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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

ADDRESSING SYSTEMS and PRODUCTS, INC. and MARSHALL GOLDBERG,

Plaintiffs,

-against-

GEORGE FREIDMAN, DIGITAL PRODUCTS, INC., F. ROBERT HABEEB and LOUIS VILLA,

Defendants.

INDEX NO. 603747/2006

MOTION DATE _____

MOTION SEQ. NO. 007

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 is decided in accordance with the accompanying Decision and Order.

Dated: April 13, 2007

KARLA MOSKOWITZ 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: I.A.S. PART 3

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ADDRESSING SYSTEMS and PRODUCTS, INC. and MARSHALL GOLDBERG,

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Index No. 603747/2006

DECISION and ORDER

KARLA MOSKOWITZ, J:

In an action alleging breach of a non-solicitation agreement, plaintiffs Addressing Systems and Products, Inc. ("ASAP") and Marshall Goldberg ("Goldberg")[1], president of ASAP, move pursuant to CPLR 2221 to renew their request for a preliminary injunction. Defendants Digital Products, Inc. ("DPI") and F. Robert Habeeb ("Habeeb"), president of DPI,[2] cross-move pursuant to CPLR 3212 for partial summary judgment on their first and third counterclaims and for a preliminary injunction to prevent plaintiffs from interfering with certain e-mail communications.

BACKGROUND[3]

In July 2001, ASAP, a business that sold mail room equipment, purchased one half of DPI, a firm that sold other office equipment. Thereafter, Goldberg and Habeeb formed a new corporation to sell a full range of business equipment to existing customers of both firms. In January 2006, following some disagreements and financial problems, ASAP and Goldberg and

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[1] ASAP and Goldberg are collectively referred to as "plaintiffs."

[2] DPI and Habeeb are collectively referred to as "defendants."

[3] I recite here only the facts necessary to resolve the instant cross-motion for partial summary judgment.

DPI and Habeeb entered into a Stock Purchase and Non-Compete Agreement ("Agreement") through which Habeeb repurchased his DPI stock. The stock purchase agreement contained mutual non-solicitation provisions whereby ASAP and Goldberg were prohibited, for a period of two years, from soliciting and selling to certain identified DPI customers (list of customers annexed to the agreement as Exhibit A) and Habeeb and DPI were prohibited, for a period of two years, from soliciting or selling to certain ASAP customers (list of customers annexed to the agreement as Exhibit B). DPI and ASAP each signed $200,000 confessions of judgment to guarantee their non-solicitation obligations. The parties provided that "[t]he principal balance shall be reduced by one twenty-fourth (1/24) each month, provided however there has been no breach of the Non-Compete Agreement." (Habeeb Aff. Ex. C, para.. 2.3).

According to paragraph 2.3 of the Agreement, if either party believed that the other had breached the non-compete clause, the "accuser" would provide the "accused" with notice of a "known breach." The accused would, within 30 days provide a complete accounting of the transaction or "deny that the asserted breach had occurred in whole or in part." Thereafter, the "accuser" would calculate its damages and the accused would pay those damages within ten (10) days. "[H]owever, in the event the parties are unable to resolve that (sic) dispute that a breach has occurred or any disputed amount, the parties shall authorize their respective accountants to review and agree on the final amount within ten [10] days." The agreement goes on to state that if the two accountants can't resolve the dispute, they will retain a third accountant who will make the determination and, in the event that the "accused" fails to either disprove the breach or pay any agreed upon amount, then the accuser has the right to execute on the Confession of Judgment. Paragraph 2.3 also states, "[Accuser] learning of [accused's] failure to provide complete information required in Section 2.3(c)(ii) shall constitute additional cause for filing of

the Confession of Judgment and void the . . . Non-Compete obligation." (Habeeb Aff, Ex. C, para. 2.3).

The Agreement also contained provisions prohibiting both parties from soliciting the other party's employees; regulating the flow of e-mail and voicemail and providing that ASAP would provide DPI with an unaltered copy of "Goldmine," a customer database.

On November 9, 2006, defendants sent plaintiffs a notice of breach that apprised plaintiffs that they had breached the Non-Compete Agreement by selling office equipment to two organizations on the prohibited list–Rockland County ARC and The Ivystone Group, also known as Drummers. Plaintiffs provided defendants with a timely response in which plaintiffs denied that Ivystone was a customer covered under the agreement. However, they admitted selling equipment to Rockland County ARC and provided defendants with the documentation regarding the sale. In their letter, plaintiffs took the position that, based on the circumstances underlying the Rockland ARC sale, they did not owe DPI any money.

Thereafter, on November 29, 2006, defendants served plaintiff with a notice of four additional breaches of the non-compete clause. The notice alleged that plaintiff sold equipment to Temple Beth-El of Great Neck, Laboratory Institute of Merchandising, Westchester Arts Council and the YMCA Retirement Fund. Plaintiff responded to the notice by stating that, due to the circumstances underlying the sale, defendants were not entitled to information or compensation regarding the accounts. (2/5/07 Goldberg Aff., Ex. 2).

RULINGS ON ORAL ARGUMENT

On March 1, 2007, at the oral argument of the motion and cross-motion, the court resolved the motion and several portions of the cross-motion on the record. The court denied plaintiffs'

motion to renew their request for a preliminary injunction on the ground that plaintiffs failed to come forward with admissible credible evidence that would require the court to change its prior determination that plaintiffs were not entitled to injunctive relief. (3/1/07 Transcript p. 28, ll. 15-22; p. 34, ll. 17-18).

In addition, the parties agreed to certain conditions regarding defendant DPI's e-mails that rendered defendants' cross-motion for a preliminary injunction moot. (3/1/07 Transcript p. 44, ll. 21-25; p. 45, ll. 1-25; p. 46, ll. 1-5). The court denied that branch of the cross-motion requesting partial summary judgment as to the portion of the third counterclaim that demands a declaratory judgment that the "side letter agreement" is null and void, finding that there are questions of fact regarding that agreement. (3/1/07 Transcript, p. 51, ll. 13-25; p. 52, ll. 1-10).

The court reserved decision on the remainder of the cross-motion. Accordingly, the two matters that remain unresolved, and that I will address, are defendants' motion for partial summary judgment on the first counterclaim that asks the court to determine that plaintiffs breached the non-solicitation clause in the parties' Agreement and the branch of the third counterclaim that requests a declaratory judgment that the non-compete obligation is void and that defendants are entitled to execute on the Confession of Judgment and enter judgment against the plaintiffs in the amount of $158,333.33.[4]

ARGUMENTS

Defendants contend that summary judgment is warranted because plaintiffs breached the non-compete agreement by selling office equipment to entities on the prohibited list. They also

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[4] As to defendants' allegations regarding Sal Albenez, that appear for the first time in its supplemental memorandum of law, and that defendants alluded to at oral argument, the court directs defendants, if they wish to pursue that, to make a motion, on notice, for the relief requested in the supplemental memorandum of law.

claim that the documentation plaintiff provided regarding the sale to the Rockland ARC was inadequate to permit defendants to calculate their damages and that plaintiff failed to properly respond to the notice regarding Ivystone and thus, pursuant to the contract, the non-compete obligation is void and defendants are entitled to execute on the confession of judgment.

In opposition, plaintiffs argue that defendants' motion for partial summary judgment is premature because they have not yet filed their reply to the counterclaim. They further contend that defendants' request for relief is premature because defendants have not followed the procedure outlined in Paragraph 2.3–that is, presenting the dispute to the accountants, and then to a neutral accountant if necessary–to determine whether or not plaintiffs have breached the non-compete clause in the Agreement and if so, the extent of damages due defendant. It is plaintiffs' argument that defendants must adhere to the procedures in the Agreement before they are entitled to execute on the Confession of Judgment or treat the non-compete clause as void. Plaintiffs argue, in the alternative, that the Confession of Judgment is void because it bears no relation to the actual damages in this matter and, instead, amounts to a penalty.

DISCUSSION

Summary Judgment

On a motion for summary judgment, the proponent of the motion must 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. (*Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 N.Y.2d 557,562 [1980]). The motion must be supported by "affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as

depositions." (CPLR 3212[b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue of fact. (CPLR 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for the failure to do so. (*Vermette v Kenworth Truck Co.*, 68 N.Y.2d 714 (1986); *Zuckerman v City of New York, supra* at 560)

A. Defendants' motion for partial summary judgment is premature.

"The soonest a motion for summary judgment may be made is after joinder of issue, which occurs when the answer is served in respect of the main claim and when a reply is served in respect of a counterclaim. The summary judgment motion under CPLR 3212 may not be made before the joinder of issue." (*Siegel, N.Y.Practice,* Section 279, *see also, City of Rochester v Chiarella,* 65 N.Y.2d 92 [1985]; *65 North 8 Street HDFC v. Suarez,* 18 A.D.3d 732 [2d Dept 2005]).

Although CPLR 3211 (c) permits a court, on notice to the parties, to treat a motion to dismiss as a motion for summary judgment, "[t]he motion is available to a party attacking a pleading who has not pleaded yet, a defendant moving against a complaint before answering, for example, but it may not be used by a pleader such as [the defendants] to foreclose a responsive pleading before an opponent has had a chance to answer the claim." (*City of Rochester v Chiarella,* 65 N.Y.2d. at 101-102 [internal citations omitted]).

Here, defendants moved for partial summary judgment on their counterclaims before plaintiffs had an opportunity to reply to those counterclaims. Accordingly, the motion is

premature.

B. In any event, there are questions of fact.

However, even if this motion was not premature, defendants have failed to establish a *prima facie* case that they are entitled to judgment as a matter of law.

In plaintiffs' December 8, 2006 response to defendants' first notice of an alleged breach, plaintiffs deny that the Ivystone group is a protected customer, and, although they supplied some documentation regarding the Rockland ARC transaction, they denied that they owe defendants commissions for that account. (Habeeb Aff, Ex. 1). Moreover, in their December 29, 2006 response to defendants' second notice of an alleged breach, plaintiffs deny that defendants are entitled to any information or compensation regarding the identified accounts.

Paragraph 2.3(c)(iii) of the Agreement states that if plaintiffs deny that an asserted breach has occurred, in whole or in part, then the parties shall authorize their accountants to review the matter and determine what, if any amount, may be due to the complaining party. Here, there is a question of fact as to whether plaintiffs' provided complete information and/or properly denied each of the breaches in compliance with paragraph 2.3(c)(ii) of the Agreement. In addition, defendants have failed to come forward with any evidence that they submitted the disputed matters to the accountants, as specified in Section 2.3 (c) (iii) of the Agreement, to determine whether a breach occurred and, if so, what amount, if any, may be due them. Because there has not been a determination that plaintiffs breached the agreement and failed to pay defendants any amount that was due, that branch of defendants cross-motion that seeks to execute on the confession of judgment and void the non-compete clause is denied because the Agreement specifies that:

> In the event that the Goldberg Parties fail to cure or disprove a breach as provided for in Section 2.3(c)(iii), maintaining strict compliance with the time provisions of this Section 2.3 and giving the accountants the time afforded them to determine whether a breach has occurred and the amount of any such profit thereon, then [defendants] shall have the right to enter and execute on the Confession of Judgment . . . . In addition, [defendants'] Non-Compete obligation as contained in this Section 2.3 shall be null and void. [Defendants] learning of the Goldberg Parties' failure to provide complete information required in Section 2.3(c)(ii) shall constitute additional cause for the filing of the confession of judgment and void the [defendants'] Non-Compete obligation.[5]

Because the court finds that the motion is premature and, in any event, there are questions of fact regarding whether plaintiffs breached the non-compete provisions in the Agreement, the cross-motion for partial summary judgment on the first and third counterclaims is denied.

Accordingly, it is ORDERED that the motion and cross-motion are denied in their entirety.

Dated: April 13, 2007

J.S.C.

[5] Submission of the disputed matters to the accountants was a condition precedent to plaintiffs' obligation to pay defendants profits due on the alleged breaches. A condition precedent is "an act or event . . . which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises." (*Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685,690 [1995] [internal quotations omitted]). Express conditions precedent are "those agreed to and imposed by the parties themselves . . . [that] must be literally performed . . . ." (*Id.* at 690).