[*1]

SCANNED ON 11/7/2005

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

PRESENT: 0601297/2005 **PART** _____

DEMAREST, TIMOTHY M
vs
CROWN FINANCIAL HOLDINGS

INDEX NO. _____

MOTION DATE _____

SEQ 3

MOTION SEQ. NO. _____

DISM ACTION/INCONVENIENT FORUM

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits Memo + Affs in Opp	2
Replying Affidavits 15 memos M1, M2	3

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 07 2005
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

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

Dated: 10/27/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

---------- x

TIMOTHY M. DEMAREST, and PERSEIDS TECHNOLOGIES, LLC,

Plaintiffs,

- against -

CROWN FINANCIAL HOLDINGS, INC., et al.,

Defendants.

---------- x

Index No.: 601297/05

DECISION/ORDER

In this action, plaintiff Timothy Demarest, a former employee of defendant Crown Financial Group, Inc. ("Crown") and plaintiff Perseids Technologies, LLC ("Perseids"), a company formed by Demarest after he left his employment with Crown, seek compensation allegedly owed to Demarest by Crown, as well as declaratory and injunctive relief. Defendants move, pursuant to CPLR 3211, to dismiss all of the causes of action of the Amended Complaint, except the cause of action for a declaratory judgment.

It is well settled that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) The test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its

statements, a cause of action can be sustained." (Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 [1st Dept 1990].) Further, the court may consider a plaintiff's opposing affidavits to amplify the pleadings. (Rovello v Orofino Realty Co., 40 NY2d 633, 635 [1976]; Eastern Consol. Props., Inc. v Lucas, 285 AD2d 421, 422 [1st Dept 2001].) When documentary evidence is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 [2001].)

The first cause of action for breach of contract alleges that Crown owes plaintiff Demarest unpaid salary, bonuses, and contractual compensation. In moving to dismiss this cause of action, defendants submit an amendment to Demarest's employment contract with Crown in which Demarest waived $50,000 of one of his bonuses. However, this documentary evidence does not demonstrate as a matter of law that the breach of contract claim is without merit, as the claim includes other items of allegedly unpaid compensation.

The second cause of action for fraud in the inducement alleges that plaintiff Demarest was induced to work for Crown by defendants' principals' misrepresentations that plaintiff could start a separate technology division at Crown. This cause of action does not allege a future intent to breach the contract but, rather, alleges a representation of present fact as to the work plaintiff would perform. As this matter was "collateral to," but the alleged inducement for, the employment contract, the second cause of action is not duplicative of the breach of contract cause of action, and may be maintained. (See Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954, 956 [1986].)

The third cause of action purports to allege "breach of duty of reasonable care." The fourth cause of action is purportedly for "failure to supervise." Although plaintiffs' claim is unclear, these causes of action appear to allege that defendants acted unreasonably by not removing Crown's Chief Executive Office after he received a "Wells Notice," thus causing Crown to close down and Demarest to be unable to develop a technology division. These causes of action do not allege a legal duty independent of the employment contract that may give rise to liability for a tort, and are not cognizable under New York law. (Cf. Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 389 [1987].)

The fifth cause of action for breach of fiduciary duty is based on the allegation that "[a]s part of the contractual relationship created by the [employment] Agreement and as Demarest's employer Defendants had a fiduciary duty to Demarest and the other executives and employees of Crown." (Complaint, ¶ 69.) A cause of action for breach of fiduciary duty may not be maintained absent a duty that is additional to a mere contract obligation, and arises out of a relationship of trust and confidence. (See Batas v Prudential Ins. Co. of Am., 281 AD2d 260 [1st Dept 2001].) Here, plaintiff does not expressly oppose dismissal of this cause of action. Moreover, the cause of action does not allege any obligation independent of the employment contract which gave rise to a fiduciary duty. (See Freedman v Pearlman, 271 AD2d 301 [1st Dept 2000][allegation that employee trusted employer to treat him fairly does not give rise to fiduciary duty]; Vitale v Steinberg, 307 AD2d 107 [1st Dept 2003][employer-employee relationship providing for division of profits will not give rise to fiduciary obligation absent agreement to also share loses].)

The sixth cause of action for unjust enrichment alleges that defendants failed to pay

plaintiff Demarest compensation due under his contract, and that "Defendants simply reaped the benefits of having Demarest as an employee and expected him to perform under the contract without compensating him for his work." (Complaint, ¶ 81.) It is well settled that the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery for unjust enrichment for events arising out of the same subject matter. (See Clark-Fitzpatrick, 70 NY2d at 388.) In opposition to the motion to dismiss, plaintiffs attempt to distinguish Demarest's claims for compensation under the contract from his claims for compensation under an unjust enrichment theory. In particular, they argue that his services under his employment contract were distinct from his services in bringing additional business to Crown, and that he had an expectation that the latter services would be compensated. (Ps.' Memo. In Opp. at 8.) However, this claim is barred by plaintiff's employment contract which specifically governs compensation for technology business fostered or promoted by Demarest. (Employment Agreement, ¶ 6 [Ex. B to Ps.' Memo In Opp.].)

The seventh cause of action for "tortious interference with business" alleges that after Crown closed down, plaintiff Demarest formed plaintiff Perseids which was retained by TD Waterhouse to develop their information systems; and that Crown began "strategically interfering" with Demarest, Perseids and their business associates, including TD Waterhouse. (Complaint, ¶ 89.) The specific acts of interference with their business which plaintiffs allege are that defendants retained counsel and began threatening and demanding that Demarest turn over confidential and proprietary information about its business relations with TD Waterhouse (id., ¶ 90); that defendants have threatened to bring action to enjoin Demarest from working for TD Waterhouse or otherwise utilizing his knowledge of the information technology field, thereby

endangering plaintiffs' relationship with TD Waterhouse (see id., ¶ 99); and that defendants have made calls to plaintiffs' family and associates, two specific incidences of which are identified, apparently to determine whether plaintiffs are working for TD Waterhouse. (Id., ¶¶ 94-96.)

Plaintiffs do not expressly oppose the branch of defendants' motion for dismissal of the seventh cause of action. In any event, the complaint does not allege that an existing contract between plaintiffs and TD Waterhouse or any other client has been breached. Nor does the complaint, which relies on allegations that defendants "threatened" legal action and made a limited number of investigative calls, plead the kind of culpable conduct – i.e., criminal or independently tortious conduct – that would ordinarily be required to support a cause of action for tortious interference with prospective economic relations. (See Carvel Corp. v Noonan, 3 NY3d 182 [2004].)

The eighth cause of action for breach of the covenant of good faith and fair dealing alleges that defendants failed to compensate Demarest for services he provided to Crown and used deceptive practices to induce Demarest to take employment with Crown. This cause of action is not based on any additional factual allegations, and is "redundant since a breach of the implied duty of good faith and fair dealing is intrinsically tied to the damages allegedly resulting from the breach of contract." (Levi v Utica First Ins. Co., 12 AD3d 256, 257-258 [1st Dept 2004]. See also Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc., 16 AD3d 352 [1st Dept 2005].)

The ninth cause of action for a preliminary injunction seeks to enjoin defendants from "broadcasting disparaging or damaging allegations against plaintiff to plaintiff or third parties" including plaintiff's family, customers and employers, and from interfering with plaintiff's business. Plaintiffs' prior motion for a preliminary injunction has been denied by separate order

of this court.

The tenth cause of action for a declaratory judgment contains allegations related to those of the seventh cause of action for tortious interference with business relations, and seeks a determination that plaintiffs have not stolen or appropriated intellectual property owned by defendants, and are entitled to conduct business in the technologies engineering field free from interference by defendants. (Complaint, ¶¶ 121-128.) Defendants have withdrawn the branch of their motion seeking dismissal of this cause of action.

The eleventh cause of action for attorneys fees is not maintainable. It is settled "that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule." (U.S. Underwriters Ins. Co. v City Club Hotel, LLC, 3 NY3d 592, 597 [2004].) The complaint fails to allege any basis on which attorneys' fees would be recoverable by plaintiffs.

It is accordingly hereby ORDERED that defendants' motion is granted to the following extent: The first and second causes of action are dismissed only as to Perseids. The third, fourth, fifth, sixth, seventh, eighth, ninth and eleventh causes of action are dismissed as to plaintiffs Demarest and Perseids; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 57 of this Court on November 17, 2005 at 11:30 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
October 27, 2005

MARCY FRIEDMAN, J.S.C.