

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

PRESENT: HON. EILEEN BRANSTEN
Justice

PART 3

Index Number : 650540/2010
GROUP HEALTH SOLUTIONS
vs.
JOSHUA P. SMITH
SEQUENCE NUMBER : 003
DISM ACTION/INCONVENIENT FORUM

INDEX NO. 650540/10
MOTION DATE 4/26/11
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

~~IS DECIDED~~ **IS DECIDED**
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8-5-11

Eileen Bransten
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X

GROUP HEALTH SOLUTIONS INC.,

Plaintiff,

Index No.
650540/2010

Motion Date:
4/26/2011

-against-

Motion Seq. No. 003

JOSHUA P. SMITH, SMITH BENEFIT PARTNERS and
VANGUARD BENEFIT SOLUTIONS, LLC,

Defendants.

-----X

BRANSTEN, J.

Defendants Joshua P. Smith, Smith Benefit Partners and Vanguard Benefit Solutions, LLC move, pursuant to CPLR 3211 (a)(7), to dismiss the amended complaint by Plaintiff Group Health Solutions. Plaintiff opposes.

BACKGROUND¹

Plaintiff Group Health Solutions Inc. ("GHS") is a New York Corporation engaged in the business of health insurance brokerage. GHS's principal place of business is at 148 Madison Avenue, 15th Floor, New York, NY.

¹ The facts are taken from the amended complaint. On a motion to dismiss, pursuant to CPLR 3211(a), the court must accept the facts as alleged in the complaint as true. *Leon v. Martinez*, 84 N.Y.2d 83 (1994).

Defendant Joshua Smith (“Smith”) was retained by GHS to service GHS clients and to locate new business for GHS. Smith is a New York resident. Defendant Smith Benefit Partners (“Smith Benefit Partners”) is a New York General Partnership with its place of business at 125 Bellows Lane, New City, New York. Smith is a General Partner of Smith Benefit Partners. Plaintiff asserts that Smith also wholly owns and/or controls Defendant Vanguard Business Solutions (“Vanguard”), a New York Limited Liability Company. Vanguard is also a health insurance brokerage service and has its place of business at 254 South Main Street, Suite 130, New City, New York.

a. Factual Allegations

GHS alleges that it primarily brokers health insurance for large groups. GHS has been actively and continuously developing and servicing its clients for 20 years. GHS states that the success of its business is due to its service and its development of personal relationships with its customers.

In addition to servicing its own clients, GHS has contracted to service the clients of Universal Underwriters Insurance Services, Inc. (“Universal”). GHS’s agreement with Universal is memorialized in written agreements with Universal (the “Universal Agreements”). Universal’s clients (“the Universal Clients”) are entities in the automotive trade, each with 10 to 600 employees. GHS has been servicing the Universal Clients for approximately ten years.

The Universal Agreements provide that Universal must refrain from referring their New York and New Jersey clients to any insurance entity other than GHS. GHS alleges that Universal is the largest single source of GHS's business, and prior to Defendants Smith's alleged interference with the Universal Agreements, represented 20% of GHS's total business.

Plaintiff GHS claims that it has spent significant time, expense and effort in developing its relationship with Universal and the Universal Clients, and in servicing the Universal Clients' health insurance needs. Among other expenses and efforts, GHS has compiled details of the healthcare needs of each Universal Client, including each client's amount and type of insurance coverage. GHS has also kept track of important individual client information such as the expiration dates of insurance contracts, premium due dates and the amount of premium paid. GHS claims that this information is confidential and is necessary to facilitate GHS's effective servicing of the Universal Clients.

GHS alleges that because of the importance of the Universal Clients to GHS's business, and as a result of the time, money and effort that GHS has spent to develop its relationship with Universal, GHS takes steps to protect its relationships with, and information of, its Universal Clients. Pursuant to this course of protection, GHS ensures that its employees, agents, servants and independent contractors execute non-compete agreements. These agreements provide that signatories will not directly or indirectly solicit, on behalf of themselves or on behalf of a third party, any of GHS's accounts for a

period of two years after termination of employment from GHS. The non-compete agreements also state that the signatories will not assist any other party in soliciting business from GHS's accounts, nor will the signing parties be employed by any other party to solicit business from the GHS accounts.

GHS states that it retained Defendant Smith in or around 1997 to assist GHS in locating new business and in servicing its clients. GHS alleges that on April 4, 2006, Smith executed a Producer Agreement for Universal Underwriters Insurance Services, Inc. ("UUISI") clients (the "Producer Agreement"). The Producer Agreement acknowledged the Universal Agreements between GHS and Universal and Smith's intention to conduct business with the Universal Clients. The Producer Agreement provided that Smith would not directly or indirectly solicit, or cause any other person or entity to solicit, any of the GHS's Universal Clients for a period of two years after the termination of Smith's employment with GHS. The Producer Agreement further provided that Smith agreed not to impede the relationship between GHS and the Universal Clients. In the event of a breach by Smith, the Producer Agreement further stipulated that GHS would be entitled to recover all profits, commissions or compensation as a result of Smith's breach. In addition, the agreement stated that GHS was entitled to recover all costs and reasonable attorneys' fees incurred in its effort to redress any breach or enforce its rights.

On October 1, 2009, Smith signed a non-compete agreement with GHS (“the Non-Compete”). Smith therein agreed that he would not directly or indirectly solicit any insurance business from any of GHS’s insurance accounts for three years following the termination of his employment. Smith also agreed not to assist any other party in soliciting any business from the GHS accounts.

The Non-Compete also contained a liquidated damages clause. The clause stated that if Smith breached the Non-Compete he was liable for damages of “three (3) times the first year’s net commission received by [Smith].” Amend. Compl. ¶ 21. In the event that that GHS suffered any loss of business as a result of Smith’s breach, damages were set at “four (4) times the net annual commissions and/or fees earned by the Agencies during the preceding twelve (12) months from all insurance accounts written by the Agencies for all accounts lost to the Agencies” as a result of the breach. Amend. Compl. ¶ 21.

GHS alleges that it gave Smith full access to the Universal Clients during Smith’s tenure with GHS. GHS also granted Smith access to all of the relationships and goodwill that GHS had developed with the Universal Clients. GHS further alleges it and Smith discussed the Producer Agreement and the Non-Compete at length prior to his signing both agreements.

On or about May 17, 2010, GHS terminated Smith’s retention for cause.

b. Three Causes of Action

GHS brings three causes of action against Defendants. GHS's first cause of action is for breach of the Producer Agreement and Non-Compete. GHS alleges that Defendants have been actively soliciting and servicing the Universal Clients, in violation of both agreements. GHS alleges that it has been damaged and continues to be damaged by this breach. GHS asserts that the agreements Smith signed provide for liquidated damages in the event of breach, and it is therefore entitled to compensatory damages from Defendants in an amount to be determined at trial. Amend. Compl. ¶ 29.

In its second cause of action, GHS alleges that Defendants have tortiously interfered with the Universal Agreement between GHS and Universal. GHS alleges that Defendants had actual knowledge of the Universal Agreements and, nonetheless, have wrongfully and intentionally interfered with these agreements. GHS contends that, following Smith's termination, Defendants have interfered with the Universal Agreements by soliciting, diverting, accepting and servicing the Universal Clients. GHS alleges that Defendants actions have been willful, wanton and malicious and have actually damaged GHS. GHS claims that it is entitled to compensatory damages and punitive damages of \$5,000,000 from each defendant.

In its third cause of action, GHS seeks to recover attorneys' fees from Smith. GHS alleges that the agreements between GHS and Smith expressly provide that if Smith

breached the agreements then GHS is entitled to attorneys' fees, and on this basis it is entitled to a judgment for attorneys' fees and other litigation expenses.

Defendants move to dismiss all three causes of action pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

ANALYSIS

I. Standard of Law

In determining whether to grant a motion to dismiss pursuant to CPLR 3211, the court must afford the complaint a liberal construction. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 329 (2002). The court accepts all of the facts alleged in the complaint as true, and accords the plaintiff the benefit of every legal inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The court asks only whether the facts of the case fit into any cognizable legal theory. *Id.* at 88. The question is not whether the pleader has stated a cause of action, but whether the pleader has a cause of action. *Id.*

When ruling on a motion to dismiss under CPLR 3211 (a)(7), the court may consider affidavits by the plaintiff to remedy defects in the complaint. *Id.* However, "bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence ... are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are

contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 496 (1st Dep't 2006).

II. GHS's First Cause of Action for Breach of Contract

GHS alleges that Defendants breached the non-compete covenants contained in the Producer Agreement and Non-Compete between Smith and GHS. Defendants move, pursuant to CPLR 3211 (a)(7), to dismiss this cause of action for failure to state a cause of action.

The elements for cause of action for breach of contract are: the existence of a contract, performance by plaintiff, the breach by defendant, and resulting damages. *See Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

a. Existence of a Contract

GHS alleges the existence of two agreements, the Producer Agreement and the Non-Compete. GHS first claims that Defendants breached the Producer Agreement. GHS contends that Smith agreed in the Producer Agreement not to solicit any of the Universal Clients for two years after the termination of his employment with GHS. GHS claims second that Defendants breached the Non-Compete. GHS alleges that Smith agreed in the Non-Compete not to solicit business from any of GHS's insurance accounts

for three years after the termination of his employment with GHS. GHS alleges that Smith has breached these two agreements by actively soliciting business from the Universal Clients. GHS contends that it has suffered damages as a result of the breach.

Defendants argue that, although the amended complaint is to be liberally construed on a motion to dismiss, GHS has failed to allege the existence of a contract because the non-compete covenants that were signed by Smith are unenforceable as a matter of law. Defendants contend that GHS has therefore failed to allege an essential element of the cause of action, and the cause of action must be dismissed. Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint ("Defendants' Memo") at 4 [citations omitted].

Defendants argue that the protection of an employer's interests is limited to protection of an employer's trade secrets, confidential customer lists, or from competition by an employee whose services are unique or extraordinary. Defendants' Memo at 6 (citations omitted). Defendants contend that the agreements upon which GHS's claim is based do not attempt to protect such information and are thus inadequate to form a cause of action.

In determining whether to enforce non-compete agreements, the court is to apply a three-prong test to determine whether the agreement is reasonable. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389 (1999). The restraint is only reasonable if the non-compete agreement "(1) is no greater than is required for the legitimate interest of the

employer, (2) does not impose undue hardship on the employee and (3) is not injurious to the public.” *Id.* at 388-89.

Courts have strictly applied this rule to limit the enforcement of broad restraints on competition. *Id.* at 389. Courts originally held that non-compete covenants were only enforceable “to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information.” *Reed, Roberts Associates, Inc. v. Strauman*, 40 N.Y.2d 303, 308 (1976). Covenants not to compete were also enforceable where “an employee’s services are unique or extraordinary and the covenant is reasonable.” *Id.* However, when the agreement is between professionals, the courts have “given greater weight to the interests of the employer in restricting competition within a confined geographical area.” *BDO Seidman*, 93 N.Y.2d at 389. Wider latitude is given to professionals because professionals are deemed to provide “unique or extraordinary services.” *Id.*

In *BDO Seidman*, the court also recognized that an employer’s interest in protecting the relationships and goodwill that the employer has developed with its clients is another basis for enforcing non-compete agreements. That basis applies even in instances where the court determined that the services in question were not unique or extraordinary and the former employee did not misappropriate confidential materials. *BDO Seidman* 93 N.Y.2d at 391. The court recognized that the defendant employee “has been enabled to share in the goodwill of a client or customer which the employer’s over-

all efforts and expenditures created,” and, thus, “the employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer’s expense, to the employer’s competitive detriment.” *Id.*

The *BDO Seidman* court held that although the services of the professionals in that matter, accountants, were not unique or extraordinary, the non-compete covenants placed in accountants’ contracts were enforceable to the extent that they protected the particular relationships that were created by the accounting firm during the course of the accountant’s employment. *Id.* at 393. The court, however, refused to enforce the covenants to relationships that were created by the employees themselves during the course of their employment. *Id.* The court also refused to extend the covenants to the “personal clients” of the employees who came to the firm solely as a result of the employee’s recruitment effort. *Id.* These clients, the court held, were not acquired at the expense of the firm, and enforcing the covenants as to these clients would be unreasonable. *Id.*

New York courts have continued to recognize the protection of customer relationships and goodwill as a legitimate interest that justifies the enforcement of non-compete covenants. In *Scott, Stackrow and Co. v. Skavina*, the court recognized the legitimate interest in protecting client relationships and goodwill that the “employer assisted the employee in developing through the employee’s performance of services in

the course of employment.” *Scott, Stackrow and Co. v. Skavina*, 9 A.D.3d 805, 806 (3d Dep’t 2004). Similarly, in *IKON Office Solutions, Inc. v. Usherwood Office Technology, Inc.* 21 Misc.3d 1144(A) (Sup. Ct. Albany Co. 2008) (Platkin, J.) the defendants were former employees of the plaintiff, a company that sold, leased and serviced office equipment and systems. The plaintiff claimed that the employees had violated non-compete covenants that prohibited the defendants from soliciting its customers after the defendant’s contracts with the plaintiff had ended. The court held that, even though the defendants had not misappropriated confidential information, the employer had a legitimate interest in protecting the goodwill and relationships that it had created with its customers through those employees. *IKON Office Technology*, 21 Misc.3d at 12.

Defendants argue that the non-compete agreements which Smith signed are unenforceable as a matter of law. Defendants first contend that the insurance customer lists are not protectable as a trade secret and the customers serviced by the defendant were otherwise discoverable through public sources. Defendants’ Memo at 6 (citations omitted). Defendants also argue that soliciting business based on casual memory is not actionable as a violation of a non-compete covenant. Defendants’ Memo at 9 (citations omitted). However, as the Court of Appeals held in *BDO Seidman*, a non-compete covenant may be enforceable even in the absence of the misappropriation of confidential information. *BDO Seidman* at 93 N.Y.2d at 391. In this case, GHS alleges that it developed and maintained relationships with clients, that Smith took advantage of those

relationships during the course of his employment and that Smith then used those relationships to compete with GHS in violation of the agreements. If proven, GHS has a legitimate interest in enforcing the non-compete agreements. *See BDO Seidman*, 93 N.Y.2d at 391.

Defendants also rely heavily on *Riedman Corp. v. Gallagher*, 48 A.D.3d 1188 (4th Dep't 2008) in support of their contention that the non-compete agreements should be unenforceable as a matter of law. In that case, a plaintiff insurance company alleged a breach of an agreement that the defendant employee would use confidential information only in furtherance of his employment with the plaintiff. *Id.* at 1188. The defendant had further agreed that he would not solicit or accept insurance business from any of the plaintiff's customers for two years after the termination of his employment. *Id.* The defendant allegedly continued to service the plaintiff's clients after the defendant was released from his employment with the plaintiff and accepted a position with another company. *Id.* The court therein held that the services of an insurance agent were not unique or extraordinary and refused to enforce the non-compete covenants. The court then granted summary judgment in favor of the defendant employees. *Id.* at 1189. However, *Riedman* is distinguishable from the case at bar.

In *Reidman*, the court specifically held that the relationships and goodwill between the plaintiff company and the clients were created by the employee and at the employee's expense, and not at the expense of the employer. *Id.* at 1190. Thus, the plaintiff

employer did not have a legitimate interest in enforcing the non-compete covenants there at issue. In contrast, here GHS alleges that it created the relationships with its customers and goodwill at its own expense. GHS thus has a legitimate interest in protecting these relationships and goodwill.

Defendant also cites in support of its argument a GHS action against another former GHS employee for impermissibly using trade secrets and customer lists. The New York Supreme Court, in an opinion by Justice Marcy Friedman, denied injunctive relief for GHS where GHS sued a former employee for using customer lists. Justice Friedman held that the customer lists were not protected as a trade secret. *Group Health Solutions v. Jacoby*, (index No. 104116/06) (Sup. Ct., NY County) (April 18, 2006) (Friedman, J.). However, as discussed above, misappropriation of confidential information is not required for a cause of action for breach of a covenant not to compete. Thus, Defendants' citation to Justice Friedman's decision is not here dispositive.

GHS's amended complaint alleges the existence of two agreements that prohibit Defendant Smith from soliciting business from the Universal Clients or from GHS's clients in the years subsequent to his termination. The fact that Defendants may not have misappropriated confidential information is not dispositive. New York courts have determined that an employer has a legitimate interest in protecting the goodwill and the relationships that the employer has developed with clients at the employer's expense. GHS alleges that it has spent much time, money and effort to form relationships with their

client base, and to service and maintain these relationships. GHS's interest in protecting goodwill is a legitimate basis to enforce the non-compete covenant, regardless of whether the defendants misappropriated confidential information. GHS has shown a protectable interest and has validly pled their claim for breach of contract. *See Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

b. Liquidated Damages

Defendants also argue that the Producer Agreement and the Non-Compete contain liquidated damages provisions that are unenforceable as a matter of law. Defendants contend that this alleged unenforceability also requires dismissal of GHS's first cause of action for breach of contract.

Defendants argue that the liquidated damages provisions in the agreements provide for triple or quadruple damages in the event of breach. Defendants contend that these clauses constitute an impermissible forfeiture and penalty. Defendants' Memo at 11. However, GHS's amended complaint seeks only damages "in an amount to be determined at trial." Amend. Compl. ¶ 29. Thus, GHS has alleged damages sufficient to withstand a motion to dismiss. Specific damages do not have to be stated in a complaint so long as facts are alleged from which damages can be properly inferred. *Rhode v. Alberto-Culver*, 505 N.Y.S.2d 989, 991 (1986).

GHS has properly pled all of the elements for breach of contract. GHS has alleged the existence of non-compete covenants between GHS and Smith, and these agreements are enforceable on their face. GHS has further alleged that Defendants breached these contracts by soliciting business from GHS's clients, and that GHS was damaged as a result of the breach.

c. Smith Benefit Partners and Vanguard

Defendants next assert that GHS's breach of contract claim must be dismissed as against Smith Benefit Partners and Vanguard. Defendants' sole argument is that "no claims are asserted against [Smith Benefit Partners and Vanguard] in the First Cause of Action" and "the First Cause of Action pleads only against Joshua Smith." Defendants' Memo at 10. The court disagrees.

Defendants could have argued pursuant to CPLR 3211 (a)(1) that no documentary evidence of a contract exists between Plaintiff GHS and Defendants Smith Benefit Partners and Vanguard and that Smith was the only signatory on the Producer Agreement and the Non-Compete. Defendants did not. Instead, Defendants argue that GHS pleads its first cause of action only against Smith. Addressing Defendants' sole argument, and not the merits of the claim on this motion to dismiss, the court disagrees.

GHS alleges that the Producer Agreement and the Non-Compete stipulate that Smith would not utilize any other entity to solicit GHS's clients. The Producer

Agreement produced by GHS states that the Producer (Smith) agrees not to “*cause or authorize any other person or entity to solicit*, for or on behalf of the Producer or any third party, and Clients of GHS.” Amend. Compl. ¶ 21 (emphasis added). Similarly, the Non-Compete agreement with GHS also states that Smith will not “*directly or indirectly assist or be employed by any other party in soliciting or accepting* any insurance business.” Amend. Compl. ¶ 21 (emphasis added).

GHS’s amended complaint specifically states that “Smith individually *and/or through the remaining Defendants* has/have been soliciting and accepting insurance business from the Universal Clients of GHS in blatant violation of the covenants and agreements made by Smith with GHS.” Amend. Compl. ¶ 25 (emphasis added). GHS’s amended complaint asserts that there is a relationship between Smith and the other two Defendants. Amend. Compl. ¶¶ 3, 4. GHS further alleges that Smith has solicited GHS’s clients through these two entities to which he is closely related.

On these allegations, GHS has thus pleaded a claim against the company Defendants sufficient to satisfy GHS’s burden and opposition to Defendants’ motion pursuant to CPLR(a)(7). The merits of GHS’s cause of action against the companies is not at issue at this time.

In affording the complaint the most liberal construction, and in according the complaint the benefit of every legal inference, GHS has asserted claims against Smith Benefit Partners and Vanguard. Defendants’ motion to dismiss the first cause of action is denied.

**II. GHS's Second Cause of Action for
Tortious Interference with Contractual Relations**

GHS's second cause of action claims that Defendant Smith tortiously interfered with GHS's contractual relations with Universal. Defendant moves to dismiss this cause of action for failure to state a claim, pursuant to CPLR 3211(a)(7).

In order to plead a claim for tortious interference with contractual relations, the plaintiff must allege "the existence of a valid contract with a third party, defendant's knowledge of the contract, defendant's intentional and improper procuring of a breach, and damages." *White Plains v. Cintas Gore*, 8 N.Y.3d 422, 426 (2007).

a. Existence of a Valid Contract with a Third Party

GHS alleges that Smith has interfered with the Universal Agreements by soliciting Universal Clients after GHS terminated his employment. The Universal Agreements provide that Universal will not refer its clients to any insurer other than GHS.

Defendants, in moving to dismiss, argue that if the non-compete agreements that Smith signed are not enforceable, then a claim for tortious interference does not exist. Defendants' Memo at 14. Defendants correctly state that a valid contract must exist for a claim of interference to exist.

However, as GHS correctly points out, its tortious interference claim is based upon Smith's alleged interference with the Universal Agreements between GHS and Universal,

not the non-compete agreements. GHS has thus made a proper allegation of a contract with a third party with which Smith allegedly interfered. GHS's interference claim is not based on the non-compete agreements between Smith and GHS and Defendants' argument therefore is without merit. Amend. Compl. ¶ 31.

b. Allegations of Specific Acts of Interference

Defendants further argue that GHS's amended complaint is devoid of any allegation of specific acts of interference. However, GHS specifically alleges that Defendants have interfered with GHS' contractual relations by "soliciting, diverting, accepting and servicing the Universal Clients since Smith's departure from GHS." Amend. Compl. ¶ 31. Thus, GHS has sufficiently pleaded specific actions by Smith which they contend constitute Smith's tortious interference with contractual relations.

c. Special Damages

Finally, Defendants contend that GHS's claim of tortious interference with contractual relations must be dismissed because GHS has failed to plead special damages. Defendants argue that special damages are an essential element of a claim for tortious interference with contractual relations. Defendants' Memo at 16.

The elements for tortious interference with contractual relations do not include special damages. Rather, as stated *supra*, the elements of Plaintiff's cause of action are:

the existence of a valid contract with a third party; defendant's knowledge of the contract; defendant's intentional and improper procuring of a breach; and damages. *White Plains* 8 N.Y.3d at 426: *see also Lama Holding Co. v. Smith Barney Co.*, 88 N.Y.2d 413, 424 (1996).

GHS has properly pled the existence of an agreement between GHS and Universal, Defendants' knowledge of that agreement, and Defendants' intentional procuring of a breach thereof by soliciting Universal Clients away from GHS and to Defendants' newfound business. Plaintiff claims compensatory damages and punitive damages of \$5,000,000 from each Defendant.

The cases that Defendants cite for the proposition that special damages must be pled to sustain a claim for tortious interference with contractual relations relate to a claim for *prima facie* tort. For example, Defendants rely on *Freihofer v. Hearst*, 65 N.Y.2d 135, 142-43 (1985) to support the proposition that special damages are an essential element of any willful conduct. However, *Freihofer* specifically addresses the elements of a *prima facie* tort. *Id.* at 142-43 (*see also Wall Street Transcript Corp. v. Ziff Communication Co.*, 225 A.D.2d 322 (1st Dep't 1986) (affirming dismissal cause of action for *prima facie* upon failure to plead special damages); *Vigoda v. DCA Production Plus, Inc.*, 293 A.D.2d 265 (1st Dep't 2002) (same). In the case at bar, GHS brings a conventional tort claim for interference with contractual relations, for which GHS's

complaint alleges all of the necessary elements. Special damages are not a necessary element. *See Paramount Pad Co. v. Baumrind*, 3 A.D.2d 655 (1st Dep't 1956).

Defendants' motion to dismiss GHS's second cause of action is denied.

III. GHS's Third Cause of Action for Attorneys' Fees

GHS's third cause of action requests attorneys' fees resulting from Defendants' alleged breach of the Producer Agreement and the Non-Compete Agreement. GHS alleges that the Producer Agreement for the Universal Clients and the Non-Compete specifically stipulate that Smith is to pay reasonable attorneys' fees if he is found to be in breach of either agreement.

Defendants move to dismiss GHS's third cause of action for failure to state a claim, pursuant to CPLR 3211 (a)(7). Defendants argue that the request for attorneys' fees cannot be sustained because the underlying non-compete covenants are unenforceable as a matter of law.

It is well settled law that each party in a litigation is responsible for its own legal fees unless there is a statutory or contractual provision to the contrary. *See Chapel v. Mitchell*, 84 N.Y.2d 345, 349 (1994); *see also A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5 (1986). In this instance, attorneys' fees are contractually provided for in both the Producer Agreement and Non-Compete that Smith signed. Amend. Compl. ¶ 21. Both agreements stipulate that attorneys' fees can be awarded in the event of breach. As

discussed *supra*, GHS has properly pled the existence of valid non-compete agreements. It follows that if Smith is proven in violation of these agreements, then GHS has properly demanded attorneys' fees pursuant thereto.

Defendants' motion to dismiss the third cause of action is denied.

IV. Punitive Damages

GHS's amended complaint seeks, in addition to compensatory damages, punitive damages of \$5,000,000 from each Defendant. Defendants claim that the request for punitive damages must be stricken.

Punitive damages are generally not awarded as a remedy for a private wrong. *See Rocanova v. Equitable Life Assurance Society of U.S.*, 83 N.Y.2d 603, 613 (1994). In order to obtain punitive damages "a private party... must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." *Id.* at 613.

GHS seeks damages for breach of contract and tortious interference, both private wrongs against GHS. GHS does not allege any actions or conduct by Smith that were directed at the public. Thus, punitive damages are not here available, and Defendants' request to strike GHS's claim for punitive damages is granted.

Accordingly it is

ORDERED that Defendants' motion to dismiss is denied; and it is further

ORDERED that Defendants shall serve and file an answer to the amended complaint within 10 days of service of a copy of this order with notice of entry; and it is further

ORDERED that Plaintiff's request for punitive damages is stricken.

Dated: New York, New York
August 5, 2011

ENTER:



Hon. Eileen Bransten, J.S.C.