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

PRESENT: HON. BERNARD J. FRIED

Index Number : 600941/2006
CURRENT MEDICAL DIRECTIONS
vs
SALOMONE, DANIEL
Sequence Number : 008
PARTIAL SUMMARY JUDGMENT

E-FILE PART 60

INDEX NO. 600941/06
MOTION DATE
MOTION SEQ. NO. 008
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

Dated: 4/13/2011

J.S.C.

HON. BERNARD J. FRIED

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: COMMERCIAL DIV. PART 60

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CURRENT MEDICAL DIRECTIONS, LLC,

Plaintiffs,

- against -

Index No. 600941/2006

DANIEL SALOMONE,

Defendant.

DANIEL SALOMONE,

Counterclaim-Plaintiff,

- against -

CURRENT MEDICAL DIRECTIONS, LLC, SUDLER & HENNESSEY, WPP GROUP USA, INC. and WPP GROUP PLC,

Counterclaim-Defendant.

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APPEARANCES:

Attorneys for the Plaintiff:

DAVIS & GILBERT, LLP
1740 Broadway
New York, New York 10019
By: Dominick Cromartie
Bruce M. Ginsberg

Attorneys for the Defendant:

LEBOWITZ LAW OFFICE, LLC
275 Madison Avenue, 36th Floor
New York, New York 10016
By: Marc A. Lebowitz
Keith M. Getz

Fried, J.:

Plaintiff and Counterclaim-Defendant Current Medical Directions, LLC ("CMD") and Counterclaim-Defendants Sudler & Hennessey, WPP Group USA, Inc., and WPP Group PLC

(collectively "WPP") move for partial summary judgment seeking dismissal of Defendant and Counterclaim-Plaintiff Daniel Salomone's ("Salomone") counterclaims for (1) breach of the implied covenant of good faith and fair dealing as duplicative of Salomone's counterclaims for breach of contract; (2) unfair competition as duplicative of Salomone's counterclaims for breach of contract and for failure to state a claim; and (3) unjust enrichment as duplicative of Salomone's counterclaims for breach of contract.[1]

Salomone's counterclaims that are the subject of CMD's motion for partial summary judgment to dismiss arise from the purchase of Current Medical Directions, Inc. ("CMDI") by WPP. Beginning in April 2004, Salomone, authorized by his co-owners of CMDI, negotiated with WPP for the purchase of CMDI. (Counterclaims ¶¶ 14-15.) On January 1, 2005, CMD Sudler Acquisition Company, LLC ("CMD Sudler"), the WPP entity created for the transaction, acquired all of the assets of CMDI. (Counterclaims ¶ 26.) As part of the transaction, CMDI and CMD Sudler entered into an Asset Purchase Agreement ("APA"), and Salomone and CMD Sudler entered into an Employment Agreement and a Non-Competition Agreement. (Counterclaims ¶ 27.)

The APA includes a provision requiring WPP to make additional payments ("Contingent Payments") as part of the purchase of CMDI, based on the financial performance of CMD from 2004 through 2008. (Counterclaims ¶¶ 29-30.) To determine whether a Contingent Payment was required, the APA requires CMD's income for each year from 2004 through 2008 to be restated in terms of Operating Profit After Taxes ("OPAT") and provides the method for

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[1] In open court on March 2, 2011, Salomone withdrew his counterclaim for unjust enrichment. Therefore, this claim is not addressed here. (*See* Hr'g Tr. 32, March 2, 2011.)

calculation. (Counterclaims ¶¶ 31-32; Lebowitz Aff.[2] Ex. A, ¶ 2.1.2(vi).) Paragraph 6(e) of the Employment Agreement gives WPP the option to terminate his employment if the OPAT for any year, beginning with 2005, was less than seventy-five percent (75%) of the average OPAT for the three immediately preceding years. (Counterclaims ¶¶ 40-41; Ginsberg Aff.[3] Ex. 3, p. 5-6.) The Employment Agreement also includes a Restrictive Covenant that prevented Salomone from soliciting clients and employees of CMDI, CMD and WPP and from providing identical services to any client of CMDI, CMD and WPP. (Couterclaims ¶¶ 44-46.) The Non-Competition Agreement prohibited Salomone from engaging in the same business as CMD and contained a similar non-solicitation clause as the Employment Agreement. (Counterclaims ¶¶ 47-49.)

The breach of the implied covenant of good faith and fair dealing counterclaim alleges that CMD failed to provide Salomone with a single OPAT calculation for 2005 and that his termination, therefore, was without merit. (Counterclaims ¶¶ 72-73.) Salomone further alleges that CMD's lawsuit prevented him from exercising his rights under the APA and Employment Agreement. (Counterclaims ¶ 74.) Finally, Salomone alleges that CMD's conduct was in bad faith and was intended to deprive him of his contractual rights. (Counterclaims ¶ 75.) The unfair competition counterclaim alleges that CMD and WPP engaged in a pattern of immoral behavior to avoid paying any Contingent Payments and to force Salomone out of the industry by wrongfully enforcing the Restrictive Covenant. (Counterclaims ¶ 78.) Salomone further alleges that he was warned by a WPP executive not to pursue business from certain clients because of competing interests within WPP. (Counterclaims ¶ 79.) Furthermore, Salomone alleges that

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[2] Affirmation of Marc A. Lebowitz in Opposition to WPP's Motion for Partial Summary Judgment.

[3] Affirmation of Bruce Ginsberg in Support of Plaintiff's Motion for Partial Summary Judgment.

WPP ended his employment without cause, continued to assert the Restrictive Covenants and filed its lawsuit against him while keeping CMDI "neutered." (Counterclaims ¶¶ 82-83.)

On a motion for summary judgment, the initial burden is on the moving party to establish a prima facie case that they are entitled to judgment as a matter of law and that no issues of material fact exist. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of a material issue of fact. *Id.* As a general rule, bare allegations are not sufficient to defeat a motion for summary judgment. *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 207 (1975). *See also Moore v. True North Communications*, 1 A.D.3d 175, 175 (1st Dept. 2003) (plaintiff's "surmise, conjecture or suspicion" was insufficient to defeat the motion for summary judgment); *Grullon v. City of New York*, 297 A.D.2d 261, 264 (1st Dept. 2002) (mere conclusory assertions devoid of evidentiary facts are insufficient to defeat a motion for summary judgment). The party opposing the motion is entitled to all favorable inferences. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept. 1997).

CMD moves for partial summary judgment dismissing Salomone's counterclaims for breach of the implied covenant of good faith and fair dealing and unfair competition. CMD argues that these counterclaims are duplicative of Salomone's counterclaims alleging breach of contract. As for the counterclaim alleging unfair competition, CMD also argues that Salomone has failed to offer any evidence that the breaches of the contracts were part of an immoral scheme to misappropriate his property. In response, Salomone argues that WPP engaged in a malevolent scheme intended to deprive him of the benefit of his bargain.

Breach of Implied Covenant of Good Faith and Fair Dealing

When the same alleged conduct forms the basis for a claim alleging a breach of contract and for a claim alleging a breach of the implied covenant of good faith and fair dealing, the latter claim will normally be dismissed as duplicative of the former claim. *New York University v. Continental Insurance Company*, 87 N.Y.2d 308, 320 (1995). *See also Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dept. 2010) (dismissed as duplicative because claims arose from the same facts); *Logan Advisors, LLC v. Patriarch Partners, LLC*, 63 A.D.3d 440, 443 (1st Dept. 2009). Additionally, a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained where the damages alleged by such a breach are "intrinsically tied to the damages resulting from the breach of a contract." *Canstar v. J.A. Jones Construction* Company, 212 A.D.2d 452, 453 (1st Dept. 1995). *See also Deer Park Enterprises v. All Systems, Inc.*, 57 A.D.3d 711, 712 (2nd Dept. 2008). However, where there is evidence that one party exercised a contractual right malevolently as part of a scheme to deprive the other party of its bargain, a claim for breach of the implied covenant of good faith and fair dealing may stand alongside a claim for breach of contract. *Richbell Information Services, Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 302-3 (1st Dept. 2003).

It is clear from the Counterclaims that Salomone's counterclaim for breach of the implied covenant of good faith and fair dealing is duplicative of his counterclaims alleging breach of the APA and the Employment Agreement. For example, in Salomone's counterclaims for breach of the APA and the Employment Agreement, he alleges that CMD failed to provide him an OPAT calculation as required in each agreement. (Counterclaims ¶¶ 53, 66.) Salomone makes the identical allegation in support of the breach of the implied covenant of good faith and fair dealing. (Counterclaims ¶ 72.) Salomone also alleges that the lawsuit CMD filed against him

constitutes a breach of the Employment Agreement and a breach of the implied covenant of good faith and fair dealing. (Counterclaims ¶¶ 57, 74.) Additionally, Salomone seeks the identical amount of damages for each claim. (Counterclaims ¶¶ 59, 67, 76.)

Salomone has also failed to produce any evidence that CMD engaged in a malevolent scheme to deprive him of his contractual bargain. Under the terms of the APA, CMD was within its contractual rights to sue Salomone alone, since he and the co-owners of CMDI agreed to joint and several liability for any misrepresentations in the APA. (*See* Ginsberg Reply Aff.[4] Ex. 1, p. 50; Hr'g Tr. 40, March 2, 2011.) Salomone alleges that the reimbursement agreements CMD entered into with two CMDI co-owners deprive him of any contractual benefit. (*See* Hr'g Tr. 34-35, March 2, 2011.) However, there is no provision in these agreements that replaces the two CMDI co-owners' obligation to indemnify Salomone and no indication these agreements were entered into in bad faith by CMD. (*See* Lebowitz Aff. Ex. C.) Salomone also failed to demonstrate that WPP knew of a compliance issue with a CMDI client (GSK) and completed the transaction with the intent to sue Salomone for a breach of the APA. Prior to the purchase, CMDI represented that it complied with the requirements of the Master Services Agreement with GSK. (*See* Ginsberg Reply Aff. Ex. 9.) Additionally, WPP was aware that CMDI's partners did not bill time and that there were some issues related to time sheet compliance. (*See* Lebowitz Aff. Ex. F.) Salomone's allegation that WPP malevolently changed its accounting protocols to misstate the OPAT numbers for 2004 and 2005 is barred by the February 2, 2011, Stipulation and Order, which prohibits Salomone from:

> [P]roffering testimony or stating at trial that (i) the Deloitte Report does not satisfy the requirements for completion of the 2004 and

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[4] Reply Affirmation of Bruce Ginsberg in Further Support of Plaintiff's Motion for Partial Summary Judgment.

> 2005 Annual Determinations pursuant to Article 2.3 of the Asset Purchase Agreement (the "APA"), or that (ii) the 2004 and 2005 Annual Determinations per the Deloitte Report are not finding, final and conclusive.

(*See* Ginsberg Reply Aff. Ex. 11; Hr'g Tr. 42, March 2, 2011.)

Salomone also alleges that WPP failed to provide the required reporting under the APA and the Employment Agreement and therefore engaged in a malevolent scheme to deprive him of his contractual bargain. However, in my February 2, 2010, Decision and Order, I found that Salomone's refusal to sign the audit representation letter prevented the auditor from providing the audit opinion of the 2004 and 2005 OPAT calculations he requested. (*See* February 2, 2010 Decision and Order, p. 17-18.) Additionally, in March 2006, Salomone himself admitted that there could be future Contingent Payments based on the performance of CMD. (*See* Ginsberg Aff. Ex. 10.) Furthermore, Salomone mischaracterizes the documents he relies on as evidence of a scheme to deprive him of his contractual rights. (*See* Lebowitz Aff. Ex. E.) The first spreadsheet, attached to the Affidavit of Ellen Goldman dated December 9, 2008, shows a Contingent Payment of $3,109,000, but was prepared by CMDI's Chief Financial Officer in 2005. (*See* Ginsberg Reply. Aff. Ex. 3.) The second spreadsheet, which shows a Contingent Payment of $1,190,000, was not prepared in February 2008 as argued by Salmone but in January 2006. (*See* Ginsberg Reply Aff. Ex. 4.)

Therefore, CMD's motion for partial summary judgment dismissing Salomone's counterclaim for breach of the implied covenant of good faith and fair dealing is granted.

Unfair Competition

A claim of unfair competition is based on the bad faith misappropriation of the skills, expenditures and labor of another. *Krinos Foods, Inc. v. Vintage Food Corp.*, 30 A.D.3d 332,

334 (1st Dept. 2006). There is no list of activities that constitute unfair competition. *Telecom International America, Ltd. v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001) (quoting *Dior v. Milton*, 155 N.Y.S.2d 443, 451 (Sup. Ct., New York County, 1956). The general principle of unfair competition is that commercial unfairness will be restrained when there appears to be a misappropriation of a benefit or property of one for the commercial advantage of another. *Id.* However, New York does not recognize bad faith litigation as unfair competition. *Bayer Schera Pharma AG v. Sandoz, Inc.*, 2010 U.S. Dist. LEXIS 33252 at *28 (S.D.N.Y. 2010). *See also CA, Inc. v. Simple.com, Inc.*, 621 F. Supp.2d 45, 53-4 (E.D.N.Y. 2009).

The allegations that form the basis of Salomone's counterclaim of unfair competition are identical to the counterclaims that form the basis of his counterclaim of breach of the APA. (*Compare* Counterclaims ¶¶ 61-64 with ¶¶ 78-81.) Furthermore, Salomone's counsel acknowledged during oral argument that the unfair competition counterclaim is based on the same facts as the breach of contract counterclaims. (Hr'g Tr. 39, March 2, 2011.)

There is also no evidence CMD engaged in any scheme to misappropriate a benefit or property belonging to Salomone for its commercial advantage. WPP paid $18,000,000 for CMDI. (*See* Ginsberg Aff. Ex. 1, p. 6.) Of that amount, $2,000,000 was used to pay off a loan guaranteed, in part, by Salomone. (*See* Ginsberg Aff. Ex. 2.) An additional $3,335,407 was paid directly to Salomone for his interest in CMDI. (*See* Ginsberg Aff. Ex. 5.) However, only six months after the purchase by WPP, Salomone admitted that CMD was "in serious jeopardy of not making it through next year (2006) in which case WPP will sue for their money back." (*See* Ginsberg Aff. Ex. 6.) Six months later, Salomone admitted that WPP had "grossly overpaid for a company." (*See* Ginsberg Aff. Ex. 7.) Therefore, CMD's motion for partial summary judgment to dismiss the unfair competition counterclaim is granted.

Accordingly, it is

ORDERED that the motion for partial summary judgment to dismiss the counterclaims of breach of the implied covenant of good faith and fair dealing and unfair competition is granted.

DATED: 4/13/2011

ENTER:

J.S.C.

HON. BERNARD J. FRIED