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

PRESENT: Helen E. Freedman PART 39

0603305/2003

LEDY, DAVID M.
vs
WILSON, J. SUZI

SEQ 04

DISC

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: July 26, 2004

Helen E. Freedman J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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DAVID M. LEDY, DAVID SILVERS, JACK GENENDE, RICHARD H. ADER, REALTY HOLDINGS OF AMERICA LLC, U.S. REALTY ADVISORS, LLC, and U.S. REALTY ADVISORS INC.,

Plaintiffs,

- against- Index No.: 603305/03

J. SUZI WILSON, MARK SARD, STEPHAN ROSEN, JONATHAN MOLIN, MOLIN VENTURES, LLC, NET LEASE CAPITAL ADVISORS, INC. AND JOHN DOES "1"-"5",

Defendants.

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FREEDMAN, J.:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This action arises from the resignation of defendants Jonathan Molin, J. Suzi Wilson, Mark Sard and Stephan Rosen from plaintiffs Realty Holdings of America LLC ("Realty Holdings"), U.S. Realty Advisors, LLC ("Realty Advisors LLC") and U.S. Realty Advisors Inc. ("Realty Advisors Inc.") in April and May 2003. Hereinafter, the Realty Holdings, Realty Advisors LLC and Realty Advisors Inc. will be collectively referred to as the "Plaintiff Companies." Plaintiffs allege that they bought out Molin's interests in the Plaintiff Companies and certain real estate deals for $2.2 million, based on Molin's promises that he would not interfere with their business, employees or clients. According to plaintiffs, however, Molin's promises were false when made, and before he resigned, he planned a joint departure with

Wilson, Sard and Rosen, secreted proprietary information from the Plaintiff Companies, and then promoted a competitive venture with the co-defendants.

In motion sequence number 003, defendants Wilson, Sard, Rosen and Net Lease Capital Advisors, Inc. ("NLCA") move for an order dismissing the seventh, eighth and ninth causes of action of plaintiffs' First Amended Complaint (the "Complaint") on the ground that they fail to state a claim against them. In motion sequence number 004, defendants Molin and Molin Ventures, LLC ("Molin Ventures") move for an order dismissing the Complaint as against them. Plaintiffs cross-move, pursuant to CPLR 3211(e), for an order granting leave to re-plead any causes of action that are inadequately pled.

FACTUAL ALLEGATIONS

The Plaintiff Companies provide real estate advisory services to public pension funds and other clients, and specialize in transactions knows as "credit tenant leasing" or "single tenant net leasing." Plaintiff Silvers is a member of Realty Holdings, and plaintiffs Ledy, Genende and Ader are members of all the Plaintiff Companies. Defendant Molin was a member and employee of the Plaintiff Companies; Wilson, Sard and Rosen were employed by the Plaintiff Companies, and worked with Molin.

The members of Realty Holdings, including Molin, were parties to an Operating Agreement, dated as of December 31, 1997 (the "Operating Agreement"), which provided that if any member withdrew before December 31, 2004, he or she would sell his or her interest in Realty Holdings for an amount based on the value of specified assets as of a certain date. The Operating Agreement further provided that, for one year after withdrawing, the member could not engage in single tenant net lease transactions, except through Realty Holdings.

The members of Realty Holdings also acquired individual interests in numerous net lease transaction (the "Deals"). The Deals' agreements each had a buy-out provision identical to that in the Operating Agreement.

The Complaint alleges that after Molin resigned on April 28, 2003, he and the plaintiffs had negotiated and entered into a Separation Agreement dated April 30, 2003 (the "Separation Agreement"). The Separation Agreement modified the buy-out provisions in the Operating Agreement and Deals' agreements: Molin's interests in Realty Holdings and in the Deals were purchased for a total of $2.2 million which was more than the figure set by the buy-out provisions. In exchange, Molin agreed (1) to tell all third parties that he was leaving the Plaintiff Companies to pursue other interests and not to disparage the plaintiffs; (2) for a period of one year, not to directly or indirectly participate in a net lease business; (3) for a period of twenty months, not to interfere with, hire, solicit or do business with the Plaintiff Companies' employees; and (4) for a period of 20 months, not to solicit the Plaintiff Companies' clients for net lease transactions or introduce any other pension fund advisors to those clients.

Wilson, Sard and Rosen allegedly resigned shortly after Molin left and are now employed by a company named Net Lease Capital Investors LLC (not sued herein), an alleged affiliate of NLCA.

The Complaint sets forth ten purported causes of action: (1) by all plaintiffs for rescission of the Separation Agreement based on its fraudulent inducement and breach by Molin; (2) by all plaintiffs against Molin for breach of fiduciary duty; (3) by the Plaintiff Companies against Molin for a declaratory judgment terminating Molin's membership in and employment by them; (4) by the Plaintiff Companies against Molin and Molin Ventures for a constructive trust; (5) by

the Plaintiff Companies against Wilson, Sard and Rosen for breach of fiduciary duty; (6) by all plaintiffs against Wilson, Sard and Rosen for aiding and abetting Molin's breach of fiduciary duty; (7) by the Plaintiff Companies against NLCA for intentionally interfering with their contracts with Molin; (8) by the Plaintiff Companies against Molin, NLCA, Wilson, Sard and Rosen for intentionally interfering with prospective relationships with three California pension funds; (9) by the Plaintiff Companies against Molin, NLCA, Wilson, Sard and Rosen for intentionally interfering with their prospective employment of non-party Gary Kaku; and (10) by the Plaintiff Companies against NLCA, Wilson, Sard and Rosen for a constructive trust.

DISCUSSION

The first cause of action purportedly states a claim that Molin fraudulently induced the plaintiffs to enter into the Separation Agreement. Pursuant to the Operating Agreement, Molin was to receive nothing more than "book value" with regard to the Plaintiff Companies and the Deals. Plaintiffs claim they agreed to pay Molin $2.2 million, an amount far exceeding the book value, based upon his misrepresentations that he would not (1) participate with competing businesses; (2) interfere with employees of the Plaintiff Companies; or (3) solicit clients of the Plaintiff Companies.

A fraudulent inducement claim cannot stand if the alleged fraud is merely that the defendant entered into a contract that he did not intend to perform. *Meehan v Meehan*, 227 AD2d 268, 270 (1st Dept 1996). Here plaintiffs claim that Molin never intended to abide by the non-compete and non-solicitation covenants in the Separation Agreement. That does not make out a fraudulent inducement claim. *See Oris Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d

114, 115 (1st Dept 1998) ("far from being collateral to the contract, the purported misrepresentation was directly related to a specific provision of the contract.")

In *Graubard Mollen Dannett & Horowitz v Moskovitz*, (86 NY2d 112 [1995]), upon which plaintiffs rely, the defendant's misrepresentation was collateral or extraneous to the contract: in that plaintiff charged that the defendant made a separate oral representation that was oral in the terms of the agreement. *Moskovitz*, 86 NY2d at 122. Plaintiffs also cite to *First Bank of the Ams. v Motor Car Funding, Inc.*, (257 AD2d 287 [1st Dept 1999]), to support their argument that the fraud claim does not duplicate their breach of contract claim. In *First Bank of the Ams.*, however, the First Department recognized that a plaintiff cannot maintain a cause of action for fraud that fails to plead a breach of duty separate and apart from, or in addition to, a breach of the contract. 257 AD2d at 291. To the extent that the first cause of action merely alleges that Molin breached the Separation Agreement, that claim remains stated.

The second cause of action alleges that Molin breached his fiduciary duties of loyalty and fidelity as a member, officer and employee of the Plaintiff Companies. The third cause of action seeks a declaratory judgment that the Plaintiff Companies terminated Molin for cause as of April 28, 2003, because of his self-dealing and breach of fiduciary duties. The fourth cause of action seeks to impose a constructive trust against Molin and Molin Ventures, which Molin allegedly "planned the formation of", on the ground that Molin breached his fiduciary duties to the Plaintiff Companies.

Specifically, Molin is accused of "undertak[ing] a campaign to divert the loyalties of the employees of the Plaintiff Companies to himself" before he resigned; engaging in "divisive behavior and the undermining of Molin's co-members through vocal criticisms to employees";

and "with the assistance of Wilson, Rosen and Sard, divert[ing] to himself, Wilson, Sard and Rosen, Proprietary Information, documents and communications, business opportunities and/or work product of the Plaintiff Companies". On one occasion, Molin allegedly requested that a client of the Plaintiff Companies pay a fee to him personally. Sard and Molin allegedly "prepar[ed] business plans and write-ups which included discussions of properties of the Plaintiff Companies, for the benefit of their own interests, and forward[ed] them to third-parties." With the assistance of Wilson, Rosen and Sard, Molin allegedly removed his computer's hard drive from the Plaintiff Companies' offices. Molin allegedly failed to charge clients for expenses and deferred a management fee to curry favor with clients at the expense of the Plaintiff Companies.

The Complaint alleges that around the time that Molin resigned, Molin publicly stated that he would 'torture' the individual plaintiffs and the Plaintiff Companies. Plaintiffs contend that they had observed Molin's attempts to divert employee loyalties while Molin was still with the Plaintiff Companies, but the Companies executed a general release of any and all claims that they had against Molin, whether known or unknown, through May 5, 2003. The broad scope of the release clearly encompasses the claims against Molin set forth by the second, third and fourth causes of action. Plaintiffs' only defense is that Molin fraudulently induced them to sign the Separation Agreement, which provided for the release. Since that claim has been dismissed, any claim based on Molin's conduct prior to May 5, 2003 is barred, and on that basis the second, third and fourth claims are dismissed.

The seventh, eighth and ninth causes of action asserted against NLCA, Wilson, Sard and Rosen sound in intentional interference with contract and prospective advantage: plaintiffs claim that the defendants stole NLCA's business from the Plaintiff Companies.

According to the plaintiffs, NLCA procured Molin's breach of the Separation Agreement by using confidential information from the other defendants and enabling Molin to compete for business and clients.

To state a claim for "tortious interference with contract," a plaintiff must allege: (1) a valid contract existed between plaintiff and a third party, (2) the defendant knew about the contract, (3) the defendant intentionally procured the breach of the contract without justification, (4) actual breach, and (5) resulting damages. *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 (1st Dept 1999). The plaintiff must also prove that the contract would not have been breached but for the defendant's conduct. *Lana & Samer, Inc. v Goldfine*, ___ AD3d __, 776 NYS2d 66, 67 (1st Dept 2004); *see also Guard-Life Corp. v S. Parker Hardware Mfg., Corp.*, 50 NY2d 183, 191 (1980) (tort liability is imposed for "inducing or otherwise causing the third person not to perform the contract").

If the person who breached the contract (here, Molin) participated in the complained-of conduct the essential element of "but for" causation cannot be satisfied. "[C]ollusion involving a party to the contract indicates as a matter of law that the party involved was predisposed to breach its contractual obligations; thus, the allegedly interfering party cannot be the 'but for' cause of its breach." *Granite Partners, L.P. v Bear, Stearns & Co., Inc.*, 17 F Supp 2d 275, 295 (SDNY 1998) (applying New York law). In *Mina Inv. Holdings, Ltd. v Lefkowitz*, 16 F Supp 2d 355, 360 (SDNY 1998), the court likewise dismissed a tortious interference claim on the ground that participation by the breaching parties precluded a viable claim of "but for" causation under New York law because the plaintiffs could not "foreclose the possibility that [breaching parties] would have violated [the contract] regardless of [defendant's participation]." Id. at 360.

The Complaint repeatedly alleges that Molin acted in concert with NLCA, Wilson, Sard and Rosen, and that the "establishment of a [competing] venture for Wilson, Rosen and Sard is primarily the result of efforts by Molin." Given these factual assertions, plaintiffs' conclusory allegation that, but for the conduct of NLCA, Molin would not have breached its contractual obligations fails as a matter of law.

The eighth cause of action purportedly states a claim against Molin, NLCA, Wilson, Sard and Rosen for intentional interference with the plaintiffs' prospective relationships with three California retirement funds. Plaintiffs contend that defendants inflicted injury by unlawful means when they misappropriated proprietary and confidential information to compete with plaintiffs. This claim fails for two reasons. First, the Complaint does not allege that the interference was motivated by "malice or to inflict injury by unlawful means rather than by self-interest or other economic considerations," *Ent. Partners Group, Inc. v Davis,* 198 AD2d 63, 64 (1st Dept 1993), as an element of the claim. Second, plaintiffs fail to allege exactly what information they misappropriated, why it was confidential or proprietary and how it helped these former employees solicit the business of these three pension funds. As for NLCA, plaintiffs merely allege that it solicited the pension fund business by using this alleged information, which is not wrongful conduct by NLCA.

The ninth cause of action alleges that Molin, NLCA, Wilson, Sard and Rosen intentionally interfered with the Plaintiff Companies' prospective employment relationship with Gary Kaku, and a result, lost its business relationship with the Los Angeles Fire and Police Retirement Association. This claim is wholly speculative, as it fails to identify what wrongful

means were employed to induce Kaku, an employee-at-will, to leave the employ of the Plaintiff Companies other than unspecified "breach of fiduciary duties."

Plaintiffs' cross motion for leave to re-plead any of these causes of action pursuant to CPLR 3211(c) is denied as futile. Molin's request for an award of attorneys fees based on paragraph 12 of the Separation Agreement is more properly the subject of a counterclaim against the parties with whom he contracted.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion (seq. 003) by defendants J. Suzi Wilson, Mark Sard, Stephan Rosen and Net Lease Capital Advisors, Inc. for an order dismissing the seventh, eighth and ninth causes of action of plaintiffs' complaint is granted and those causes of action are hereby severed and dismissed; and it is further

ORDERED that the motion (seq. 004) by defendants Jonathan Molin and Molin Ventures, LLC is granted only to the extent of severing and dismissing the first cause of action based on fraudulent inducement, and severing and dismissing the second, third and fourth causes of action; and it is further

ORDERED that the remained of the action will continue, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that the defendants are directed to answer the complaint within ten days of service upon them of a copy of this order, and it is further

ORDERED that the parties are directed to appear for a preliminary conference with the Court on September 14, 2004 at 9:30 a.m.

ORDERED that plaintiffs' cross motion for leave to re-plead is denied.

Dated: July 26, 2004

ENTER:

Helen E. Freedman, J.S.C.