STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

NAVINT CONSULTING, LLC,

Plaintiff,

v.

JAIMAL FECTEAU, JEREMY SALOME, KAREN GAMMELL, CHRIS MULLEN, and JULIE VILLAGRAN,

Defendants.

DECISION AND ORDER

Index #2007/11877

Defendants, Jaimal Fecteau, Jeremy Salome, Karen Gammell, Chris Mullen, and Julie Villagran, move for the following relief: (1) pursuant to CPLR 3211 an order dismissing the complaint for failure to state a cause of action, or in the alternative, (2) an order pursuant to CPLR 3024(a) directing plaintiff to prepare a more definite statement of its claims, and striking the scandalous material, (3) an order quashing the subpoena served on non-party InterDyn AKA pursuant to CPLR 2304, and (4) an order pursuant to CPLR 3122 granting a protective order with respect to the First Notice to Produce.

This action was commenced on September 10, 2007 by plaintiff, defendants' former employer, after defendants left their employment with plaintiff's New England office and went to work for a competitor, InterDyn AKA, in Boston, Massachusetts. Four of the defendants left plaintiff's employ between May 23,

2007 and June 8, 2007, and the fifth defendant left two months later. Plaintiff alleges that defendants' conduct violated the terms of Confidentiality and Non-Compete Agreements, tortiously interfered with plaintiff's contracts with the other defendants, and violated common law duties of good faith and loyalty. The complaint seeks both monetary and injunctive relief.

Defendants Fecteau, Gammell, and Villagran became employees of plaintiff in March 2005, when plaintiff acquired Computerized Financial Services, Inc., their former employer. Complaint, ¶¶16-17. After the acquisition, Gammell and Villagran became Application Consultants, and Fecteau became a Technical Consultant. Id. at ¶18.

Thereafter, plaintiff hired Salome (an acquaintance of Fecteau) and Mullen. Salome was hired as an Application Consultant, and Mullen was hired as an Account Representative. Id. at ¶19. Mullen allegedly worked closely with the other defendants and was also part of plaintiff's Northeast Microsoft Leadership Team. Id. at ¶¶19-20.

Defendants Fecteau, Gammell, Salome and Villagran were each required to execute a document entitled, "Confidentiality and Non-Compete Agreement." Id. at ¶22. Defendant Mullen did not sign the agreement. Id. at ¶24. The agreement states, in relevant part:

1. Nondisclosure and Nonuse of Confidential

Information

Except as required by employment or retention by Navint, or with the prior written approval of an authorized officer of Navint, I will not disclose or use, either during or after my employment/retention with Navint, any trade secret, confidential information, propriety information or know-how of either Navint or any of its clients, past, present, or prospective, (collectively "Proprietary Information") which was made known to me during my retention with Navint. Proprietary Information refers to any information, not generally known in the relevant trade or industry, which was obtained from Navint or any of its clients, past, present, or prospective. Proprietary Information includes but is not limited to the following items, whether or not labeled as such: customer lists, notes, drawings, and writings; computer programs (including source and object codes), algorithms, systems, related documentation such as user manuals, functional and technical specifications, system descriptions, program documentation, output reports, terminal displays and data file contents; plans, process and preparations for Navint's current and proposed business activities; discoveries, inventions, developments, ideas, research, engineering, designs, and products; projects and improvements made or conceived in connection with Navint's customer and prospective customer's lists; and marketing and financial data of Navint and its clients. I agree to comply with all restrictions and regulations of Navint's clients concerning any and all Information such clients deem proprietary or confidential . . .

5. Non-Solicitation

During my employment or retention by Navint and for one year after termination of my employment or retention with Navint, I will not directly or indirectly contact or solicit any employee of Navint with regard to the

> present, future or contemplated employment or retention of any employees of Navint by me or any other person, firm, corporation, government agency or other entity. I further agree that during my retention and for one year after my termination, I will not solicit, cause to be solicited, or aid in the solicitation of any past, current or prospective clients of navint for the purpose of doing business with any competitor of Navint.
>
> I further agree that I will not conduct any discussions or engage in any communication wit any consultant, then currently engaged by Navint, for the purpose of employing or retaining the services of said consultant, without first informing the chairman, president or chief financial officer of Navint ("Navint Officer") of my intent to retain said consultant. I further agree that in no event, unless otherwise agreed to by such Navint Officer, shall I retain the services of said consultant prior to the first to occur either a) the termination of said consultant's contract with Navint, or b) ninety (90) days after informing a Navint Officer of my intentions.

It is further alleged that plaintiff's employee handbook also contains confidentiality and non-solicitation provisions. Complaint, ¶25.

Plaintiff alleges that defendants were given "access to confidential and proprietary information, including client lists, business plans, implementation methodology, software code, financial information, and client prospect lists." Id. at ¶32. Plaintiff further alleges that it expended a substantial sum of money on each defendant for training and business development, as

well as in the development of good will between the defendants and plaintiff's clients. Id. at ¶33.

All five defendants resigned their positions with plaintiff in the Spring and Summer of 2007, the first on May 10, 2007, and the last on July 31, 2007. At the time of their departures, it is alleged that each informed plaintiff that they did not plan to work in plaintiff's industry anymore. Id. at ¶38. Plaintiff alleges that each defendant concealed from plaintiff that their representations were untrue, and that they actually intended to work for a competitor of plaintiff. Id. at ¶43.

In late August, 2007, plaintiff learned that the defendants were working for plaintiff's competitor, AKA. Id. at ¶48. Plaintiff alleges:

> Navint does not presently have specific knowledge of any solicitation of Navint clients or prospective clients by defendants. However, two clients with whom one or more of the defendants worked when they were employed by Navint have recently exhibited unusual and unexplainable behavior. Based on the facts and circumstances surrounding defendants' departures from Navint and their association with AKA, Navint is justifiably concerned that improper solicitation of clients or prospective clients has already occurred or will occur in the future. This Court should prohibit such wrongful conduct.

Id. at ¶51.

Plaintiff's first cause of action alleges breach of contract, alleging that defendant Fecteau, Gammel, Salome, and

Villagran have breached the Confidentiality and Non-Compete Agreements. Id. at 53. Plaintiff alleges that discovery is needed to determine the "exact scope and extent of defendants' breaches," including whether defendants have solicited plaintiff's clients and prospective clients. Id. at ¶54.

The second cause of action alleges tortious interference with contract against all defendants. Plaintiff alleges that defendants knew, or should have known, that defendants Fecteau, Gammell, Salome, and Villagran were bound by the Confidentiality and Non-Complete Agreements with plaintiffs. Id. at ¶61. Plaintiff alleges that "some or all" of the defendants interfered with the contractual obligations under the agreements, although the extent of the interference is not known, but will be a subject of discovery. Id. at ¶¶62-63.

Finally, the third cause of action alleges breach of the common law duty of good faith and loyalty. Id. at ¶¶69-70.

Motion to Dismiss

In determining a motion to dismiss for failure to state a cause of action, a court will liberally construe the complaint, CPLR § 3026; Doria v Masucci, 230 A.D.2d 764, 765 (2d Dept. 1996), and will give the plaintiff "the benefit of every possible favorable inference." Shanley v. Welch, 6 A.D.3d 1065 (4th Dept. 2005); 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002). In addition, the court will accept as

true all facts that are alleged in the complaint and in any submissions in opposition to the motion to dismiss. See 511 West 232nd Owners Corp., 98 N.Y.2d at 152; Gibraltar Steel Corporation v. Gibraltar Metal Processing, 19 A.D.3d 1141, 1142 (4th Dept. 2005). The motion to dismiss for failure to state a cause of action "must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" 511 West 232nd Owners Corp., 98 N.Y.2d at 152, *quoting* Polonetsky v. Better Homes Depot, 97 N.Y.2d 46, 54 (2001)). See also Shanley, 6 A.D.3d at 1065. If the court determines "that plaintiffs are entitled to relief on any reasonable view of the facts stated," the court's inquiry is complete, and the complaint is deemed legally sufficient. See Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995).

Courts have broad discretion pursuant to CPLR 3211(d) to deny a motion to dismiss without prejudice to renewal following discovery if "facts essential to justify opposition may exist but cannot then be stated." CPLR 3211(d). See also, Mayo v. Grotthenthaler, 25 A.D.3d 998, 999 (3d Dept. 2006); Herzog v. Town of Thompson, 216 A.D.2d 801, 802 (3d Dept. 1995). CPLR 3211(d) states:

> Facts available to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify

> opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

However, to be entitled to such a ruling "[a]t the very least, plaintiffs must make a 'sufficient start' and show their position 'not to be frivolous.'" Id., *quoting* Peterson v. Spartan Indus., Inc., 33 N.Y.2d 463, 467 (1974).

First Cause of Action: Breach of Contract

The elements of a cause of action for breach of contract are: (1) contract formation between the parties; (2) plaintiff's performance, (3) defendant's failure to perform, and (4) resulting damage. See Furia v. Furia, 116 A.D.2d 694 (2d Dept. 1986). On this motion to dismiss, the court must assess whether, accepting plaintiff's allegations as true, and giving plaintiff the benefit of every favorable inference, plaintiff has stated a cause of action.

At the outset, the court notes that the first cause of action is not stated as against defendant Mullen, who did not sign an agreement with plaintiff.

An analysis of the first cause of action requires re-visiting the law on restrictive covenants. Under New York law, "negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of

reasonableness." Reed, Roberts Assoc. v. Strauman, 40 N.Y.2d 303, 307 (1976). "An employee agreement not to compete will be enforced only if 'it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.'" Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina, 9 A.D.3d 805, 806 (3d Dept. 2004). See also BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 389 (1999); Crown It Services, Inc. v. Koval-Olsen, 11 A.D.3d 263, 264 (1st Dept. 2004). This general limitation of reasonableness "applies equally" to a "covenant given by an employee . . . where he quits his employ." Purchasing Assoc., Inc. v. Weitz, 13 N.Y.2d 267, 272 (1963).

As the Court of Appeals has observed, "in Reed, Roberts Associates, supra, we limited the cognizable employer interests under the first prong of the common-law rule to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 389 (1999). Accordingly, a court must still scrutinize whether an agreement is reasonable as to time and area, and whether the covenant, on the facts presented, is being legitimately employed to protect plaintiff's legitimate interests, would not be harmful to the public, and would not be unduly burdensome to the defendant. Id. at 391.

Thus, contrary to defendants' contention, the complaint is not ripe for dismissal merely because plaintiff cannot prove that defendants were not unique employees. That is just one prong of the analysis.

Defendants could nevertheless be found liable if they engage in other means of unfair competition. "[T]he only justification for imposing an employee agreement not to compete is to forestall unfair competition," and "a former employee may be capable of fairly competing for an employer's clients by refraining from use of unfair means to compete," where "the employee abstains from unfair means in competing for those clients, the employer's interest in preserving its client base against the competition of the former employee is no more legitimate and worthy of contractual protection than when it vies with unrelated competitors for those clients." Id. 93 N.Y.2d at 391. Here, contrary to defendants' argument, plaintiff's complaint alleges that defendants were given access to confidential and proprietary information. See Complaint, ¶32.

Nevertheless, the first cause of action is ripe for dismissal because it is based upon mere speculation. This cause of action alleges that the agreements have been breached "[u]pon information and belief," Complaint, ¶53, and states that discovery is needed to ascertain the "exact scope and extent" of the breaches, including "whether defendants have breached their

obligations not to solicit Navint's clients and prospective clients." Id. at ¶54. The sole "specific" claim made against defendants is that "two clients with whom one or more of the defendants worked when they were employed by Navint have recently exhibited unusual and unexplainable behavior." Id. at ¶51. Based on that behavior, plaintiff concludes that it is "justifiably concerned that improper solicitation of clients or prospective clients has already occurred or will occur in the future." Id.

"Although on a motion to dismiss the complaint must be liberally construed . . . plaintiff must support its claim with more than mere speculation." Burrowes v. Combs, 25 A.D.3d 370, 373 (1st Dept. 2006). "[S]cant speculation without the support of relevant facts" are insufficient to state a cause of action. Id.

Plaintiff's first cause of action is supported only on the information and belief allegation that defendants may have breached their agreement because of allegedly suspicious circumstances, such as the timing of the departures and two clients' unspecified but allegedly odd behavior. Plaintiff's claims on the first cause of action are merely speculative and do not state a cause of action. Plaintiffs submitted no affidavits on this motion to dismiss to look to for further bolstering of the claim, or to even indicate a "sufficient start" has been made toward stating the cause of action.

The motion to dismiss on the first cause of action is granted without prejudice.

Second Cause of Action: Tortious Interference with Contract

The cause of action for tortious interference with contract alleges that "[u]pon information and belief, acting alone or in concert, some or all of the defendants have tortiously interfered with defendant Fecteau's, Gammell's, Salome's and Villagran's contractual obligations to Navint." Complaint, ¶62. Plaintiff alleges that the "full scope" of the tort has been concealed and is not known, but that discovery will reveal the extent and scope, as well as "whether the tortious interference extends to any Navint contractual relationship with its clients or Navint prospective business relationships." Id.

Plaintiff's complaint lacks any specific allegations that any of the defendants actually tortiously interfered with the contract of another defendant. With respect to tortious interference with the contracts of the co-defendants, plaintiff instead relies upon inferences it wishes to be drawn from the timing of the departures, the performance of some of the defendants in plaintiff's employ in the weeks prior to their resignations (id. at ¶45), and the fact that some of the defendants asked for copies of their HR/personnel files. Id. at

¶46.[1]

Plaintiff's proffer in the complaint is insufficient to state a cause of action for tortious interference with contract. Akin to the analysis on the first cause of action, plaintiff's speculation, without more, cannot support a claim. The allegations before the court are not a "sufficient start" toward alleging this cause of action. Chestnut Hill Partners, LLC v. Van Raatte, ___ A.D.3d ___ (1st Dept. November 20, 2007).

The second cause of action is dismissed without prejudice for failure to state a cause of action.

Third Cause of Action: Breach of Common Law Duty of Good Faith and Loyalty

---

[1] "Agreements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts." American Preferred Prescription, Inc. v. Health Mgt., Inc., 252 A.D.2d 414, 417 [1st Dept. 1998], citing Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 191- 92 [1980]. Where only prospective contractual rights have allegedly been interfered with, the plaintiff must show more culpable conduct NBT Bancorp. Inc. v. Fleet/Norstar Fin. Group, 87 N.Y.2d 614, 621; Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 NY2d at 193-94. Thus, the plaintiff must establish that the interference was accomplished by "wrongful means," consisting of fraud, misrepresentation, physical violence, civil suits, criminal prosecutions and some degree of economic pressure, "but more than simple persuasion is required." Snyder v. Sony Music Entertainment, Inc., 252 A.D.2d 294, 299-300 [1st Dept. 1999], or that defendant acted for the sole purpose of harming the plaintiff. Id. See also, Don Buchwald & Assoc., Inc. v. Rich, 281 A.D.2d 329 [1st Dept. 2001] [simple persuasion by competitor in inducing a customer to switch is recognized defense]; Jurlique, Inc. v. Austral Biolab Pty., Ltd., 187 A.D.2d 637 [2d Dept. 1992]. Plaintiff has failed to meet this higher standard of wrongful means.

"[A]n employee is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.'" CBS Corp. v. Dumsday, 268 A.D.2d 350, 353 (1st Dept. 2000), *quoting* Lamdin v. Broadway Surface Adv. Corp., 272 N.Y. 133, 138 (1936). Even where evidence suggests that an employee secretly formed a competing business while working for a former employer, a situation more extreme than the circumstances alleged herein, "such conduct does not, without more, constitute actionable employee disloyalty." Amer. Printing Converters, Inc. v. JES Label & Tape, Inc., 103 A.D.2d 787 (2d Dept. 1984). See also, First Empire Securities, Inc. v. Miele, 19 Misc.3d 1108(A) (Sup.Ct. Suffolk Co. 2007). *Cf.* Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc., 100 A.D.2d 81, 88 (1st Dept. 1984). However, an employee may not do so by misappropriating trade secrets or employing fraudulent methods. Don Buckwald & Assoc., Inc. v. Marber-Rich, 11 A.D.3d 277, 279 [2004]; Pearlgreen Corp. v. Yau Chi Chu, 8 A.D.3d 460, 461 [2004]; Starlight Limousine Serv. v. Cucinella, 275 A.D.2d 704, 705 [2000]; Wallack Frgt. Lines v. Next Day Express, Inc., 273 A.D.2d 463 [2000]; Walter Karl, Inc. v. Wood, 137 A.D.2d 22, 27 [1988].

Plaintiff's third cause of action is based upon the allegations preceding it, including the following:

> 43. Defendants Fecteau, Gammell, Salome, and Mullen all concealed from Navint that theses

> (sic) explanations were untrue, and that each of them actually intended to work for one of Navint's direct competitors, AKA.
>
> 44. Defendant Villagran admitted at the time of her resignation that she was considering "a couple" of offers, but had not yet decided on the right fit. She concealed that she actually intended to join her former teammates, defendants Fecteau, Gammell, Salome and Mullen, at AKA.
>
> 45. Significantly, in the weeks prior to their resignations, defendants Fecteau, Mullen, and Villagran neglected their employment responsibilities, were non-responsive to requests for information, failed to show up for required meetings and/or were absent without leave.

Plaintiff's allegations are insufficient to withstand the motion to dismiss the third cause of action. Even if defendants did secretly intend to compete with plaintiff, that conduct, without more that is not alleged here, does not constitute a breach of the duty of good faith and loyalty. As stated above, the complaint lacks any specific allegation that the defendants have violated, or are violating, any restrictive covenants. Moreover, the defendants alleged neglect of their duties as employees, while perhaps grounds for termination of an employee who had not already resigned, do not rise to the level of a tort.

The motion to dismiss the third cause of action is granted without prejudice.

In light of the court's decision above, the issues raised with respect to discovery and CPLR 3024 are rendered moot.

SO ORDERED.

_____
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December 18, 2007
Rochester, New York