STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

EVOLUTION IMPRESSIONS, INC.,

Plaintiff, DECISION AND ORDER

v. INDEX No. 2005/06051

JAMES D. LEWANDOWSKI, DAVID HICKEY, GREGORY MAREK, GIORGIO BRACAGLIA and 1 SOURCE PARTNERS, INC.,

Defendant.

In support of the summary judgment motion, Conolly swore that, while employed at 1 Source Partners, Inc., he found documents at that defendant's offices, including bid folders (one including Evolution's dealings with one of its customers, Corning Museum of Glass) taken from Evolution and used by defendants to submit competing bids slightly lower than Evolution's bid. Thibault swore that, while at 1 Source, he saw defendants "in possession of numerous documents belonging to Evolution which had been stolen from Evolution all on Evolution's letterhead," including "customer job folders, quote sheets, and spec sheets." Thibault also swore in his affidavit that defendants used pallets of paper and ink and other materials, which he further testified at the inquest/hearing were worth between $25,000 and $30,000, taken from plaintiff but used in defendants own production.

Plaintiff contends that these allegations were conclusively

established as fact, as they were uncontroverted by reason of defendants' default in opposing summary judgment. Defendants contend in response that there should be no conclusive finding of fact, that they only suffered the equivalent of a default judgment, and that no adjudication of the merits of plaintiff's claims there by resulted. The court finds only one case supporting the latter position. That case hold that, "application of the rules of summary judgment disposition presumes a litigated motion," Tortorello v. Carlin, 260 A.D.2d 201, 205 (1st Dept. 1999)(refusing to apply first stage summary judgment jurisprudence principles of Winegrad and Alvarez v. Prospert Hospital when opposing papers were not submitted on a motion for summary judgment and observing that there is "no authority . . . to support the practice of deciding an application for accelerated judgment pursuant to CPLR 3212 on the merits in the absence of opposing papers," id. 260 A.D.2d at 204). When a summary judgment motion is unopposed, the court's disposition thereof is on default "with leave to . . . [the affected party] to make application to vacate her default upon a proper showing." Id. 260 A.D.2d at 202. Although the court in Tortorello observed that, in the circumstances of a defaulted summary judgment motion, "the factual allegations of . . . [the] moving papers are appropriately 'deemed admitted,'" id. 260 A.D.2d at 206 (quoting Kuehre & Nagel v. Baiden, 36 N.Y.2d 539,

544 (1975)), such treatment is not for the purpose of determining the merits of the action. Id. 260 A.D.2d at 206 ("Even if this court were to reach the merits . . .") Indeed, the court in Kuehre & Nagel, from which the rule of admission of uncontroverted facts emanates in the cases, was limited to cases "where there are cross-motions for summary judgment" in which one side's facts go uncontroverted. Id. 36 N.Y.2d at 544.

In this aspect, New York practice varies from the formula of Vermont Teddy Bear Co. v. 8-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004), quoted in Liberty Taxi Mgmt., Inc. v. Gincherman, 32 A.D.3d 276, 277 n.* (1st Dept. 2006) which was cited on p.4 of my January 25th decision. I took Liberty Mgmt. to mean that I had to consider the sufficiency of plaintiff's moving papers on the motion to vacate. Tortorello suggests that a court on such a motion need not do so, but rather need only address the standard for default vacatur. Id. 260 A.D.2d at 202. See also, Brooks v. Sunbed Realty, Inc., 36 A.D.3d 740 (2d Dept. 2007). Nevertheless, Liberty Mgmt's citation of and description of Vermont Teddy Bear is fully consistent with CPLR 3215(b) and (f) which requires either a verified complaint sufficient to adequately state the causes of action for which judgment is sought or an affidavit attesting to the merits of those claims.

So defendants are correct that we are now confined to the rules of default. But the observations in Tortorello must also

be considered with the generally stated rule in New York that a default judgment "results in a final judgment on the merits," even when "entered after . . . [a] default on the summary judgment motion." Collins v. Bertram Yacht Corp., 42 N.Y.2d 1033, 1034-35 (1977), affing, 53 A.D.2d 527 (1st Dept. 1976). "An award of summary judgment, even when based upon a party's failure to register any opposition to an application for such relief, is generally deemed a resolution on the merits." Vinci v. Northside Partnership, 250 A.D.2d 965 (3d Dept. 1998). Accordingly, defendants cannot in this inquest/hearing on damages relitigate the merits of plaintiff's claims sounding in the faithless servant doctrine and misappropriation of confidential material used to impermissibly compete with their employer. Inasmuch as the required evidentiary support for these claims was provided in the unopposed summary judgment motion, CPLR 3215(f), the disposition of these causes of action was on the merits.

Nevertheless, an assessment by the court was necessary, CPLR 3215(b), and conducted with defendants' participation. As defendants contend, damages must be proved by plaintiff within a reasonable degree of certainty and not as a matter of pure speculation. Ashland Mgmt. v. Janien, 82 N.Y.2d 395, 403 (1993). Further, because no restrictive covenants or non-competition agreements were executed, assessment of plaintiff's proof need not be overly strict. I do not accept defendants' argument that

cases such as Alexander & Alexander of New York v. Fritzen, 147 A.D.2d 241 (1st Dept. 1989) and Lehigh Constr. Group, Inc. v. Almquist, 262 A.D.2d 943 (4th Dept. 1999) are controlling. Gruber's testimony was that most of the jobs for the customers in question were not done on a bid basis, but rather were repetitive as to type and performed on a quote basis or just invoiced after the jobs were requested and completed. The customers in question came to Evolution when the individual defendants came into plaintiff's employ and ceased doing business, with one or two exceptions too minor to be relevant, when 1 Source began business and defendants departed to their new venture. Given the proof on the summary judgment motion, some damage occurred and it is only a question of how much.

Because of the defendants' theft of Evolution's financial records, including its bid folders, Evolution acknowledges that it cannot establish the particular jobs which it was in the process of quoting during the time the defendants were hatching their plan to launch a competitive business. Also, defendants failed to make any accounting of the corporate defendant's finances/revenues/profits prior to their use of the QuickBook program in September 2005, well after the relevant time frame. Accordingly, plaintiff did not on the hearing, demonstrate what jobs defendants performed and were paid for during the first

months of their operation.[1] Because its ability to prove lost profits in the preferred manner was hampered by defendants' litigation misconduct and acts of misappropriation, a flexible approach to damages using the best available evidence is appropriate.

> In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential, as well as direct and positive proof." Any other rule would enable the wrongdoer to profit by his wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
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> The most elementary conceptions of justice and public policy require the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946) [citations omitted]. See also, Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) ("it will be enough

[1] As plaintiff points out in the affidavit of Andrew J. Ryan, Esq., submitted in opposition to the defendants' motion to vacate the original order and judgment on November 8, 2006, the asset deposition of the defendants in furtherance of the execution of the order and judgment was scheduled to take place. However, rather than complying with these deposition notices, the defendants simply ignored them (Ryan affidavit, 12/29/06, ¶s 27-28).

if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise"); Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927)("Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate. . . . Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible.")

In Estate of Rothko, 43 N.Y.2d 305 (1977), the Surrogate had found that executor misconduct frustrated attempts at a precise measure of damages. The court adopted a flexible approach:

> Under the circumstances, it was impossible to appraise the value of the unreturned works of art with an absolute certainty and, so long as the figure arrived at had a reasonable basis of computation and was not merely speculative, possible or imaginary, the Surrogate had the right to resort to reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgment and common sense in arriving at that amount. This is particularly so where the conduct of

> wrongdoers has rendered it difficult to ascertain the damages suffered with the precision otherwise possible.

Id. 43 N.Y.2d at 323. In Reynolds Securities, Inc. v. Underwriters Bank and Trust Co., 44 N.Y.2d 568 (1978), the court similarly held:

> [I]f the plaintiff's ability to prove his affirmative case with a fair degree of precision is seriously hampered by the defendant's obstructiveness, the court, in order that a just result be achieved, is not without power, where necessary, to rely on lesser and more informal proofs. A defendant whose conduct has both caused injury to another and put obstacles in the path of the plaintiff's recovery is hardly in a position to complain when, as a consequence, the damages cannot be established with exactitude.

Id. 44 N.Y.2d at 574. See fn 2, below.

In Duane Jones Co., Inc. v. Burke, 306 N.Y. 172 (1954), the leading "faithless servant" case in New York, the court similarly held:

> And when from the nature of the case the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, no objection is perceived to placing before the jury all the facts and circumstances of the case having any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and accurate estimate which the nature of the case will permit.

Id. 306 N.Y. at 192. See also, e.g., Gomez v. Bicknell, 302 A.D.2d 107, 114 (2d Dept. 2002) ("As an alternative to an accounting of the disloyal employee's gain, a calculation of what

the employer would have made of the diverted corporate opportunity is an available measure of damages.") See also, Hyde Park Products Corp. v. Maximilian Lerner Corp., 65 N.Y.2d 316, 322 (1985)("Plaintiffs may show either reduced sales to a solicited customer to whom defendant sold peat moss or that the opportunity for profit on additional sales to such customer was lost by consequence of defendants' solicitation."); Campbell v. Silver Huntington Enterprises, L.L.C., 288 A.D.2d 416 (2d Dept. 2001)("Rather, the jury could have rationally awarded damages in an amount representing the best approximation possible through the exercise of good judgment and common sense. Recovery will not be denied merely because the quantum of damages is uncertain or difficult to ascertain.")

This case represents the flip side of Gomez v. Bicknell, 302 A.D.2d 107 (2d Dept. 2002). There, plaintiff met its burden to show the amount of disgorgement of the faithless servant's profits merely by proving "the gross fee Gomez received" for the job diverted from the former employer. Id. 302 A.D.2d at 114-15. The court concluded that, on the issue of net profit, "[t]he burden then shifted to Gomez to demonstrate the amount of his direct costs in generating this gross income because he is in exclusive possession of that information . . . [after which the former employer] would then have the opportunity to question the reasonableness of any deduction." Id. 302 A.D.2d at 115. Here,

by contrast, the former employer elected to recover the lost profits *it* would have made had no diversion occurred, and provided estimated proof of the same, instead of litigating by way of a motion to compel, or otherwise, defendants' failure to account as directed by the court on January 25th and claiming, as an alternate measure, *defendant's* net profits on those jobs they wrongfully retained. Plaintiff came to the inquest/damages hearing without a relevant accounting and not having moved to compel the same before the inquest/hearing when it was not forthcoming.

Moreover, notwithstanding well settled authority on what would constitute the "tangible expectancies" of Evolution in the circumstances (cited in my bench decision on defendants' motion in limine), and notwithstanding the fact that plaintiff retained and kept profits on the relevant customer jobs in progress when defendants departed, and further notwithstanding the fact that plaintiff subpoenaed Bracalia for records the hearing testimony established he kept until the QuickBook data base was developed in September 2005, and that plaintiff failed to enforce the subpoena by motion or contempt proceedings, and in particular notwithstanding that plaintiff failed to move for an adjournment when confronted with the fact that defendants' belated "accounting" on the day of the inquest/damages hearing failed to account for anything taken in by 1 Source Partners between the

time of its inception and the time the QuickBook data base was developed by defendants (the latter of which was disclosed), plaintiff simply awaited a thoroughly predictable in limine ruling before announcing its election of the alternate damages measure based on profits it likely would have made but for the diversion of the indicated customers. Yet, because plaintiff is in exclusive possession of its records of gross and net profits, plaintiff in Exhibit #15 and in its testimony wholly failed to adduce evidence of net profits, the only reasonable measure awardable. As in Gomez, plaintiff would be expected to have the burden of proving what its costs would have been in generating the gross profits claimed in Exh. #15, and defendants would then have the opportunity to "question the reasonableness of any deduction" by claiming that it was too little. Cf., Gomez v. Bicknell, 302 A.D.2d at 115. Because plaintiff failed to do this, and it assuredly had the means without discovery to adduce such proof, the court finds that plaintiff should not be awarded lost profits damages.

Substantial leeway should be afforded plaintiff in these circumstances,[2] but plaintiff at least has the burden to show

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[2] The applicable rule is:

> Thus, under the long-standing New York rule, when the existence of damage is certain, and the only uncertainty is as to its amount, the plaintiff will not be denied a recovery of substantial damages. See Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447, 456 (2d

"net loss of profits." Gomez v. Bicknell, 302 A.D.2d at 215; Borne Chemical Co., Inc. v. Dictron, 85 A.D.2d 646, 650-51 (2d Dept. 1981). Having failed to do so, plaintiff cannot by faulting defendants' deplorable conduct as faithless employees and their inexcusable litigation conduct take advantage of a gross profits figure as the only ascertainable measure of damages. Plaintiff's counsel, in his letter of July 9, 2007, acknowledges that Exh. #15 "calculated gross profits," but states that "labor costs allocated as direct costs to specific jobs did include a component for general company overhead." O'Brien letter

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Cir. 1977); W. L. Hailey & Co. v. County of Niagara, 388 F.2d 746, 753 (2d Cir. 1967) (collecting New York cases). Moreover, the burden of uncertainty as to the amount of damage is upon the wrongdoer, Perma Research & Dev. v. Singer, supra, 542 F.2d at 116, and the test for admissibility of evidence concerning prospective damages is whether the evidence has any tendency to show their probable amount. Duane Jones Co. v. Burke, 306 N.Y. 172, 192, 117 N.E.2d 237, 247-48 (1954). The plaintiff need only show a "stable foundation for a reasonable estimate of royalties he would have earned had defendant not breached." Freund v. Washington Square Press, Inc., supra, 34 N.Y.2d at 383, 357 N.Y.S.2d at 861, 314 N.E.2d at 421. "Such an estimate necessarily requires some improvisation, and the party who has caused the loss may not insist on theoretical perfection." Entis v. Atlantic Wire & Cable Corp., 335 F.2d 759, 763 (2d Cir. 1964). "(T)he law will make the best appraisal that *927 it can, summoning to its service whatever aids it can command." Sinclair Rfg. Co. v. Jenkins Co., 289 U.S. 689, 697, 53 S.Ct. 736, 739, 77 L.Ed. 1449 (1933).

Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926-27 (2d Cir. 1977).

of July 9, at 6. What precisely counsel means by this is unclear, but the testimony shows that there is no net profit figure that may be gleaned from the evidence submitted. Gruber acknowledged that manufacturing costs, for example, would be a "sub component" of a net profit calculation not reflected in Exh. #15, and that Exh. #15 sets forth "our gross profit" and "likely not" their net profit.

> Q. The numbers that you have submitted as the profits on a particular job are not net profits, correct?
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> A. That is correct.

Gruber further acknowledged that there are "a number of factors that can affect your bottom line net profitability," many of which are not known until the job is done and all relevant data, such as a pressman's ultimate hours are entered into plaintiff's computer accounting system (the Logic System). In addition, Gruber acknowledged that, when determining net profit, there is a retrospective process of examining "overall plantwide expenses for your entire operation" (He answered: "For the entire operation"). The only testimony that conceivably supports counsel's statement in the July 9 letter is Gruber's reference to the hourly rates in their estimates or quotes as "fully burdened" by "overhead expenses." But he conceded that, "by overhead, it does not include materials." This testimony shows that making an award of true net profits from the evidence presented would amount to pure speculation.

Accordingly, nominal damages of one dollar on the lost profits claim is awarded. Plaintiff may have judgment for the earnings held in prior decisions to be properly disgorged:

James Lewandowski - $66,875.48

Gregory Marek - $28,073.23

David Hickey - $54,011.82

See In re Blumenthal, 40 A.D.3d 318 (1st Dept. 2007).

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: July 23, 2007
Rochester, New York