

Good Energy, L.P. v Kosachuk
2007 NY Slip Op 30171(U)
March 5, 2007
Supreme Court, New York County
Docket Number: 0600513
Judge: Karla Moskowitz
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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GOOD ENERGY, L.P., GOOD ENERGY, LLC
AND MAXIMILIAN HOOVER,
Plantiffs,
- against -
CHRIS KOSACHUK,
Defendant.
-----x

INDEX NO. 600513/2006
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

-----x
CHRIS KOSACHUK,
Third Party Plaintiff,
- against -
CHARLES de CASTEJA, CAR LOS MADRAZO,
KENNETH SUSSMANE, GOOD ENERGY II LLC,
GOOD OFFICES TECHNOLOGY PARTNERS, LLC
and McCUE SUSSMANE & ZAPFEL, P.C.,
Third Party Defendants.
-----x

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying
Decision and Order.

Dated: March 5, 2007

KARLA MOSKOWITZ J.S.C.

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NEW YORK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE [* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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GOOD ENERGY, L.P., GOOD ENERGY, I.I.C
AND MAXIMILIAN HOOVER,

Plaintiffs,

Index No. 600513/2006

- against -

CHRIS KOSACHUK,

Decision and Order

Defendant.

-----x
CHRIS KOSACHUK,

Third Party Plaintiff,

- against -

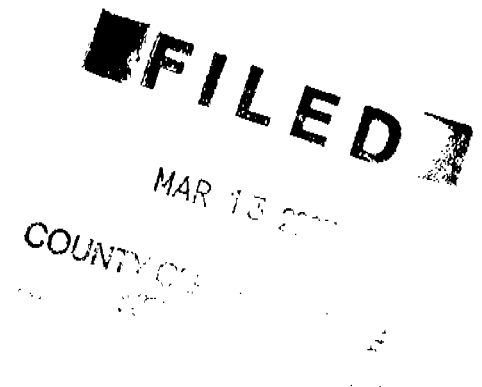
CHARLES de CASTEJA, CARLOS MADRAZO,
KENNETH SUSSMANE, GOOD ENERGY II LLC,
GOOD OFFICES TECHNOLOGY PARTNERS, LLC
and McCUE SUSSMANE & ZAPFEL, P.C.,

Third Party Defendants.
-----x

KARLA MOSKOWITZ, J:

The underlying dispute arises from a disagreement between plaintiff Maximilian Hoover (“Hoover”) and defendant Chris Kosachuk (“Kosachuk”) over a contract for the sale of Kosachuk’s interests in two limited liability companies to Hoover. When Kosachuk sold his 15% interest in Good Energy LLC (“GELLC”) and in Good Energy II LLC (“GEIILC”), he allegedly agreed to several covenants that included confidentiality and non-compete provisions in the energy-transfer business and promises not to solicit suppliers or customers and to cooperate in the transition of the business. Plaintiffs claim Kosachuk breached the agreement.

In this decision and order, the court consolidates two sets of motions and cross-motions.



In motion sequence number 005, defendant moves for summary judgment and plaintiffs cross-move for summary judgment pursuant to CPLR 3212. In motion sequence number 006, plaintiffs move to dismiss all counterclaims and third party claims for failure to state a cause of action and on the basis of documentary evidence pursuant to CPLR 3211(a)(1) and (a)(7). In his cross-motion, defendant moves to: (1) stay, vacate or modify the May 18, 2006 temporary restraining order pursuant to CPLR 2221; (2) amend his pleadings pursuant to CPLR 3025(b); and (3) for a continuance for additional discovery, specifically expert testimony on the value of Good Energy shares pursuant to CPLR 3211(d). Defendant's moving papers refer only to the temporary restraining order, but, at oral argument on May 18, 2006, the court requested that the parties settle an order for a preliminary injunction. (Transcript of Oral Argument, dated May 18, 2006, at 22). The court signed the preliminary injunction order on June 19, 2006. So the injunction defendant seeks to stay, vacate or modify is actually the preliminary injunction. The court also notes that defendant represented himself pro se in motion sequence number 005 but retained counsel for 006.

For the reasons stated below, the court grants summary judgment to plaintiffs (sequence number 005). The court grants plaintiffs' motion to dismiss all counterclaims and third party claims (sequence number 006). The court denies defendant's cross-motion to stay, vacate or modify the preliminary injunction, amend his pleadings and for a continuance for additional discovery (sequence number 006).

BACKGROUND

The following facts are primarily from the complaint, defendant's answer, counterclaims and third party complaint, and other papers the parties submitted on these motions.

Plaintiff Hoover serves as president of Good Energy L.P. (“Good Energy”) and manager and member of GELLC. (Complaint ¶ 3). Kosachuk is an energy commodity broker who acted as executive vice president of Good Energy and manager and member of GELLC, the general partner of Good Energy, from the time the companies formed, in April 2003, until December 2005. He was also a manager and member of GEIILLC, the sole limited partner of Good Energy. (*Id.* ¶ 4). Good Energy provides broker services for energy commodity products, including electricity, natural gas and fuel oil supply contracts, and sells energy demand management products and services. (*Id.* ¶¶ 6-7).

On December 12, 2005, Good Energy, Hoover and defendant entered into an Agreement for Purchase and Sale (the “Agreement”) that gave defendant \$550,000 to sell his 15% membership interests in each of GELLC and GEIILLC to Hoover. (Complaint ¶ 14). In addition, defendant agreed to resign as an officer and employee of Good Energy and as manager of GELLC and GEIILLC. (*Id.*). Plaintiffs maintain that the purchase price of \$550,000 resulted from “arms length negotiations and represented a fair and equitable price for the interests sold by defendant” (*id.*), but defendant disputes plaintiffs’ contention that “arms length negotiations” produced a “fair and equitable” purchase price. (Answer, Counterclaims and Third Party Complaint ¶ 14). Plaintiffs, however, point to December 12, 2005 emails from Kosachuk to Hoover in which Kosachuk claims to be “very excited about the buyout,” states the “agreement looks fine” and requests that Hoover wire him the money that very day. (Emails, dated December 12, 2005, in Notice of Plaintiffs’ Cross-Motion for Summary Judgment, Exh.B).

Defendant further denies that he resigned from his positions at Good Energy, GELLC and GEIILLC and disagrees with plaintiffs that the price was “fair and equitable.” In fact, defendant

alleges that Hoover bought defendant's interests for "one-fourth of their true value" and that Hoover "had prearranged the sale [of Kosachuk's interests to third party defendants] Charles de Casteja and Carlos Madrazo at nearly four times the price at which Hoover coerced Defendant to sell." (Answer, Counterclaims and Third Party Complaint ¶ 42). De Casteja received a 4 % interest in GEIILLC for \$146,667, and Madrazo received a 3 % interest in GEIILLC for \$112,500. (Affidavit of Chris Kosachuk, dated September 21, 2006, Exhs. G and H ["Assignment of Membership Interest," dated December 12, 2005, from Hoover to Madrazo and de Casteja]). Defendant claims this sale is "suspicious" because it transpired "on the same day that Hoover forced the sale of my shares – December 12, 2005." (Kosachuk Aff., dated September 21, 2006, ¶ 39). Hoover denies the existence of any prearranged sale and denies a profit of four times the price defendant received. (Affidavit of Maximillian Hoover, dated July 7, 2006, ¶¶ 40, 47). At the time of the Agreement, defendant Kosachuk believed his interest had a value of \$1.5 million but claims Hoover insisted the value was only \$550,000 and threatened to terminate defendant without any compensation if he did not accept Hoover's offer. (Answer, Counterclaims and Third Party Complaint ¶ 67).

The following provisions of the Agreement are relevant to the motions currently before the court:

5.2 Continued Assistance. Following the Closing, the Seller [Kosachuk] shall refer to the Company as promptly as practicable any telephone calls, letters, orders, notices, requests, inquiries and other communications relating to the Business or the Company. Seller shall cooperate in an orderly transfer of his duties for the Company

5.3 Confidentiality. Seller shall not (a) retain any document, databases, or other media embodying any confidential or proprietary information, including information regarding customers, prospects, vendors or business practices of the Business, or know-how which constitutes a part of the assets used in the Business or use, publish or disclose

to any third person any such confidential or proprietary know-how; or (b) use, publish or disclose any information concerning the Business, the Company, Buyer or any affiliates of the Company and Buyer

6.1 Covenant Not to Compete. (a) For a period of five (5) years following the date hereof, Seller shall not, directly or indirectly, by or for himself or as the agent of another or through others as its, his or her agent:

- (i) divulge, communicate, use or disclose any nonpublic information concerning the Business as currently conducted by the Company, the Company, the Affiliates, or Buyer, or their personnel, business and affairs (except as required by Law); or
- (ii) interfere with the business relationships or disparage the name or reputation of the Business as currently conducted by the Company, the Company, the Affiliates, or Buyer

(b) for a period of five (5) years following the date hereof, Seller shall not, directly or indirectly, by or for himself or as the agent of another or through others as his agent:

- (i) promote, sell, lease, license, distribute, install or service anywhere in the United States [the "Territory"] any (A) energy commodity products including electricity, natural gas and fuel oil and energy demand management products and services . . . or (B) product extensions of the foregoing which are in competition with those of the Business [collectively the "Covered Areas"]; or
- (ii) own, manage, operate, participate in or have any interest in any other business engaged in the Covered Areas anywhere in the Territory, provided, however, that nothing herein shall prohibit Seller from being a passive owner of not more than five percent (5%) of the outstanding stock of any class of securities of a corporation or other entity engaged in such business which is publicly traded so long as Seller has no active participation in the business of such corporation or other entity.

6.2 Covenant Not to Solicit. (a) for a period of five (5) years following the date hereof, Seller shall not directly or indirectly, by or for himself, or as the agent of another, or through others as his agent, solicit for employment or employ any individual who is then an employee or consultant of the Company or Buyer or their Affiliates or request, induce or advise any such employee or consultant to leave the employ of the Company or Buyer or their Affiliates.

(b) For a period of five (5) years following the date hereof, Seller shall not, directly or indirectly, by or for himself or as the agent of another, or through others as his agent, solicit any business from customers or suppliers of the Business as currently conducted by the Company, or request, induce or advice customers or suppliers of the Business as currently conducted by the Company to withdraw, curtail or cancel their business with the Company or Buyer.

6.5 Scope. The parties agree and acknowledge that the duration, scope and geographic areas applicable to the covenants in this Article VI are fair, reasonable and necessary, that

adequate compensation has been received by Seller for such obligations, and that these obligations do not prevent Seller from earning a livelihood. If, however, for any reason any court determines that the restrictions in this Article VI are not reasonable, that consideration is inadequate or that Seller has been prevented from earning a livelihood, such restrictions shall be interpreted, modified or rewritten to include as much of the duration, scope and geographic area identified in this Article as will render such restrictions valid and enforceable.

(Agreement for Purchase and Sale, dated December 12, 2005 in Notice of Plaintiffs' Cross-Motion for Summary Judgment, Exh. I [{"Agreement"}]).

Plaintiffs assert defendant breached the Agreement as soon as he signed it by retaining, using and disclosing Good Energy's confidential and proprietary information to third parties in violation of section 5.3. (Complaint ¶ 17). Plaintiffs also contend defendant used this confidential information to pursue energy brokerage agreements with Good Energy's energy vendors, including Mpower Energy Services, LLC, Direct Energy, Entergy Solutions and Constellation NewEnergy, and to solicit Good Energy's customers, such as Triple Net Properties. (*Id.* ¶¶ 18-19). Plaintiffs submit documentary evidence of agreements between defendant and plaintiffs' supplier Mpower Retail Energy, L.P. (Affirmation of Kenneth Sussman, dated October 10, 2006, Exh. D [Confidential Agreement between Mpower Retail Energy L.P. and Kosachuk, dated December 29, 2005]) and Gexa Energy, an important energy broker in plaintiffs' business (Sussman Aff., dated October 10, 2006, Exh. G [Independent Contractor Agreement between Gexa Energy, LP, and Kosachuk, dated May 9, 2006]). They also submit documentary evidence that suggests defendant solicited plaintiffs' customer Triple Net Properties in conjunction with defendant's work for Gexa Energy. (Sussman Aff., dated October 10, 2006, Exh. F [4/4/06 email from Kosachuk to Gexa Energy in which Kosachuk solicits energy pricing for Triple Net Properties]).

According to plaintiffs, defendant's conduct violates sections 6.1 (Covenant Not to Compete) and 6.2 (Covenant Not to Solicit) of the Agreement because he allegedly competed with Good Energy by pursuing business in the energy commodity products sector and allegedly solicited Good Energy's customers and suppliers. (Complaint ¶¶ 21-22). Plaintiffs claim defendant breached the Continued Assistance Covenant by refusing to refer communications to Good Energy and by failing to cooperate in "an orderly transfer of his duties for Good Energy." (*Id.* ¶ 20). Defendant insists that he did not solicit any of plaintiffs' suppliers or customers because, for instance, Gexa Energy and Triple Net Properties came to him. (Reply Affidavit of Chris Kosachuk, dated October 20, 2006, ¶ 6). Defendant does, however, acknowledge that "[i]f the Court upholds the 'anti-sales' portions of the covenants not-to-compete in the Purchase and Sale Agreement, then my accepting business with Triple Net is presumably improper, as is my interaction with Gexa." (*Id.* ¶ 7). Regarding Mpower Retail Energy, defendant claims Mpower never executed their contract. (*Id.* ¶ 13).

The complaint contains three causes of action: breach of the Agreement, breach of the covenant of good faith and fair dealing, breach of the common law duty to refrain from soliciting Good Energy customers, and a request for a permanent injunction to enforce the Agreement (first cause of action); an accounting and repayment of all profits, compensation, commission, remuneration or benefits defendant received by violating the Agreement (second cause of action); and misappropriation of confidential and proprietary information, such as details of Good Energy contracts with suppliers and of Good Energy negotiations with potential customers (third cause of action).

Defendant answered the complaint and filed several third party claims against Charles de

Casteja (“de Casteja”), Carlos Madrazo (“Madrazo”), Kenneth Sussmane (“Sussmane”), GEILLC, Good Offices Technology Partners, LLC (“Good Offices”) and McCue Sussmane & Zapfel, P.C. Good Offices is the “controlling unit holder” of GELLC and GEILLC, with a 75% interest. (Answer, Counterclaims and Third Party Complaint ¶¶ 45, 55). Plaintiff Hoover is the sole manager of Good Offices. (Hoover Aff., dated July 7, 2006, ¶ 46). Madrazo is an advisor to Good Energy and de Casteja is an employee of Good Energy. (Answer, Counterclaims and Third Party Complaint ¶¶ 46-47). Defendant also alleges that Madrazo and Casteja are Hoover’s “best friends.” (*Id.*). Sussmane is the corporate attorney for plaintiff companies and for GEILLC and Good Offices Technology Partners. He is also the personal attorney for Hoover (*id.* ¶ 48) and appeared before the court on both of the motions that this decision and order address. Sussmane works for third party defendant McCue Sussmane & Zapfel, P.C.

The claims include breach of fiduciary duty against all plaintiffs and third party defendants for either directly breaching a fiduciary duty to defendant or being aware of Hoover’s breach of his fiduciary duty to defendant (first counterclaim and first third party claim); fraud against all plaintiffs and third party defendants in inducing defendant to sign the Agreement (second counterclaim and second third party claim); aiding and abetting fraud and breach of duty against plaintiff Hoover and third party defendants de Casteja, Madrazo, Sussmane, McCue, Sussmane & Zapfel, P.C. and Good Offices (third counterclaim and third third party claim); violation of 15 USC § 78J(B) against plaintiff Hoover for misrepresenting the value of defendant’s interest (fourth counterclaim); unjust enrichment against plaintiff Hoover (fifth counterclaim); civil theft pursuant to the Florida Anti-Fencing Act against plaintiff Hoover (sixth counterclaim); and constructive trust against plaintiff Hoover (seventh counterclaim).

Defendant seeks to recover the difference between the actual sale price of the interest he sold to Hoover and the alleged fair value of that interest. Defendant maintains that Hoover fraudulently obtained his interest and claims the Agreement's restrictive covenants are "null, void and of no force or effect." (Answer, Counterclaims and Third Party Complaint ¶ 42). Hoover disputes allegations he misrepresented the value of defendant's interest and claims they agreed in 2003 that "the purchase price would be based upon a valuation of Good Energy equal to two times the sum of the last twelve months revenues of Good Energy." (Hoover Aff., dated July 7, 2006, ¶ 35). Hoover also states that the Agreement was "necessary to protect the good will and legitimate business interests of the Good Energy business and its investors." (*Id.* ¶ 14).

At oral argument on July 13, 2006, the court denied defendant's motion by order to show cause for summary judgment (sequence number 005) because, given the court's June 19, 2006 order granting a temporary injunction, plaintiff had already demonstrated a likelihood of success on the merits. (Transcript of Oral Argument, dated July 13, 2006, at 17). The court then agreed to hear plaintiffs' cross-motion for summary judgment (sequence number 005), plaintiffs' motion to dismiss all counterclaims and third party claims (sequence number 006) and defendant's cross-motion to vacate the preliminary injunction, amend his pleadings and for a continuance for additional discovery (sequence number 006) together. (*Id.* at 18). At oral argument on October 26, 2006, the court denied the motion to vacate or modify the preliminary injunction because defendant was continuing to breach the Agreement by doing business with plaintiffs' clients, specifically Triple Net Properties. (Transcript of Oral Argument, dated October 26, 2006, at 26, 31, 37-38). By signing the Agreement, defendant had agreed not to work in the same industry as Good Energy, so his continued involvement in that industry violates the Agreement. (*Id.* at 38).

DISCUSSION

I. Plaintiffs' Cross-Motion for Summary Judgment (motion sequence number 005)

Pursuant to CPLR 3212(b), a court grants summary judgment if “upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212[b]; *see also Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A court denies the motion “if any party shall show facts sufficient to require a trial of any issue of fact.” (CPLR 3212[b]). “This standard requires that the proponent of a motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact.” (*Sbar v District Council 37 Health & Sec. Fund Trust*, 820 NYS 2d 846 [Sup Ct, NY County 2006] [internal quotations and citations omitted]).

Although defendant attempts to introduce an issue of fact by characterizing the Agreement as an employment agreement (Transcript of Oral Argument, dated October 26, 2006, at 20-21), the language of the Agreement itself indicates that it pertains to the sale of a business and not severance of employment. The title “Agreement for Purchase and Sale” and the entire text of the Agreement support this conclusion. Moreover, the Agreement describes the transaction as the “purchase and sale of membership interests,” and this purpose does not address in any way employment terms with Good Energy. (*See* Agreement § 1.1).

Defendant also tries to introduce an issue of fact about whether, at the time of signing the Agreement, he had said he would pursue real estate and thus leave the energy commodity business. (Transcript of Oral Argument, dated October 26, 2006, at 22). Defendant’s intended

career path at the time of signing the Agreement is not a material issue of fact because he willingly signed the Agreement, as his emails of December 12, 2006 reveal. (*See supra* p 3). In addition, no issue of fact exists about defendant's breach of the Agreement because he concedes doing business with at least one of Good Energy's clients, Triple Net Properties, in violation of section 6.1 of the Agreement, the Covenant Not to Compete. (Transcript of Oral Argument, dated October 26, 2006, at 26; Defendant-Counterclaimant's and Third Party Plaintiff's Memorandum of Law in Opposition to Plaintiff's Cross-Motion for Summary Judgment, p 10). Plaintiffs thus have a cause of action for defendant's breach of the Agreement that warrants summary judgment in their favor.

Any defense that the Agreement is unenforceable and that plaintiffs lack a cause of action fails. "Where, for instance, there is a sale of a business, involving as it does the transfer of its good will as a going concern, the courts will enforce an incidental covenant by the seller not to compete with the buyer after the sale." (*Purchasing Assocs., Inc. v Weitz*, 13 NY2d 267, 271 [1963]). A sale of a business involves transfer of good will when, for instance, the purchase price is high and express covenants against competition exist. (*Mohawk Maintenance Co. v Kessler*, 52 NY2d 276, 286-87 [1981]). Defendant argues that the transaction with plaintiff Hoover was not a sale of a business because defendant merely sold a minority interest. (Transcript of Oral Argument, dated October 26, 2006, at 12, 14, 19). Defendant cites *In re Gift Pax* for this proposition, but that case states only that it will not imply restrictive covenants, such as a covenant not to compete, in the sale of a minority shareholder's interest if the agreement does not contain one. (*In re Gift Pax, Inc.*, 123 Misc 2d 830, 836-37 [Sup Ct, Nassau County 1984]). Here, the Agreement contains several restrictive covenants, including the Covenant Not

to Compete. Moreover, the size of the interest sold is not the determining factor for a court to find a sale that includes a transfer of good will and for a court to enforce a non-compete provision that a sale agreement contains. (*See Hadari v Leshchinsky*, 242 AD2d 557, 558 [2d Dept 1997] [“Where the shareholders of a commercial enterprise sell their interest in the business for consideration, which includes payment for the good will of the business, a covenant restricting the sellers’ right to compete with the purchaser is enforceable.”] [citations omitted]). Because of the consideration defendant received (\$555,000) and the presence of several restrictive covenants, this Agreement is a valid sale of a business that transferred good will.

Although restrictive covenants associated with the sale of a business must still be reasonable, courts are less strict in interpreting reasonableness than in the context of restrictive covenants for employment agreements. (*See Purchasing Assocs.*, 13 NY2d at 272; *Reed, Roberts Assocs., Inc. v Strauman*, 40 NY2d 303, 307 [1976] [a “stricter standard of reasonableness will be applied” to employment contracts than to sale of business contracts]); *Town Line Repairs, Inc. v Anderson*, 90 AD2d 517, 517-18 [2d Dept 1982] [“As a general rule, however, covenants not to compete pursuant to the sale of a business are not treated as strictly as those whose sole purpose is to limit employment.”] [citations omitted]). Courts do uphold non-compete provisions in sale contracts that are five years in duration and unlimited in geographic scope. (*See Mohawk Maintenance*, 52 NY2d at 280, 284 [finding no problem with non-compete in a sale of business agreement that lasted five years from the day of sale and included any state where company had business on the date of closing]; *Brintec Corp. v Akzo, N.V.*, 129 AD2d 447, 448 [1st Dept 1987] [concluding sale contract’s non-compete of five years with no geographic limitation valid]; *Hadari*, 242 AD2d at 558 [upholding five-year non-compete that applied to New York City in

contract of sale]). Courts also imply a duty not to solicit former customers, and the seller thus has “a specific duty to refrain from soliciting his former customers after he has sold his business and the accompanying ‘good will’ to another.” (*Mohawk*, 52 NY2d at 285-86). In addition, this duty is indefinite and “not in any way limited by the durational provisions contained in the express restrictive covenants or by the legal principle derived from our cases that express covenants restricting competition must be reasonable in scope.” (*Id.* at 279).

Thus, defendant cannot argue here that his Agreement is unenforceable because the terms of the Covenant Not to Compete are reasonable (limited to five years and the United States), and, even if the Agreement did not contain a specific Covenant Not to Solicit, New York law would impose one. The Agreement itself states defendant acknowledges the reasonableness of the scope in the Covenant Not to Compete and the Covenant Not to Solicit. (*See* Agreement § 6.5). In return for entering into the Agreement, defendant received \$550,000 as the benefit of his bargain. Defendant therefore cannot argue that the Agreement is unconscionable. (Affidavit of Chris Kosachuk, dated September 21, 2006, ¶ 57). Moreover, Kosachuk knowingly breached the Agreement by doing business with plaintiffs’ client Triple Net Properties and suppliers Mpower Retail Energy, L.P. and Gcxa Energy, L.P. (*See supra* pp 6-7).

Even if the Agreement were unenforceable, the sale of the business to Hoover includes the sale of good will and implies a duty not to solicit customers. Defendant’s characterization of the sale as “a transfer of interest to a controlling shareholder [Hoover]” is unconvincing as proof the transaction did not involve good will because that transaction was nevertheless a sale that defendant accepted and that New York case law, as discussed above, interprets as transferring good will and an implied obligation not to solicit. (Defendant-Counterclaimant’s and Third Party

Plaintiff's Memorandum of Law in Opposition to Plaintiff's Cross-Motion for Summary Judgment, p 14). As for defendant's contention that he did not solicit Triple Net Properties (*id.* at 10), this contention is belied by plaintiffs' documentary evidence in the form of emails that highlight defendant's active role in acquiring Triple Net Properties' business (Sussmane Aff., dated October 10, 2006, Exh. F [4/4/06 email from Kosachuk to Gexa Energy in which Kosachuk solicits energy pricing for Triple Net Properties]).

Because of the absence of any issues of fact, defendant's willingness to enter the Agreement, defendant's own acknowledgment of breaching the Agreement and New York case law upholding similar contracts for sales of businesses, plaintiffs have supported their motion for summary judgment in their favor for breach of the Agreement and breach of the common law duty not to solicit.

In addition to breach of contract and breach of the common law duty to refrain from soliciting Good Energy customers, the complaint contains causes of action for breach of the covenant of good faith and fair dealing (first cause of action), an accounting (second cause of action) and misappropriation of confidential and proprietary information (third cause of action). Neither party fully addresses any of these issues in their briefs.

Regarding breach of the covenant of good faith and fair dealing, "[u]nder New York Law, parties to an express contract are bound by an implied duty of good faith, 'but breach of that duty is merely a breach of the underlying contract.'" (*Fasolino Foods Co., Inc. v Banca Nazionale Del Lavoro*, 961 F2d 1052, 1056 [2d Cir 1992], quoting *Geler v National Westminster Bank USA*, 770 F Supp 210, 215 [SDNY 1991]). Thus, "it is well-settled New York law that a claim alleging breach of the implied covenant must be dismissed as duplicative when the conduct

constitutes the breach of the underlying contract.” *Nornberg v Thai Magic Co., Inc.*, 10 Misc 3d 1076A, 4 [Sup Ct, NY County 2006, Fried, J.], citing *Horn v New York Times*, 100 NY2d 85 [2003]). The alleged breach of the covenant of good faith and fair dealing here involves the same conduct as the underlying breach of contract action. The breach of contract action therefore subsumes the breach of the covenant of good faith and fair dealing. Accordingly, the court dismisses that part of the first cause of action that involves breach of the covenant of good faith and fair dealing but otherwise grants summary judgment to plaintiffs on breach of contract, the primary claim in the first cause of action.

Because defendant openly admits doing business with Triple Net Properties and communicated information about it to Gexa Energy, he can only be doing so on the basis of confidential information he acquired and thus misappropriated during his tenure at Good Energy when Triple Net Properties was Good Energy’s client. Even though the parties mention, but do not elaborate on, this cause of action in their briefs, the court still can find misappropriation in defendant’s violation of the Confidentiality provision of the Agreement. As with the breach of the covenant of good faith and fair dealing, the third cause of action for common law misappropriation duplicates the breach of contract cause of action, and the damages sought appear identical to those sought in the previous claims. Accordingly, the court dismisses the third cause of action, and, as already stated, the court grants summary judgment to plaintiffs on the first cause of action for breach of contract and an injunction.

As for an accounting, plaintiffs prevail on this cause of action because defendant’s violation of the Agreement entitles plaintiffs to any benefit he received. (*See* Agreement § 6.4 [if Seller violates the Agreement, “Buyer shall be entitled to an accounting and repayment of all

profits . . . the Seller, directly or indirectly, may realize.”)).

II. Plaintiffs’ Motion to Dismiss all Counterclaims and Third Party Claims (motion sequence number 006)

Plaintiffs move to dismiss defendants’ counterclaims and third party claims on the grounds that “a defense is founded upon documentary evidence” (CPLR 3211[a][1]) and that “the pleading fails to state a cause of action” (CPLR 3211[a][7]). On a motion to dismiss for failure to state a claim, “the court should accept as true the facts as alleged in the complaint, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] [citations omitted]). In addition, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference and the criteria becomes ‘whether the proponent of the pleading has a cause of action, not whether he has stated one.’” (*Id.*, quoting *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). Specifically, a court may grant a motion to dismiss on documentary evidence “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Ladenburg Thalmann & Co. v. Tim’s Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000] [citation omitted]).

A. Breach of Fiduciary Duty (first counterclaim and first third party claim)

Defendant alleges breach of fiduciary duty against all plaintiffs and third party defendants. In the business context, “[a] conventional business relationship, without more, does not become a fiduciary relationship by mere allegation.” (*Oursler v Women’s Interart Center, Inc.*, 170 AD2d 407, 407 [1st Dept 1991] [citation omitted]). That is, even if a contract does not

give rise to a fiduciary relationship, “a cause of action for breach of fiduciary duty may survive, for pleading purposes, where the complaining party sets forth allegations that, apart from the terms of the contract, [the parties] created a relationship of higher trust” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, *20 [2005]). “[A] conclusory allegation must follow from the factual allegations preceding it.” (*Henneberry v Sumitomo Corp. of Am.*, 415 F Supp 2d 423, 461 [SDNY 2006] [citation omitted] [concluding plaintiff failed to allege a fiduciary relationship when the pleadings made the following conclusory allegation, without support from the factual allegations preceding it: “As set forth above, defendants breached their fiduciary duty owed to Mr. Henneberry”])).

Neither the Agreement nor the allegations here give rise to a fiduciary duty between defendant and plaintiffs or third party defendants. The Agreement contains no language that indicates plaintiffs and third party defendants owe Kosachuk a fiduciary duty, and Kosachuk’s pleadings contain no factual allegations to support the conclusory allegations about a fiduciary relationship. Kosachuk merely alleges, “Hoover owed Kosachuk fiduciary duties as a minority unit holder of the Company, including duty of loyalty, good faith and candor. Further, Hoover, as Kosachuk’s business partner and joint venturer, owed Kosachuk the highest duty of loyalty.” (Answer, Counterclaims and Third Party Complaint ¶ 79). Against third party defendant Good Offices and plaintiff Hoover, Kosachuk alleges, “[they] also owed a fiduciary duty to Kosachuk as a minority unit holder.” (*Id.* ¶ 80).

Nowhere does Kosachuk allege facts against plaintiffs Good Energy and GELLC or against the remaining third party defendants (de Casteja, Madrazo, Sussmane, GEILLC or McCue Sussmane & Zapfel) that indicate a fiduciary relationship. Defendant alleges only that “[p]laintiffs and third party defendants breached their fiduciary duties owed to Kosachuk by

orchestrating the scheme and taking the corporate actions described above.” (Answer, Counterclaims and Third Party Complaint ¶ 81).

Although the answer does contain allegations against Sussmane and McCue Sussmane & Zapfel (*see id.* ¶ 81 [stating they had a “legal, moral and ethical obligation to inform Kosachuk that they were not representing Kosachuk and that Kosachuk should seek independent counsel for this transaction”], defendant still does not explain why or how a fiduciary relationship exists. Plaintiffs contend that Sussmane and McCue Sussmane & Zapfel never represented Kosachuk and that Sussmane never even met Kosachuk (Sussmane Aff., dated June 19, 2006, ¶¶ 6-8), whereas defendant suggests Sussmane did represent him “in his capacity as our lawyer throughout the years that I have owned my interest in [GELLC, GEIILLC, and managed Good Energy]” (Kosachuk Aff, dated September 21, 2006, ¶ 72).

Even if there was a fiduciary relationship between defendant and plaintiffs or third party defendants, defendant does not properly plead it with sufficient particularity. Defendant’s missing or limited allegations, as described above, do not suffice, and “[t]he cause of action alleging breach of fiduciary duty [is] properly dismissed for failure to plead facts giving rise to a fiduciary relationship.” (*Dove v L’Agence, Inc.*, 250 AD2d 435, 435 [1st Dept 1998], citing CPLR 3016[b]). Accordingly, the court dismisses the breach of fiduciary duty claim.

B. Fraud (second counterclaim and second third party claim)

To allege fraud, a party must show a “representation concerning a material fact, falsity of that representation, scienter, reliance and damages.” (*Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245 AD2d 96, 98 [1st Dept 1997], citing *Nottenberg v Walber 985 Co.*, 160 AD2d 574, 575 [1st Dept 1990]). A party’s reliance must be reasonable, but “[w]here a party has the means

to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations.” (*Id.* at 98-99, citing *Blue Corp. v Reiss Plaza Assocs.* 183 AD2d 662, 662 [1st Dept 1992]).

CPLR 3016(b) further requires a party to plead fraud with specificity, so, if conclusory allegations of fraud lack a factual basis to support them, a party’s claim will fail. (*Longo v Butler Equities II, L.P.*, 278 AD2d 97, 97-98 [1st Dept 2000]).

Defendant’s second counterclaim and third party claim alleges that all plaintiffs and all third party defendants induced defendant to sign the Agreement. At oral argument on May 18, 2006, I stated that I did not “see a fraud and inducement” (Transcript of Oral Argument, dated May 18, 2006, at 18) and still do not. Defendant’s pleading contains no specific allegations against GEI LLC, Good Offices, Sussmane or McCue Sussmane & Zapfel. Regarding Hoover, Good Energy, GELLC, de Casteja and Madrazo, defendant suggests a prearranged plan to buy his former shares at a higher price than what he received from Hoover. Defendant alleges, “Upon information and belief Hoover pre-negotiated with both de Casteja and Madrazo to purchase Kosachuk’s units in Good Energy II, LLC. Hoover pre-sold Kosachuk’s units to raise the funds required to buy Kosachuk’s units.” (Answer, Counterclaims and Third Party Complaint ¶ 75).

The court does not understand the nature of this “scheme” (*id.* ¶ 64) because the allegations lack factual specifics. For example, defendant states, “Hoover told Kosachuk that the units were only worth \$550,000” (*id.* ¶ 67), and “[p]laintiffs i) falsely represented to Kosachuk the true value of his units and/or failed to inform him of potential buyers for his units at a much higher price” (*id.* ¶ 86). More importantly, defendant does not plead reliance on any misrepresentations of any individual, except one comment Hoover allegedly made. The answer states generally, plaintiffs “iii) intended to (and did) induce Kosachuk to sign the Unit Purchase

and Sale Agreement in reliance upon their misrepresentations and/or omissions, including, but not limited to, Hoover's statement that 'the units are only worth \$550,000.'" (*Id.* ¶ 86). Finally, even if the court could find reliance, defendant's reliance would not be reasonable because "his exercise of ordinary intelligence" as an executive vice president of Good Energy from April 2003 to December 2005 should have equipped him to determine the value of his interests on his own, without resorting to Hoover's estimate. (*See Stuart Silver Assocs.*, 245 AD2d at 98-99).

Accordingly, the court dismisses the fraud claim.

C. Aiding and Abetting Fraud and Breach of Duty (third counterclaim and third third party claim)

Because the court has found no fraud here, defendant's claim of aiding and abetting fraud likewise fails. In his papers, however, defendant addresses only the cause of action for aiding and abetting a breach of fiduciary duty against Hoover, de Casteja, Madrazo, Sussmane, McCue Sussmane & Zapfel and Good Offices. (*See Defendant-Counterclaimant's and Third Party Plaintiff's Memorandum of Law in Support of its Cross-Motion and in Opposition to Plaintiffs' and Third Party Defendants' Motion to Dismiss*, p 15).

Just as the court can find no aiding and abetting fraud because of the absence of fraud, the court cannot find aiding and abetting breach of fiduciary duty in the absence of any fiduciary duty that plaintiffs or third party defendants owe Kosachuk. (*See supra* pp 16-17). "To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead a breach of fiduciary duty, that defendant knowingly induced or participated in the breach, and damages resulting from the breach." (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101 [1st Dept 2006], citing *Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). Kosachuk cannot satisfy the first element and therefore his claim fails. Defendant attempts to argue that Sussmane represented him as legal counsel in the transaction and therefore had a duty to warn him about Hoover's

fraud and then participated in this fraud by drafting the Agreement. Again, there is no fraud here, so defendant cannot allege aiding and abetting liability. (Defendant-Counterclaimant's and Third Party Plaintiff's Memorandum of Law in Support of its Cross-Motion and in Opposition to Plaintiffs' and Third Party Defendants' Motion to Dismiss, p 18). Accordingly, the court dismisses the aiding and abetting fraud and breach of fiduciary duty claim.

D. Violation of 15 USC § 78J(B) (fourth counterclaim)

This court does not have jurisdiction to hear this claim because, pursuant to section 27 of the Securities Exchange Act of 1934, district courts of the United States retain exclusive jurisdiction over federal securities violations. Accordingly, the court dismisses the fourth counterclaim.

E. Unjust Enrichment (fifth counterclaim)

“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter.” (*Adiel v Coca-Cola Bottling Co. of New York*, 1995 WL 542432, *3, quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). In addition, “a quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved.” (*Clark-Fitzpatrick*, 70 NY2d at 388-89).

The court has already discussed the validity of the Agreement that governs this business transaction. (*See supra* pp 11-14). Because the Agreement is valid and defendant agreed to and signed this Agreement of his own accord, defendant cannot plead unjust enrichment. Moreover, defendant received the benefit of his bargain in the amount of \$550,000, and he accepted the terms of the Agreement that prevent him from receiving any further benefit from the re-sale of

his interest to de Casteja and Madrazo. The Agreement explicitly states that defendant sells to Hoover “all right, title and interest in and to the Membership Interests.” (Agreement § 1.1). The Agreement also contains a Release provision: “In consideration of the payment of the Purchase Price . . . Seller hereby irrevocably and unconditionally, fully and forever acquits, releases and discharges and agrees to hold harmless the Company, Buyer . . . from any [and] all present and future claims, actions, causes of action . . . sums of money . . .” (Agreement, § 6.6(a)).

Accordingly, the court dismisses the fifth counterclaim.

F. Civil Theft Under the Florida Anti-Fencing Act (sixth counterclaim)

This court has no grounds to apply Florida law in this matter. The Agreement states, “The parties acknowledge and agree that this Agreement shall be governed by the laws of the State of New York, as to all matters including matters of validity, construction, effect, performance and liability, without consideration of conflicts of laws provisions contained therein, and the courts of the state of New York have exclusive jurisdiction of all disputes with respect to an alleged breach of any representation, warranty, agreement or covenant of this Agreement” (Agreement § 8.6).

Defendant’s argument that, because he does not allege breach of the Agreement against plaintiffs, New York does not apply is unavailing. (Defendant-Counterclaimant’s and Third Party Plaintiff’s Memorandum of Law in Support of its Cross-Motion and in Opposition to Plaintiffs’ and Third Party Defendants’ Motion to Dismiss, p 20). Defendant’s counterclaims arise from the subject matter that the Agreement covers, and the Agreement clearly states that New York law governs all matters relating to the “effect” and “performance” of the Agreement. This “effect” and “performance” of the Agreement would include any allegations of theft against plaintiff Hoover in the purchase and sale of Kosachuk’s interest. Accordingly, the court

dismisses the sixth counterclaim.

G. Constructive Trust (seventh counterclaim)

To impose a constructive trust, these elements must be present: “(1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment.” (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976] [citations omitted]). Defendant seeks to impose a constructive trust upon plaintiff Hoover for the profit he allegedly made in re-selling some of defendant’s interest to third party defendants de Casteja and Madrazo. Defendant has not alleged the existence of a fiduciary relationship between himself and Hoover. (*See supra* pp 16-17). Nor can he allege unjust enrichment. (*See supra* p 21). Accordingly, the court dismisses the seventh counterclaim.

III. Defendant’s Cross-Motion (motion sequence number 006)

Defendant cross-moves to vacate the preliminary injunction, amend his pleadings and obtain a continuance for additional discovery. At oral argument, the court denied that part of the cross-motion seeking to vacate the preliminary injunction. (Transcript of Oral Argument, dated October 26, 2006, at 26, 31, 37-38).

“Although leave to amend a pleading should be freely given (CPI.R 3025[b]), an amendment which is devoid of merit should not be permitted.” (*Goldstein v Barco of California, Inc.*, 109 AD2d 817, 818 [2d Dept 1985]). Because, as discussed above, the court does not find any basis for defendant’s claims in the documentary evidence before the court, any amendments defendant might seek would necessarily be “devoid of merit.” Likewise, any additional discovery would be futile. Accordingly, the court denies plaintiffs’ request to amend his pleadings and his request for additional discovery.

IV. Plaintiffs' Request for a Permanent Injunction

“The standard for obtaining a permanent injunction is essentially the same as for a preliminary injunction with the exception that the plaintiff must actually succeed on the merits of the case, rather than merely demonstrate that success is likely in a future proceeding.”

(Weizmann Institute of Science v Neschis, 229 F Supp 2d 234, 258 (SDNY 2002); see also Whitby Operating Corp. v Schleissner, 117 Misc 2d 794, 798-99 [Sup Ct, NY County 1982] [“Where the ultimate relief requested is a permanent injunction, the tests are even more strictly applied, and the remedy more disfavored, since the granting of temporary relief in essence decides the lawsuit.”] [citations omitted]). To obtain a preliminary injunction, a plaintiff must show (i) a likelihood of success on the merits, (ii) an irreparable injury in the absence of a preliminary injunction, and (iii) a balancing of the equities in the plaintiff's favor. *(Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 [1990]).*

As explained above, because plaintiffs do succeed on the merits and the court grants summary judgment in their favor and dismisses all of defendant's counterclaims and third party claims, the court issues a permanent injunction pursuant to the terms of the Purchase and Sale Agreement and the preliminary injunction of June 19, 2006.

CONCLUSION

Accordingly, it is

ORDERED that defendant's motion for summary judgment, sequence number 005, was denied from the bench and denied herein except for that part of the first cause of action alleging breach of the covenant of good faith and fair dealing and the third cause of action which are dismissed as duplicative; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment on the issues of liability

and on an accounting, sequence number 005, is granted, except for that part of the first cause of action alleging breach of the covenant of good faith and fair dealing and the third cause of action which are dismissed as duplicative; and it is further

ORDERED that the amount of damages and an accounting are severed; and it is further

ORDERED that plaintiffs' request for a permanent injunction against defendant, sequence number 005, is granted and the parties directed to settle an order pursuant to the terms of the Agreement for Purchase and Sale and the preliminary injunction; and it is further

ORDERED that plaintiffs' motion to dismiss all counterclaims and third party claims, sequence number 006, is granted; and it is further

ORDERED that defendant's cross-motion to vacate or modify the preliminary injunction, amend his pleadings and obtain a continuance for further discovery, sequence number 006, is denied; and it is further

ORDERED that the parties schedule a compliance conference with the court to be held within two weeks of this decision and order and that the note of issue date is extended until May 31, 2007; and it is further

ORDERED that the Clerk is directed to enter judgment on liability and sever that part of the action for assessment of damages and for an accounting; and it is further

ORDERED that the Clerk is directed to dismiss the third party action and the counterclaims of the first party action.

Dated: March 5th, 2007

FILED

MAR 13 2007

ENTER

COUNTY CLERK'S OFFICE
NEW YORK

