

Information Mgt. Network, LLC v O'Connor
2008 NY Slip Op 30960(U)
March 31, 2008
Supreme Court, New York County
Docket Number: 0601881/2007
Judge: Carol R. Edmead
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PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Information Management Network

INDEX NO. 601881/07

MOTION DATE 2/19/08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

O'Connor, Justin, et al.

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

PAPERS NUMBERED

Notice of Motlon/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

FILED
APR 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Justin O'Connor and Pier Conference Group, Inc., for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the First and Second Causes of Action in the Verified Complaint of plaintiff Information Management Network, LLC is **denied in its entirety**; and it is further

ORDERED that the motion of defendants Justin O'Connor and Pier Conference Group, Inc., for an order pursuant to CPLR 3024(b), dismissing the Second Cause of Action, striking all irrelevant, scandalous and prejudicial statements from plaintiff's Second Cause of Action is **denied except as to ¶¶ 52 and 58**. As to these two paragraphs defendants' motion is denied as such paragraphs are deemed not scandalous; and it is further

Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

ORDERED that defendants shall serve their Answer to the Verified Complaint within twenty days of receipt of this order; and it is further

ORDERED that counsel for all parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, on **Tuesday**, May 27, 2008 at 3:00 p.m., in Part 35, 60 Centre Street, Room 438, New York, New York; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for defendants.

FILED
APR 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated 3/31/08

ENTER: *Carol R. Edmead*, J.S.C.

HON. CAROL EDMEAD

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 35

INFORMATION MANAGEMENT NETWORK, LLC, x

Plaintiff

Index No. 601881/07

-against-

DECISION/ORDER

JUSTIN O'CONNOR and PIER CONFERENCE
GROUP, INC.,

Defendants.

FILED
APR 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

EDMEAD, J.S.C. x

MEMORANDUM DECISION

Defendants Justin O'Connor ("O'Connor") and Pier Conference Group, Inc. ("Pier") (collectively "defendants"), move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the First and Second Causes of Action in the Verified Complaint of plaintiff Information Management Network, LLC ("plaintiff" or "IMN"), or in the alternative, dismissing the Second Cause of Action, striking all irrelevant, scandalous and prejudicial statements from plaintiff's Second Cause of Action pursuant to CPLR 3024(b).

On or about March 22, 2005, plaintiff and O'Connor entered into an employment agreement (the "Employment Agreement"), that provides, in pertinent part, as follows:

2. *Title and Responsibilities.* O'Connor shall be Senior Vice President for the Public Finance Division of IMN. O'Connor shall report directly to Scott Brody. O'Connor shall be responsible for the performance of the executive, managerial and administrative duties customarily and historically performed by the employee as the Senior VP of the Public Finance Division, including but not limited to the production of conferences and the sales of sponsorships for the conferences. O'Connor shall perform and discharge, faithfully, diligently and to the best of his ability, his duties and responsibilities hereunder in accordance with Section 5 herein. O'Connor will work primarily from IMN's New Jersey office; provided however he makes himself available to come in to the New York

office (with all related expenses paid for by IMN) when necessary to fulfill his duties as defined above, which shall be a minimum of three times a month, unless otherwise waived by IMN. Nothing herein shall prevent IMN from assigning other managers, producers or salespersons to perform the aforementioned tasks.

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4. Termination. Either party may terminate this Agreement at any time if the other party has failed to comply with the terms and conditions of the Agreement. Any termination of this Agreement by any party shall not constitute a waiver of any rights or limit any remedies the terminating party may have under this Agreement. It is expressly agreed by the parties that O'Connor is an employee at will and nothing herein shall be construed to alter that employment status in any way; provided however, that each party shall give the other party at least 180 days advance written notice should a party decide to terminate the employment relationship. If O'Connor's employment is terminated due to his death or disability, then Section 4.1, 4.2 and 9 shall not be applicable.

5. Duty of Loyalty. O'Connor acknowledges that upon execution of this Agreement, he shall owe IMN a duty of loyalty, to act at all times in the best interests of IMN and to perform all duties as an IMN Employee to the best of his ability. O'Connor agrees that, while employed by IMN, O'Connor will not direct, produce or sell sponsorships for any other conference unless otherwise directed by IMN. O'Connor also agrees during his employment not to assist, or provide services to, any competitor of IMN or any other conference company without IMN's express written consent.

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7. Confidentiality. During the course of O'Connor's employment with IMN, he will have access to or knowledge of, or work on the development or creation of Confidential Information (as hereinafter defined). O'Connor hereby agrees that he will not at any time, whether during or within five years after the termination of his employment for any reason, reveal to any person or entity any Confidential Information of IMN or of any third party which IMN is under an obligation to keep confidential, except as may be required in the ordinary course of performing his duties as an employee of IMN, and O'Connor shall keep secret all Confidential Information and shall not use or attempt to use any such information in any manner, except as may be required in the ordinary course of performing his duties as an employee of IMN. O'Connor will not intentionally disclose, and will use best efforts to prohibit the unintentional disclosure, to any third party of any confidential or proprietary information concerning IMN or its processes, inventory, formulae, customers, suppliers, mailing lists, databases, or any trade

secret, unless the disclosure is expressly asserted to be in writing by IMN....

Defendants' Contentions

Plaintiff has failed to properly state a claim upon which relief can be granted as to its claims for breach of the confidentiality and duty of loyalty provisions in O'Connor's Employment Agreement with plaintiff.

Further, plaintiffs have improperly inserted statements about O'Connor in the Second Cause of Action in the Verified Complaint that are false, incendiary, blatant mischaracterizations of events, and are irrelevant to its claim for breach of a duty of loyalty as a matter of law and O'Connor's job performance at plaintiff.

O'Connor states that at no time during his employment with plaintiff was he told or given written notice that he was in breach of any duty of loyalty or his duties or responsibilities for plaintiff under the Employment Agreement. In fact, O'Connor's conduct and performance at IMN were not an issue during his tenure at IMN.

The Employment Agreement provides that O'Connor may not compete with plaintiff for a period of one year after his termination of employment "unless [plaintiff] terminates this agreement without cause." On March 28, 2007, O'Connor was terminated without cause, and without the requisite 180-day notice and has been free to compete with plaintiff since that date.

During O'Connor's tenure with plaintiff, he was permitted to retain an independent computer consultant William Nolan ("Nolan"), to perform certain computer work for plaintiff. During the course of that retention, Nolan properly obtained certain of plaintiff's information. Nolan was briefly retained by defendants to provide computer services after plaintiff terminated O'Connor. Plaintiff requested that Nolan return plaintiff's information. As acknowledged by

plaintiff in the Verified Complaint, O'Connor demanded that Nolan return plaintiff's information. Defendants believe that Nolan has returned said information. Neither O'Connor nor Pier is using any of plaintiff's confidential information or Nolan's services, and O'Connor is not in breach of any duty concerning the use and/or disclosure of plaintiff's confidential information.

Plaintiff failed to provide O'Connor with the requisite 180-day notice period for his termination without cause. Even if O'Connor breached the Employment Agreement, as IMN now claims, none of the alleged misconduct interfered with O'Connor's ability to perform his job and, in any event, IMN failed to give O'Connor the contractually-mandated written notice and opportunity to cure such breach.

Plaintiff's Opposition

O'Connor's actions and behavior caused plaintiff to lose business opportunities, to lose valuable employees, and subjected plaintiff to liability for O'Connor's illegal and immoral behavior towards other employees. O'Connor's duty to act in plaintiff's interest is based on his agreement to do so in a contract which was negotiated between the parties.

Defendants' only argument for dismissing the breach of contract claims asserted by plaintiff is their assertion that plaintiff cannot recover under a contract it has already breached, failing to note that plaintiff's termination of O'Connor's employment is based on O'Connor's initial breach of his Employment Agreement. Here, there is an executed Employment Agreement which plaintiff seeks to enforce.

Defendants' only support for their contention that the First Cause of Action should be dismissed as a matter of law is based upon a misreading of the Verified Complaint. Defendants

contend that information was supplied to Nolan, permissibly in connection with plaintiff's business. Plaintiffs do not dispute this. O'Connor then claims that he requested Nolan return that information and that upon O'Connor's information and belief, this has occurred. Defendants assert that none of plaintiff's confidential information is being used by O'Connor's new company. These allegations by O'Connor are made in an affidavit outside the four corners of the Verified Complaint and are impermissible.

Defendants next contend that plaintiff's Second Cause of Action should be dismissed as plaintiff supposedly fails to state a cause of action for a breach of the fiduciary duty of loyalty. Defendants, however, fail to recognize that plaintiff is not asserting a claim for a common law breach of the duty of loyalty, but rather, breach of contract. While the facts alleged in the Verified Complaint indicate that defendants did indeed violate that duty, plaintiff has elected to pursue relief pursuant to the Employment Agreement. Plaintiff's Second Cause of Action arises out of Sections 2 and 5 of the Employment Agreement and the duties and obligations owed to plaintiff under those sections.

And, plaintiff is within its rights to terminate O'Connor without allowing him to cure. If defendants wish to recover on the theory that plaintiff also breached the Employment Agreement, they may bring a counterclaim to that effect.

Defendants' alternative motion to strike allegations from plaintiff's Second Cause of Action pursuant to CPLR 3024(b) ought to be dismissed because those allegations are relevant to plaintiff's Second Cause of Action and are not prejudicial to defendants. The actions of O'Connor which led to his termination of employment are in direct violation of Sections 2 and 5 of his Employment Agreement with plaintiff. What defendants fail to realize is that plaintiff is

not claiming a breach of the common law duty of loyalty; rather, plaintiff claims that O'Connor violated the duties set forth in the Employment Agreement. That Employment Agreement provides in part that O'Connor shall: "act at all times in the best interests of IMN and perform all duties as an IMN Employee to the best of his ability."

Defendants' Reply

The extent of IMN's documentary submissions include a Verified Complaint by an attorney who lacks personal knowledge, a Memorandum of Law signed by counsel, and a document purportedly taken from IMN's employee handbook that is unauthenticated and incomplete. All these submissions lack any probative value.

Plaintiff failed to rebut defendants' defenses based on documentary evidence. Where a written agreement, e.g., the Employment Agreement, contradicts the cause of action for breach of contract, the document itself constitutes documentary evidence warranting dismissal. Defendants have submitted documentary evidence, the Employment Agreement, and the O'Connor affidavit supporting and warranting dismissal of IMN's claims.

And, the sworn affidavit of O'Connor is un rebutted and establishes that neither he nor Pier are using or have used any IMN confidential information.

Plaintiff's complaint (§ 19) does not assert that plaintiff was terminated for cause. And, plaintiff never provided O'Connor with the 180-day notice.

Analysis

CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [1], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary

evidence.” Thus, where the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law,” dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a][1] motion is whether the documentary evidence submitted “conclusively establishes a defense to the asserted claims as a matter of law” (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] citing *Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211[a][1] (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

(*Igarashi v Higashi*, 289 AD2d 128, 735 NYS2d 33 [1st Dept 2001] [In view of the documentary evidence, to wit, deeds signed by plaintiff at the closings of the four properties in question indicating that both plaintiff and defendant are owners of the properties, dismissal of the first four causes of action, which essentially claimed that plaintiff was the sole owner of the property, was appropriate. While pleadings should be liberally construed on a motion to dismiss, claims "flatly contradicted by documentary evidence" must be rejected], citing *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279,

675 NE2d 1232 [1996]).

(*Baystone Equities, Inc. v Gerel Corp.*, 305 AD2d 260, 759 NYS2d 78 [1st Dept 2003] [contracts, rationally construed, are not consistent with plaintiff's contention that the five-day notice to cure contractually required of the seller as a condition of contract termination in certain circumstances was applicable where termination was predicated on nonpayment of the deposit. Finally, the documentary evidence renders untenable plaintiff's claim that the parties entered into a net lease agreement after the original contracts were terminated]).

(*Morgenthau & Latham v Bank of New York Co.*, 305 AD2d 74, 760 NYS2d 438 [1st Dept 2003] [Where documentary evidence relied upon by movant constitutes informal judicial admissions by plaintiffs' "attorney-in-fact" in another action, such judicial admissions by plaintiffs' agent in a pending Federal action constitute "documentary evidence" within the meaning of CPLR 3211(a)(1); prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff's present claim may constitute documentary evidence within the meaning of CPLR 3211(a)(1); *IMO Indus. Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999] [legal malpractice defendant's submission of excerpts of client's Answer and selected pre-litigation correspondence did not conclusively establish firm's defense as a matter of law]).

Affidavits and deposition transcripts do not qualify as "documentary evidence" for purposes of this rule (*see Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3d Dept 1988]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court Bronx County 2004]).

Defendants' motion to dismiss the First and Second Causes of Action of plaintiff's Verified Complaint, based on documentary evidence, is denied.

Viewing the allegations in the complaint in the light most favorable to the plaintiff (*see Leon v Martinez*, 84 N.Y.2d at 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511), this court finds that the Verified Complaint states cognizable claims against the defendants for, the First Cause of Action, Use and Disclosure of Confidential Information in Violation of Defendant's Employment Agreement, and the Second Cause of Action, Breach of the Duty of Loyalty in Violation of Defendant's Employment Agreement. The Verified Complaint contains allegations sufficient to support the plaintiffs' claim. In this respect, the allegations of the complaint also present a justiciable controversy. Moreover, such allegations were not "utterly refute[d]" by the documentary evidence submitted by the defendants in support of that branch of their motion which was to dismiss pursuant to CPLR 3211(a)(1) (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d at 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190).

Further, for this court to grant a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence forming the basis of the defense must resolve all factual issues as a matter of law and conclusively dispose of the cause of action (*see McCue v County of Westchester*, 18 A.D.3d 830, 831, 796 N.Y.S.2d 384; *see also Held v Kaufman*, 91 N.Y.2d 425, 430-431, 671 N.Y.S.2d 429, 694 N.E.2d 430). Here the Employment Agreement - as documentary evidence - submitted by defendants fails to conclusively dispose of plaintiff's First Cause of Action.

And, the degree to which the O'Connor affidavit is submitted in support of dismissing the First Cause of Action - breach of the Employment Agreement - said affidavit does no more than

assert the inaccuracy of plaintiff's allegations, and it may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint (*see Rovello v Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970), and does not otherwise conclusively establish a defense to the asserted claims as a matter of law (*see Leon v Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). The conclusory, self serving statements by O'Connor - " Neither I nor Pier is using any IMN confidential information or Nolan's services, and I am not in breach of any duty concerning the use and/or disclosure of IMN confidential information" - and recent letter from counsel denying defendants' use of plaintiff's confidential information, are wholly insufficient to support dismissal.

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must "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 into any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff’s counsel which flatly contradicted plaintiff’s current allegations of prima facie tort].

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a] [7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint

(*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: “The scope of a court’s inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed” (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, citing *P.T. Bank Central Asia v Chinese Am. Bank*, 301 AD2d 373, 375 [2003]), the object being “to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action” (*id. at 376; see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

Plaintiff has sufficiently stated a claim upon which relief can be granted as to its claims for both breach of confidentiality and duty of loyalty provisions in O’Connor’s Employment Agreement with IMN.

With respect to the First Cause of Action, IMN sufficiently pleaded that O’Connor knowingly exploited the confidential information and trade secrets allegedly misappropriated by O’Connor, and engaged in unfair competition (*see, Laro Maintenance Corp. v Culkin*, 267 A.D.2d 431, 700 N.Y.S.2d 490; *WMW Mach. Co. v Koerber AG*, 240 A.D.2d 400, 658 N.Y.S.2d 385; and that O’Connor usurped corporate assets and opportunities belonging to IMD (*see, Laro Maintenance Corp. v Culkin, supra; Schneider Leasing Plus v Stallone*, 172 A.D.2d 739, 569 N.Y.S.2d 126).)

Plaintiff has sufficiently pled its Second Cause of Action - Breach of Defendant’s Duty of Loyalty in Violation of the Employment Agreement. (*see, Ashland Mgt. v Janien*, 82 N.Y.2d 395, 604 N.Y.S.2d 912, 624 N.E.2d 1007; *Starlight Limousine Serv. v Cucinella*, 275 A.D.2d

704, 713 N.Y.S.2d 195; *Hinderhofer v Daisy Mfg. Co.*, 272 A.D.2d 444, 708 N.Y.S.2d 312); that the alleged conduct by O'Connor was a breach of his Employment Agreement and his duty of loyalty to IMN (*see, Wallack Freight Lines v Next Day Express*, 273 A.D.2d 462, 711 N.Y.S.2d 891; *Hinderhofer v Daisy Mfg. Co.*, *supra*; *Stiepleman Coverage Corp. v Raifman*, 258 A.D.2d 515, 685 N.Y.S.2d 283; *Laro Maintenance Corp. v Culkin*, 267 A.D.2d 431, 700 N.Y.S.2d 490; *WMW Mach. Co. v Koerber AG*, 240 A.D.2d 400, 658 N.Y.S.2d 385; *Schneider Leasing Plus v Stallone*, 172 A.D.2d 739, 569 N.Y.S.2d 126).

Based on the foregoing, defendants' motion to dismiss the First and Second Causes of Action of the Verified Complaint, based on plaintiff's failure to state a cause of action, is denied.

Motion to Strike Scandalous or Prejudicial Matter

Finally, plaintiff has not improperly inserted statements about O'Connor in the Second Cause of Action in the Verified Complaint that as a matter of law should be stricken as false, incendiary, blatant mischaracterizations of events and, irrelevant to plaintiff's claim for breach of a duty of loyalty and O'Connor's job performance at IMN.

In reviewing a motion pursuant to CPLR 3024(b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action (*see New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 A.D.3d 391, 802 N.Y.S.2d 363 [2005]; *Bristol Harbour Assocs. v Home Ins. Co.*, 244 A.D.2d 885, 886, 665 N.Y.S.2d 142 [1997]; *Wegman v Dairylea Co-op.*, 50 A.D.2d 108, 111, 376 N.Y.S.2d 728 [1975], *lv. dismissed* 38 N.Y.2d 918, 382 N.Y.S.2d 979, 346 N.E.2d 817 [1976]; *see also Rice v St. Luke's-Roosevelt Hosp. Ctr.*, 293 A.D.2d 258, 259, 739 N.Y.S.2d 384 [2002]).

In the instant case, O'Connor seeks to strike allegations in the complaint on three

grounds: (1) IMN terminated his employment without cause; (2) IMN breached the Employment Agreement by failing to afford him the opportunity to cure as required by Paragraph 21.1 of the Employment Agreement; and (3) even if the allegations plaintiff sets forth were true (which they are not), they are irrelevant to, and do not support, plaintiff's claim for breach of the duty of loyalty.

Plaintiff counters that the actions of O'Connor which led to the termination of his employment are in direct violation of Sections 2 and 5 of O'Connor's Employment Agreement with plaintiff.

As a general rule, allegations related to breach of contract/breach of a duty of loyalty are admissible at trial. Thus, the allegations related to such are relevant and should not be struck (*see* Siegel, N.Y. Prac. § 230, at 380 [4th ed.] [“relevancy is still the best key to whether matter is ‘unnecessarily’ pleaded, and the best key to relevancy is whether it would be admissible in evidence at the trial”]; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C:3024:4, at 323 [“In general, we may conclude that ‘unnecessarily’ means ‘irrelevant.’ We should test this by the rules of evidence and draw the rule accordingly. Generally speaking, if the item would be admissible at the trial under the evidentiary rules of relevancy, its inclusion in the pleading, whether or not it constitutes ideal pleading, would not justify a motion to strike under CPLR 3024(b)”]).

After an exhaustive review of each and every paragraph sought to be stricken by O'Connor, this court finds that defendants' application to strike save ¶¶ 52 and 58 is denied. These allegations regard O'Connor's conduct and are tied to his alleged breach of contract/breach

of duty of loyalty and are necessary for the sufficiency of plaintiff's causes of action.

Defendants' application to strike ¶¶ 52 and 58 is denied as such paragraphs are not scandalous.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Justin O'Connor and Pier Conference Group, Inc., for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the First and Second Causes of Action in the Verified Complaint of plaintiff Information Management Network, LLC is **denied in its entirety**; and it is further

ORDERED that the motion of defendants Justin O'Connor and Pier Conference Group, Inc., for an order pursuant to CPLR 3024(b), dismissing the Second Cause of Action, striking all irrelevant, scandalous and prejudicial statements from plaintiff's Second Cause of Action is **denied except as to** ¶¶ 52 and 58. As to these two paragraphs, defendants' motion is **denied** as such paragraphs are deemed not scandalous; and it is further

ORDERED that defendants shall serve their Answer to the Verified Complaint within twenty days of receipt of this order; and it is further

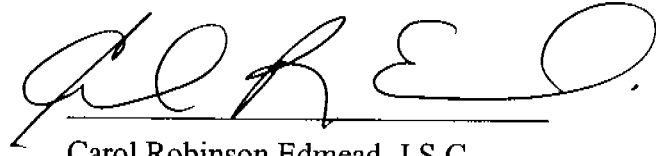
ORDERED that counsel for all parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, on **Tuesday**, May 27, 2008 at 3:00 p.m., in Part 35, 60 Centre Street, Room 438, New York, New York; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry

within twenty days of entry on counsel for defendants.

This constitutes the decision and order of this court.

Dated: March 31, 2008



Carol Robinson Edmead, J.S.C.

FILED
APR 03 2008
COUNTY CLERK'S OFFICE
NEW YORK