorization from his Company-issued email account to his personal email account, which conduct violated the Company's Consulting Services Electronic Communications ("Email") and Internet Policy, which plaintiff received and signed in acknowledgment on February 10, 2000 (*id.*, ¶¶ 13-14). TSR alleges that this violation was willful, and for the purpose of using Company documents to gain a competitive advantage against the Company, or to publicly air negative information about the Company (*id.*, ¶ 15).

TSR further alleges that, between 2017-2019, plaintiff charged over $250,000 in expenses to his Company credit card, some of which appeared to be personal expenses and many of which were not verified with proper documentation as required by the Employment Agreement. In addition, plaintiff incurred excessive and unnecessary expenses, including, but not limited to, $150,000 in New York hotel charges when he resides in New York and, in violation of Company

policy, he did not submit proper documentation for his expenses as legitimate business expenses (*id.*, ¶ 16).

TSR also asserts that plaintiff misled the Company into entering over $600,000 in severance packages for employees based on his representations that these packages were sought by employees who were concerned about a change in control. According to TSR, it later learned that plaintiff unilaterally approached these employees and offered them bloated severance packages to decrease the value of the business upon a change in control (*id.*, ¶ 18).

Finally, TSR asserts that plaintiff began disclosing confidential information about the potential change in ownership and/or dispute regarding ownership of TSR to negatively impact client relationships (*id.*, ¶ 21). Section 6 of the Confidence/Non-Compete Agreement states that upon his employment termination, plaintiff was required to return "all property of the Company and/or its Customers and all documents, records, notebooks, and similar repositories of or containing trade secrets or other confidential information, including copies thereof, which may then be in the Employee's possession, whether prepared by the Employee or by others." TSR alleges that plaintiff has failed to return Company property, including but not limited to, the documents that Mr. Hughes transferred to his personal email (*id.*, ¶ 29).

TSR asserts that plaintiff is retaining these records in order to engage in competition with the Company, because plaintiff is actively pursuing the acquisition of "Company A," which was - and currently is - an acquisition target of TSR during plaintiff's employment (*id.*, ¶¶ 30-31). TSR further asserts that, since his termination of employment, plaintiff has repeatedly contacted TSR employees in order to solicit information about TSR, for his own competitive advantage, and that multiple employees have complained to the Company about plaintiff's persistent outreach and inquiries (*id.*, ¶¶ 32-33).

TSR contends that this conduct is in violation of section 4 (a) of the Confidence/Non-Compete Agreement, which provides that plaintiff may not, for a period of nine months following his employment, "solicit, contact, represent, or offer to represent the Company's Full-Time Employees and/or Independent Contractors," as well as section 5(a) of the Confidence/Non-Compete Agreement, which provides that plaintiff "shall not during the term of his employment by the Company and for a period of nine (9) months following the termination of his employment with the Company, directly or indirectly on his own behalf or on behalf of others, engage in the business of providing, or be employed by a company that provides, IT staffing services (or other services similar to, or competitive with, the Company's services) to business enterprises with locations in the New York Metropolitan Area (a 'Competitive Business')" (*id.*, ¶¶ 34-35).

TSR brings counterclaims for declaratory relief-termination (first counterclaim), breach of the Confidence/Non-Compete Agreement (second, third and fourth counterclaims), breach of fiduciary duty (fifth counterclaim), misappropriation of trade secrets (sixth counterclaim), declaratory and injunctive relief – unfair competition (seventh counterclaim), and conversion (eighth counterclaim).

DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment should not be granted if there are genuine material issues of disputed fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

Plaintiff moves for summary judgment as to both of his affirmative claims regarding breach of the Employment Agreement. Plaintiff seeks a determination that TSR breached the terms of the Employment Agreement by terminating his employment without paying the severance owed, and a determination that the associated Confidence/Non-Compete Agreement is unenforceable, based on its terms, and due to the breach of the Employment Agreement. Plaintiff also seeks summary judgment dismissing TSR's counterclaims.

Paragraph 6 (a) of the Employment Agreement governs termination for Cause:

> "Termination for 'Cause' shall mean Executive shall (i) be convicted of, or plead guilty or nolo contendere to, any crime constituting a felony, (ii) engage in willful misconduct that is materially injurious to the Corporation, (iii) commit an act of fraud against the Corporation or (iv) materially breach any term of this Agreement or any written policy established by the Board and fail to correct such breach within ten days after written notice of commission thereof. For purposes of the definition of 'Cause' above, no act or failure to act, on the part of Executive, shall be considered 'willful' unless it is done, or omitted to be done, by Executive in bad faith. Any act, or failure to act, based upon authority given by the Board or based upon the advice of counsel for Corporation shall be conclusively presumed to be done, or omitted to be done, by Executive in good faith. Executive's termination of employment shall not be for 'Cause' unless and until there shall have been a resolution duly adopted by the Board finding that, in the good faith opinion of such Board, the conduct or events described in any of the subparagraphs (i) through (iv) above have been engaged in or occurred, as applicable.

Both parties agree that subparagraphs (ii) and (iv) are the only subparagraphs applicable to this action. Subparagraph (ii) requires both willful misconduct and conduct materially injurious to TSR, and subparagraph (iv) requires a material breach of the Employment Agreement.

Plaintiff contends that "none of the allegations by TSR satisfy the termination for Cause provisions in the Agreement because (1) they were business judgment decisions, (2) they were approved by the then existing Board, counsel, or other TSR officers, (3) they are demonstrably erroneous, and (4) TSR failed to give Plaintiff notice, a precondition to certain termination for Cause provisions" (plaintiff's memorandum of law [NYSCEF Doc No. 13], at 1).

In support of this contention, plaintiff largely relies on his own affidavit, in which he alleges that the conduct purportedly at the heart of TSR's decision – plaintiff forwarding emails to himself; plaintiff billing TSR for hotel stays in New York and other business expenses; and plaintiff making various decisions protected by the business judgment rule – is not the type of conduct that constitutes "cause" pursuant to the terms of the Employment Agreement. According to plaintiff, the Employment Agreement's requirements that the conduct be willful – defined as done in bad faith – and be materially injurious or a material breach of a policy, indicate that only egregious misconduct would suffice for termination for Cause. Plaintiff asserts that none of TSR's allegations rise to the level that would justify a termination for cause, but instead are a pretextual justification for the Company to avoid its contractual obligations to make required severance payment (Hughes aff [NYSCEF Doc No. 17], ¶ 17).

Specifically, plaintiff contends that he did not forward himself any emails containing confidential information (*id.*, ¶ 51), and did not charge any improper or personal expenses to the Company (*id.*, ¶¶ 54-58). Further, with respect to TSR's allegations that he misled the Company into entering into over $600,000 in severance packages with the purpose of decreasing the value

of the Company, made poor business decisions in order to avoid the purchase by the new investors, and disclosed confidential information about the impending change in ownership in order to negatively impact client relationships, plaintiff alleges that the conduct alleged, even if true, would not, as a matter of law, constitute grounds for termination for cause as defined under the Employment Agreement because, "at all times, I consulted with the Board of Directors and/or corporate counsel, rendering my actions conclusively taken (or omitted) in good faith," and "[t]hus, none of the conduct can be viewed as willfully causing material injury to the Company, and therefore does not constitute grounds for termination for Cause" (*id.*, ¶ 59).

With respect to TSR's allegations that he breached the Confidence/Non-Compete Agreement, plaintiff alleges that this agreement is not enforceable due to the Company's breach of the Employment Agreement (*id.*, ¶¶ 69-70). Plaintiff also alleges that, even if it were enforceable, he did not breach its terms (*id.*, ¶ 71).

With respect to TSR's allegations that his discussions with Company A violate the Confidence/Non-Compete Agreement, and that he is using information about Company A that he obtained during his employment to further his potential acquisition, plaintiff asserts that those allegations are baseless because he was not involved in the discussions pertaining to the possible acquisition, and was not aware of the terms of the non-disclosure agreement governing a potential transaction with Company A (*id.*, ¶¶ 72-73). Plaintiff further asserts that he did not begin any discussion with Company A until after the Company terminated his employment (*id.*, ¶ 74).

Plaintiff thus argues that he has proved his prima facie case for breach of contract, because he has established (1) the existence of the contract – the Employment Agreement; (2) TSR's breach – the wrongful termination, i.e., TSR's failure to satisfy its obligation to demonstrate any basis for terminating his employment for cause; and (3) damages – the severance payments owed (*see*

plaintiff's reply memorandum of law [NYSCEF Doc No. 52], at 2). Plaintiff further argues that, having done that, he shifted the burden to TSR to demonstrate by admissible evidence that it had a basis for terminating him for cause as set forth in the Employment Agreement, but that TSR has not met its burden to refute plaintiff's prima facie case. Plaintiff contends that TSR offers no evidence to support his termination for cause, nor does it respond to plaintiff's arguments that the alleged grounds for the termination are not legally sufficient.

The court rejects plaintiff's argument – and his motion – as premature. Plaintiff has failed to set forth a prima facie case for breach of the Employment Agreement and dismissal of TSR's counterclaims and, rather than conclusively establishing his entitlement to summary judgment, plaintiff's affidavit raises multiple factual issues with respect to these claims.

As noted above, there has been no discovery in this case. Although CPLR 3212 does not preclude a party from obtaining summary judgment prior to discovery, it is a steep hill for the early movant to climb (*see e.g. Yun-Shou Gao v City of NY*, 29 AD3d 449, 449 [1st Dept 2006] ["motion was made before any disclosure had been conducted and was properly denied in the circumstances presented"]; *Bradley v Ibex Constr. LLC*, 22 AD3d 380, 380-381 [1st Dept 2005] [denying summary judgment motions as "premature under the circumstances presented," as they "were made before a preliminary conference had been held and before defendants had any opportunity to obtain disclosure"]; *Ardizzone v Summit Glory LLC*, 2020 NY Slip Op 31070[U], * 4 [Sup Ct, NY County 2020] [denying summary judgment motion when "the formal discovery process . . . has yet to commence"]; *Robb v Knights Collision & Auto Care Ctr. Inc.*, 2018 NY Slip Op 31400[U], * 3 [Sup Ct, NY County 2018] ["Since no preliminary conference has been held and no discovery has been conducted in this matter, KCE's motion for summary judgment is clearly premature"]).

Generally, pre-discovery summary judgment motions have been granted when the factual record is undisputed, the factual disputes are legally irrelevant to the parties' claims, or the non-movant fails to show a need for discovery. Illustrative examples include where: 1) the allegations were deficient as matter of law, irrespective of the factual submissions (*see Jeffers v American Univ. of Antigua*, 125 AD3d 440, 441-443 [1st Dept 2015] [upholding denial of summary judgment motion as premature except as to fraud claims where the allegations were insufficient as matter of law]); 2) strict liability was at issue, such as in rear-end collision cases (*see Santana v Danco Inc.*, 115 AD3d 560, 560 [1st Dept 2014] ["It is well settled that when a rear-end collision occurs, the driver of the front vehicle is entitled to summary judgment on liability, unless the driver of the following vehicle can provide a nonnegligent explanation for the collision"] [internal quotations and citation omitted]; 3) the claim is for account stated, where a prima facie case is made out through proof that the defendant retained bills without objection (*see A&W Egg Co., Inc. v Tufo's Wholesale Dairy, Inc.*, 169 AD3d 616, 617 [1st Dept 2019] [finding that "the motion was not prematurely decided before discovery"]; and 4) instruments for the payment of money only, where a prima facie case is made out by submission of the instrument and proof of nonpayment (*see Citibank, N.A. v Villano*, 140 AD3d 553, 553 [1st Dept 2016] [pre-discovery motion not premature as "(d)efendant obviously knew whether or not she signed the documents without needing access to plaintiff's records"]).

This case, by contrast, is not susceptible to pre-discovery summary judgment. Plaintiff is asking the court to resolve a myriad of claims in his favor – ten in total – based largely upon his own affidavit. However, New York courts generally have rejected dispositive reliance on affidavits submitted in support of summary judgment where the non-movant has not had the opportunity to depose the affiants (*see Ardizzone*, 2020 NY Slip Op 31070[U], at * 7 [denying

summary judgment and noting that, although the parties had submitted affidavits in support of their motions, the other parties "have not had the opportunity depose" the affiants and ask questions]; *see also Kemper Independence Ins. Co. v AB Med. Supply, Inc.*, 187 AD3d 671, 671 [1st Dept 2020] [affirming denial of plaintiff's motion for summary judgment as "plaintiff moved for summary judgment before any depositions had been conducted"]; *Vizcaino v Park Lane Mosholu, LLC*, 180 AD3d 524, 524 [1st Dept 2020] ["The remainder of the motion for summary judgment was premature because defendants had not been deposed"]; *Guzman v City of New York*, 171 AD3d 653, 653 [1st Dept 2019] [affirming denial of summary motion as premature, as "[n]o discovery had been conducted" prior to the summary judgment motion, "thereby depriving plaintiff of the opportunity to depose the parties who would have knowledge concerning the relevant issues in this action"]).

Plaintiff argues that TSR does not require discovery to oppose summary judgment because the matters at issue are those within TSR's own knowledge. Specifically, plaintiff argues that TSR's repeated assertion in its Rule 19 (a) Counter-Statement to plaintiff's Rule 19 (a) Statement of Facts that it lacks sufficient information to respond is meritless, since it allegedly terminated plaintiff for cause, and therefore must know why plaintiff was terminated. Although there is some appeal to that suggestion, in the current circumstances it is unclear whether current management of TSR has ready access to information necessary to fully address plaintiff's pre-discovery motion for summary judgment.

In addition, plaintiff's affidavit itself raises material factual issues requiring denial of the motion. "On a motion for summary judgment ... self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts" (*Sacher v Long*

Is. Jewish–Hillside Med. Ctr., 142 AD2d 567, 568 [2d Dept 1988]; *accord Mills v Niagara Frontier Transp. Auth.*, 163 AD3d 1435, 1438 [4th Dept 2018]; *Nahar v Gulati*, 33 Misc 3d 1233[A], 2011 NY Slip Op 52230[U], *1 [Sup Ct, NY County 2011]; *see also* John R. Higgitt, Supplementary Practice Commentary, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3212:19 [2015 Supp] [explaining movants cannot rely on self-serving testimony for summary judgment "[w]hen the movant holds the sole key to a material fact" because "it is too easy for her to state the fact as she wishes in the moving affidavit. She should be required to testify to it in open court, and then submit to that most probing of truth-discerning devices: the cross-examination"]). Indeed, "[i]f everything or anything had to be believed in court simply because there is no witness to contradict it, the administration of justice would be a pitiable affair" (*Punsky v City of New York,* 129 App Div 558, 559 [2d Dept 1908]). Thus, plaintiff's self-serving affidavit is insufficient to establish his "prima facie entitlement to summary judgment as a matter of law" (*see e.g. Quiroz v 176 N. Main, LLC*, 125 AD3d 628, 631 [2d Dept 2015]).

For instance, plaintiff contends that "[t]he provisions of Paragraph 6 of the Agreement target egregious misconduct - criminal behavior, fraud against the Company, willful misconduct, or a violation of a Company policy that was not cured" (Hughes aff, ¶ 17). Plaintiff then sets forth defendants' allegations against him, and unilaterally declares that none of the conduct alleged rises to the level that would justify a termination for cause. However, whether plaintiff's conduct can deemed to constitute "willful misconduct," which requires "bad faith" on plaintiff's part, or whether plaintiff's conduct is "materially injurious," are matters of factual dispute (*see Elbayoumi v TD Bank, N.A.*, 185 AD3d 786, 789 [2d Dept 2020] [denying motion for summary judgment as "there were triable issues of fact as to whether (defendant's) conduct constituted . . . willful misconduct"]; *Banc of Am. Sec. LLC v Solow Bldg. Co. II*, 47 AD3d 239, 245–46 [1st Dept 2007]

[lower court "properly concluded that issues of fact with respect to whether [defendant] acted . . . in bad faith preclude summary disposition"]; *Modern Settings, Inc. v American Dist. Tel. Co. (A.D.T.)*, 121 AD2d 266, 269 [1st Dept 1986] [finding that summary judgment was "plainly premature," and whether certain actions constituted willful misconduct "must await a trial"]).

Factual and legal issues also remain with respect to the enforceability of the Employment Agreement and the Confidentiality/Non-Compete Agreement. Plaintiff's argument as to unenforceability relies on whether TSR had cause for termination for his employment, and whether plaintiff effectively resigned for "Good Cause" due to a "Change in Control," after he had been notified that his employment was terminated. However, whether or not plaintiff was fired for cause, or which party breached the Employment Agreement, are fact-intensive issues that cannot be determined at this juncture (*see Todd v Grandoe Corp.*, 302 AD2d 789, 791 [3rd Dept 2003] [denying motion for summary judgment as there was a "triable issue of fact as to whether [plaintiff] was fired without cause and entitled to severance pay as described in the agreement"]; *J.K. Dental Lab Servs., Inc. v Manno*, 38 Misc 3d 1227[A], 2013 NY Slip Op 50303[U], * 5 [Sup Ct, NY County 2013] [denying motion for summary judgment as there were factual issues as to whether defendant was fired for cause, and whether plaintiff breached the employment agreement]).

In addition, although plaintiff flatly contends that he did not violate the Confidentiality/Non-Compete Agreement (Hughes aff, ¶ 71), whether or not plaintiff disclosed confidential information about the potential change in ownership, or engaged in competition with the Company by pursuing the acquisition of Company A, are also inherently factual issues (*see Photonics Indus. Intl., Inc. v Xiaojie Zhao*, 185 AD3d 1064, 1067-1068 [2d Dept 2020] [denying motion for summary judgment for breach of employment agreement as there was a triable issue of fact whether the noncompetition clause of employment agreement should be enforced, and whether

defendant used plaintiff's trade secrets]; *Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 445 [1st Dept 2017] ["the issue of defendants' alleged misconduct by violating the non-solicitation and noncompete provisions of the DCA and breaching their duty of loyalty as alleged in the complaint, which, if proven, would unquestionably constitute a termination for cause under the DCA, remains an issues of fact to be determined by the jury at trial"]).

Indeed, although plaintiff contends that the emails that he downloaded contained no confidential information (Hughes aff, ¶ 51), his request that this Court review these emails *in camera* to determine if they contain confidential information or trade secrets (NYSCEF Doc. No. 72 at 20-25) only illustrates that there are factual issues requiring denial of the motion. Determining whether the documents contain confidential information must be informed by an understanding of the business that this Court cannot simply assume from Plaintiff's motion papers and arguments.

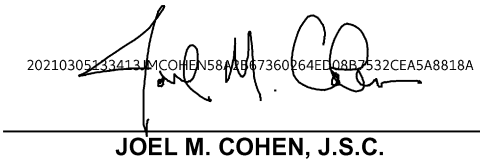
In addition, plaintiff's admissions that: 1) he did, in fact, forward emails from his TSR account to his personal account, including emails that contained Company information (*see* Hughes aff, ¶¶ 48, 50); 2) he pursued Company A, a target of TSR for acquisition, upon his termination from TSR, though he denies any unfair competition (*see id.*, ¶¶ 74-75); and 3) he reached out to employees after his termination, though he denies trying to obtain confidential information or interfering in TSR's employment relationship with their employees (*see id.*, ¶ 76), also raise, rather than resolve, the factual issues in dispute (*see Mahuson v Ventraq, Inc.*, 118 AD3d 1267, 1269 [4th Dept 2014] ["Plaintiffs' own submissions raise triable issues of fact whether they violated the non-competition and non-solicitation covenants at issue"]). TSR has the right to depose and conduct discovery based on plaintiff's admissions.

The court has considered Plaintiff's remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is **DENIED**.

This constitutes the decision and order of this court.



3/5/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE