

**D'Antonio v Hiller**

2008 NY Slip Op 31405(U)

April 25, 2008

Supreme Court, New York County

Docket Number: 0112433/2006

Judge: Eileen Bransten

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

PRESENT: EILEEN BRANSTEN  
*Justice*

PART 3

THOMAS W. D'ANTONIO

INDEX NO. 112433/06

MOTION DATE 4/16/08

- v -

MOTION SEQ. NO. 002

GARY HILLER

MOTION CAL. NO. \_\_\_\_\_

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

**FILED**

APR 29 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion: X Yes No

Upon the foregoing papers, it is

**ORDERED** that this motion is decided in accordance with the accompanying memorandum decision.

Dated: 4-25-08    
 **HON. EILEEN BRANSTEN** J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART THREE

-----X

THOMAS W. D'ANTONIO,

Plaintiff,

Index No.: 112243/06

Motion Date: 4/16/08

Motion Sequence Nos.: 002 & 003

-against-

GARY HILLER, LARRY LAIMO and  
MERCURY BEACH-MAID, INC.,

Defendants.

**FILED**  
APR 29 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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PRESENT: EILEEN BRANSTEN, J:

Motion sequence numbers 002 and 003 are consolidated for disposition.

In Motion Sequence No. 002, Plaintiff Thomas W. D'Antonio ("Mr. D'Antonio") moves (1) pursuant to CPLR 3212 for summary judgment disposition on the counterclaims asserted by Defendants Gary Hiller ("Mr. Hiller"), Larry Laimo ("Mr. Laimo"), and Mercury Beach-Maid, Inc. ("MBM") (collectively, "Defendants"); (2) for partial summary judgment for money allegedly due; and (3) to quash a Subpoena *Duces Tecum* pursuant to CPLR 2301. Defendants oppose the motion and cross-move for (1) leave to amend their answer under CPLR 3025(b), (2) summary judgment on the proposed amended first counterclaim, and (3)

Mr. D'Antonio's counsel disqualification pursuant to 22 NYCRR 1200.21(a). In Motion Sequence No. 003, Mr. D'Antonio seeks leave to amend his complaint to add a claim for fraud.

### **BACKGROUND**

MBM is a New York-organized corporation in the retail-apparel business with its principal place of operations in New York, New York. *See*, Mallin Aff. Ex. A, Amended Complaint at 1, ¶ 4. Messrs. D'Antonio, Hiller, and Laimo are all domiciled in New York.

Pursuant to a Stock Purchase Agreement executed on September 26, 1994, Messrs. D'Antonio, Hiller, and Laimo each purchased 22% of MBM's stock.<sup>1</sup> *Id.*, at 2, ¶ 13. In order to finance this purchase, they borrowed \$570,000.00 from MBM's former owners evidenced by a promissory note dated September 26, 1994. *See*, Pergament Aff., Ex. 6. In order to repay the loan to MBM's former owners, Messrs. D'Antonio, Hiller, and Laimo each borrowed money from MBM, which are evidenced by a series of promissory notes. *See*, July 23, 2007 Hiller Aff'd, at 2, ¶ 5.

On February 10, 2000, Messrs. D'Antonio, Hiller, and Laimo executed a Shareholders Agreement where each became MBM's officers and were named members of its Board of Directors. *Id.*, Ex.D. Mr. D'Antonio also assumed the role of MBM's Vice President and Secretary, where he was authorized to sell and purchase men's apparel on its behalf. *See*,

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<sup>1</sup> Non-party Philip Amarant purchased 34% of the stock.

May 17, 2007 D'Antonio Aff'd, at 5, ¶¶ 19-20.

The agreement provides in relevant part that

“Upon termination of employment of the Shareholder \* \* \* the other Shareholders \* \* \* shall purchase, and the Terminated Shareholder shall sell, all of the Shares owned by the Terminated Shareholder at the time of his termination of employment.

\* \* \*

“The Non-terminated Shareholders shall pay the Purchase Price for all of the shares of the Terminated Shareholder, within ninety (90) days of the termination of employment [the Non-terminated Shareholders shall pay] the Initial Payment [20% of the purchase price] and the balance of the purchase price in the form of a Payout Notice signed by all of the Non-Terminated Shareholders. The principal on the Payout Notice shall be reduced by the balance remaining \* \* \*, if any, upon the Note dated September 26, 1994 \* \* \*.

\* \* \*

“Should an event have occurred that would require the current valuation of Shares \* \* \* then the Shareholders hereby mutually agree that the independent accounting firm representing [MBM] at that time, shall, as of the Valuation Date, produce a financial statement of [MBM] within forty-five (45) days \* \* \*. Based upon the balance sheet produced \* \* \* the [MBM's] net book value shall be used to calculate the Last Share Price.”

Mallin Aff., Ex. A, Supplemental Complaint, Ex. A, ¶ 5 C, 6.

The relationship between Mr. D'Antonio and Messrs. Hiller and Laimo began to deteriorate. In emails dated April 8, 2005; August 15, 2005; and September 19, 2005, Mr. D'Antonio expressed his dismay with them to MBM's clients. *Id.*, Exs. Q, R, & S.

On the morning of September 12, 2005, Mr. D'Antonio told Messrs. Hiller and Laimo that he withdrew his personal guaranty on MBM's line of credit with Atlantic Bank because of his uncertain relationship with the company. *See*, May 17, 2007 D'Antonio Aff'd., at 6, ¶ 27. Messrs. Hiller and Laimo convened a special meeting of the Board of Directors later that day, where they informed Mr. D'Antonio that his employment would be terminated as of October 31, 2005. *See*, Plaintiff's Amended Rule 19-A Statement, at 5, ¶ 28.

They advised him that he would no longer be permitted on MBM's premises as of September 16, 2005, but would continue to receive salary and benefits until the scheduled termination date. *Id.*, ¶¶ 29-30. Messrs. D'Antonio, Hiller, and Laimo agreed that if Mr. D'Antonio became employed by a MBM-competitor before the October 31, 2005 termination date, MBM's obligation to pay him salary and benefits would immediately cease. *Id.*, at 6, ¶ 36. They also discussed the possibility that MBM may become incapable of honoring this obligation if Atlantic Bank cancelled or lowered its line of credit, because it would no longer have Mr. D'Antonio's personal guaranty. *Id.*, ¶ 35. Mr. D'Antonio was represented by his brother, Dennis D'Antonio, Esq., of Weg & Meyers, P.C., at this meeting. *See*, Defendants' Rule 19-A Statement, at 9, Response to Statement 27.

In a letter addressed to Mr. D'Antonio dated November 23, 2005, Messrs. Hiller and Laimo advised Mr. D'Antonio that his service to MBM ceased on November 2, 2005, and that the valuation of his MBM stock would be calculated as of that date. *See*, Mallin Aff.,

Ex. I. On December 28, 2005, they notified Mr. D'Antonio that his stock was valued at \$317,300.72. *Id.*, Ex. J. Mr. D'Antonio alleges that he was excluded from any MBM business from that day forward despite that fact that he still retains his shareholder and board-member status.

On or about January 15, 2006, Mr. D'Antonio began to work for Bounty Trading ("Bounty"), a New York corporation engaged in the business of purchasing and reselling men's and women's apparel. *See*, May 17, 2007 D'Antonio Aff'd, at 7, ¶ 35. It is MBM's direct competitor. *Id.*, ¶ 37.

Mr. D'Antonio commenced an action on January 18, 2006 in New York Supreme Court, New York County under Index No. 600155/06 where he alleged that his termination from MBM was in violation of its corporate bylaws. *See*, Defendants' Rule 19-A Statement, at 10, Response to Statement 29. In a decision dated May 18, 2006, the Court (Moskowitz, J.) dismissed the action. *See*, Pergament Aff., Ex. 3. The Appellate Division, First Department affirmed this by Order dated June 19, 2007. *See*, *D'Antonio v. Hiller*, 41 A.D.3d 240 (1<sup>st</sup> Dept. 2007).

On September 6, 2006, Mr. D'Antonio commenced this action for breach of contract, fraud, tortious interference with a contract, re-valuation of his stock, and the imposition of a constructive trust. Defendants moved to dismiss the complaint and Mr. D'Antonio cross-moved for partial summary judgment in the amount of \$63,460.14, the amount of the Initial

Payment, plus interest, for his stock. By Decision and Order dated December 14, 2006, the Court (Moskowitz, J.) dismissed without prejudice Mr. D'Antonio's breach of contract, fraud, and stock re-valuation claims; dismissed with prejudice the tortious interference cause of action; and granted Mr. D'Antonio partial summary judgment. *See*, Mallin Aff., Ex K. On February 27, 2007, judgment was entered in the amount of \$70,115.84, representing the Initial Payment plus interest. Defendants filed a notice of appeal on March 5, 2007 and an Undertaking on Appeal with the posting of a \$87,249.00 bond on March 8, 2007. *See*, Mallin Aff., Ex. L & M.

Mr. D'Antonio re-filed his complaint on January 6, 2007 for breach of contract, an accounting, re-valuation of his stock, and the imposition of a constructive trust. In their answer, Defendants assert counterclaims for (1) a reduction in any recovery Mr. D'Antonio may attain, (2) breaches of fiduciary duty, (3) corporate opportunity diversions, and (4) defamation. In Motion Sequence No. 002, Mr. D'Antonio moves for summary judgment on all the counterclaims; partial summary judgment granting him \$21,153.18 plus interest, which represents the first and second installment payments due to him for the purchase of his stock; and to squash the Subpoena *Duces Tecum* issued to Bounty. Defendants oppose the motion, and cross-move to amend their Answer for the purpose of clarifying the allegations in the first counterclaim and for summary judgment on that claim. They also seek to

disqualify Mr. D'Antonio's counsel and his firm on the grounds that he will be necessary witnesses in this litigation.

In Motion Sequence 003, Mr. D'Antonio moves to amend his complaint to add a claim for fraud, premised on the allegations that Messrs. Hiller and Laimo deprived him from his right to participate in MBM as a shareholder and board member, and for not compensating him for the value of his stock. Defendants oppose the motion.

#### **DISCUSSION**

##### *Summary Judgment on the Second, Third, Fourth, and Fifth Counterclaims: Breach of Fiduciary Duty and Corporate Opportunity Diversion*

To obtain summary judgment, the movant must establish its cause of action sufficiently to warrant the court as a matter of law in directing judgment in its favor and it must set forth evidence that there is no factual issue requiring an adjudication on the facts. *See, Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 315 (2004). "The motion must be supported by an affidavit of a person having knowledge of the facts \* \* \*." *S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338 (1974). To defeat a summary judgement motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212 (b).

A cause of action for breach of fiduciary duty requires: (1) the existence of a duty based on a relationship of trust and confidence, (2) a breach of that duty, and (3) that the

breach was the proximate cause and cause in fact of the loss. *See, Lamdin v. Broadway Surface Advertising Corp.*, 272 N.Y.2d 133 (1936). Under the doctrine of corporate opportunity, “corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit any opportunity that should be an asset of the corporation.” *Alexander & Alexander of New York v. Fritzen*, 147 A.D.2d 241 (1<sup>st</sup> Dept. 1989).

In the second and third counterclaims, Defendants allege that Mr. D’Antonio took MBM’s resources and customer accounts and diverted opportunities to Bounty. In support of his motion for summary judgment, Mr. D’Antonio submits his own affidavit, where he attests that:

“Bounty Trading, like MBM and other businesses of the kind, do not enter into exclusive contracts \* \* \*. Deals are completed on a case-by-case basis. \* \* \* Based on my involvement in the industry for over twenty-five years, [Bounty’s] method for purchasing and reselling apparel is the same method used by our competitors, including MBM. \* \* \* MBM did not provide me with customer lists \* \* \* rather, I was able to create and develop my own business connections.”

May 17, 2007 D’Antonio Aff’d, at 9, ¶¶ 39-40. Moreover, he avers that because this alleged activity occurred after he was terminated from MBM, he no longer owed it a fiduciary duty.

In opposition, the Defendants submit Mr. Hiller’s affidavit who attests that MBM needs

Bounty's deposition<sup>2</sup> "in order to fully examine and develop the facts and circumstances that led to [Mr. D'Antonio] becoming employed by [it]." *See*, June 11, 2007 Hiller Aff'd, at 2, ¶ 5.

It is an adjudicated fact that Mr. D'Antonio was validly terminated from MBM, *see*, *D'Antonio v. Hiller, supra*, and there is nothing improper for an employee to compete with the former employer absent a non-competitive agreement. *See, Gibbs v. Breed, Abbott, & Morgan*, 271 A.D.2d 180 (1<sup>st</sup> Dept. 2000). But Mr. D'Antonio's fiduciary status with respect to MBM post-termination is unclear since, although he was validly fired, he still remains a shareholder and board member. This uncertainty is further compounded by Mr. D'Antonio's allegation that he was completely excluded from any and all information concerning MBM while Defendants contend that they have kept him apprised of its business affairs. "Courts will look at the ongoing relationship between the parties to determine whether a fiduciary duty exists." *Sergeants Benev. Ass'n Annuity Fund v. Renick*, 19 A.D.3d 107 (1<sup>st</sup> Dept. 2005).

At this juncture, it cannot be determined factually whether a fiduciary relationship exists post-termination let alone whether a duty was breached and a loss ensued because of it. Moreover, Defendants allege that Mr. D'Antonio siphoned their assets, possibly pre-

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<sup>2</sup> See discussion, *infra*.

termination while he was certainly still a fiduciary, in order to improperly compete with them. It is these ambiguities that warrant the motion's denial.

“A party opposing summary judgment may obtain further discovery when it appears that facts supporting the position of the party may exist but cannot be stated.” CPLR 3212(f); *see also, Global Minerals and Metal Corp v. Holme*, 35 A.D.3d 93 (1<sup>st</sup> Dept. 2006). Here, Mr. Hiller identifies Bounty as a source to potentially discover the facts to support MBM's allegations against Mr. D'Antonio. Accordingly, summary judgment on the second and third counterclaims is denied with leave to renew after discovery is complete.

In the fourth counterclaim, Defendants allege that Mr. D'Antonio breached his fiduciary duty when he made the decision to withdraw his personal guaranty on the line of credit with Atlantic Bank. In support of his motion to summarily dispose of this counterclaim, Mr. D'Antonio submits his own affidavit. He attests that he withdrew his personal guaranty at a point where he knew his continued employment with MBM was not certain and that Messrs. Hiller and Laimo's only response was with respect to their possible inability to pay him through October 31, 2005. *See*, May 17, 2007 D'Antonio Aff'd, at 7, ¶¶ 27-28. In opposition, Mr. Hiller attests that Mr. D'Antonio withdrew the guaranty as “leverage to negotiate a buyout” because this caused “MBM to nearly close its doors.” June 11, 2007 Hiller Aff'd, at 4, ¶ 11.

This counterclaim alleges behavior that occurred pre-termination when Mr. D'Antonio was clearly still in a fiduciary relationship with MBM and his fellow shareholders. It certainly could not be expected, in a normal situation, for an employee to remain personally liable on a corporate line of credit after expulsion from the firm. But the situation here is more complicated because of Mr. D'Antonio's bifurcated status as a terminated employee who is, to this day, a shareholder and board member. Additional discovery is needed to fully probe the relationship among the parties. Summary judgment on the fourth counterclaim is denied with leave to renew after discovery is complete.

In the fifth counterclaim, Defendants allege that Mr. D'Antonio purchased an unauthorized product, while still employed and clearly a fiduciary, for resale that resulted in MBM being named a defendant in a trademark infringement lawsuit. Mr. D'Antonio denies in his affidavit that he knowingly did this. *See*, May 17, 2007 D'Antonio Aff'd, at 11, ¶ 52. Mr. Hill disputes this in opposition, and seeks to probe this issue in discovery. *See*, June 11, 2007 Hiller Aff'd, at 4, ¶ 14.

Issues of fact with respect to Mr. D'Antonio's intent in making the alleged unauthorized purchases warrant the motion's denial. Discovery on this issue should provide both sides with additional information to assist them in this action's prosecution and defense. Accordingly the motion for summary judgment on the fifth counterclaim is denied with leave to renew after discovery is complete.

*Summary Judgment on the Hiller-Laimo Counterclaim for Defamation*

An action for defamation must be commenced within one year of the statement's transmission. *See*, CPLR 215(3); *see also*, *Stafford v. Bickford*, 159 A.D.2d 456 (1<sup>st</sup> Dept. 1990). Here, Messrs Hiller and Laimo allege that Mr. D'Antonio defamed them in three separate emails sent to MBM's clients dated April 8, 2005; August 15, 2005; and September 19, 2005. *See*, Mallin Aff., Ex. Q, R, & S. However, they filed this counterclaim on February 27, 2007, well-over one year from the emails' publication. Accordingly, this claim is time-barred, as Defendants acknowledge, and the motion is hereby granted. *See*, Defendants' Memo in Opp. at 10.

*Partial Summary Judgment on the First and Second "Installment" Payments*

Mr. D'Antonio argues that he is entitled to summary judgment to receive the first and second "installment" payments for his stock since the Court (Moskowitz, J.) granted his previous motion on the Initial Payment of \$63,460.14 plus interest. This request is wholly defective.

First, it is true that it is the law of the case that Messrs. Hiller and Laimo must adhere to the Shareholders Agreement and pay Mr. D'Antonio an Initial Payment and then execute a Payout Note for his stock. But this may not remain as such. As of this moment, Defendants' appeal of that decision is pending before the Appellate Division, First

Department, who may issue an Order that will alter the law of the case. This request is therefore premature.

Second, while the first cause of action in Mr. D'Antonio's Amended Complaint pleads that Defendants are in breach of the Shareholder Agreement, he only alleges \$63,460.14 in damages for the Initial Payment. Here, Mr. D'Antonio seeks judgment on a claim - the Payout Note - for which he did not assert in his complaint. Moreover, if he prevails on appeal, he will recover the damages actually plead here from the Undertaking posted by Defendants. At that juncture, he could follow the proper procedures to collect the entirety of the monies owed for his stock. The motion is denied.<sup>3</sup>

*Motion to Squash the Subpoena Duces Tecum*

Mr. D'Antonio moves to squash the Subpoena *Duces Tecum* issued to Bounty on the grounds that it requests documents and information that constitute trade secrets and confidential business information. *See*, Mallin Aff., at 2, ¶ 3. New York recognizes that a trade secret exists where there is a "formula, pattern, device, or compilation of information \* \* \* used in one's business \* \* \* which gives [one] an opportunity to obtain an advantage

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<sup>3</sup> The Court (Moskowitz, J.) granted Mr. D'Antonio permission to submit a sur-reply, where he cross-moved for summary judgment on the third installment payment. That cross-motion is also denied.

over competitors who do not know or use it.” *Mann ex rel Akst v. Cooper Tire Co.*, 33 A.D.3d 24 (1<sup>st</sup> Dept. 2006), *citing Ashland Mgt. Inc. v. Janien*, 82 N.Y.2d 395 (1993).

Here, Defendants seek, from November 1, 2005 to the present, (1) any agreements between Bounty and Mr. D'Antonio; (2) documents from meetings where MBM and Messrs. Hiller and Laimo were discussed; (3) information reflecting sales closed by Bounty that Mr. D'Antonio participated in; (4) the names of manufacturers, vendors, and distributors used by Bounty in transactions where Mr. D'Antonio acted as seller or buyer; and (5) the profits Bounty generated from deals in which Mr. D'Antonio was involved.

Facially, these documents do not appear to represent trade secrets whose disclosure will give MBM a competitive advantage. Indeed, Bounty-President Steven Wax attests that his company's "method for purchasing and reselling apparel is the same method utilized by our competitors, including MBM." *Mallin Aff.*, *Wax Aff'd*, at 3, ¶ 12. Moreover, he only offers conclusory allegations that these documents contain trade secrets, which is insufficient to squash a subpoena. *See, Business Networks of New York, Inc. v. Complete Network Solutions, Inc.*, 265 A.D.2d 194 (1<sup>st</sup> Dept. 1999).

On May 17, 2007, MBM offered Mr. D'Antonio and Bounty an attorney's eyes only confidentiality stipulation with respect to the Subpoena *Duces Tecum*, to which neither responded. *See, Pergament Aff.*, Ex. 1. This is a sound offer since, in the unlikely event a trade secret is revealed, it would not arrive in MBM's actual possession. Accordingly, the

motion to squash the subpoena is denied, and the parties are directed to prepare a confidentiality agreement and submit it to the Court to be so-ordered.

*Cross-Motion to Amend and Summary Judgment on the First Counterclaim*

In its original first counterclaim, MBM alleged that Mr. D'Antonio had an outstanding balance of \$14,228.33 for his portion of the promissory note executed on September 26, 1994 in favor of its former owners and that any recovery Mr. D'Antonio is rewarded should be reduced by this amount. MBM now seeks to amend this counterclaim, alleging that the potential recovery should be reduced by \$37,942.32, the outstanding amount he owes MBM pursuant to the loan agreement that he executed with it. *See*, July 23, 2007 Hiller Aff'd, at 2, ¶ 5.

It is well-settled that leave to amend a pleading pursuant to CPLR 3025(b) is left to the sound discretion of the trial court. *See, Edenwald Contracting Co., Inc., v. City of New York*, 60 N.Y.2d 957, 959 (1983). While leave to amend is freely given, [the Appellate Division, First Department] has consistently held that, in order to conserve judicial resources, an examination of the underlying merits of the cause of action is warranted." *Megarix Furs, Inc. v. Gimbel Bros. Inc.*, 172 A.D.2d 209 (1<sup>st</sup> Dept. 1991). When amendment is sought on the eve of trial and there is an extensive delay in moving for it, this underlying-merits examination requires an affidavit proffering the reasoning for the late-stage pleading. *See, Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20 (1<sup>st</sup> Dept. 2003) (denying leave to amend

when it was sought two and half years after the action was commenced and shortly before the trial was to start).

Here, Defendants filed their Answer on February 27, 2007 and their cross-motion to amend on June 11, 2007. This is a less-than-four-month time frame between initial pleading and the motion's filing. Moreover, discovery is yet to be completed and the Note of Issue is not due until September 28, 2008. This was not an excessive delay nor was it done on the eve of trial. MBM is therefore not required to submit an accompanying affidavit.

In support for the amendment, MBM proffers copies of eleven promissory notes executed by Mr. D'Antonio to MBM in the principal sum of \$9,485.58 with interest. *See*, Pergament Aff., Ex. 7. In addition, it submits two extensions for the promissory notes, executed by Mr. D'Antonio on April 1, 2001 and March 28, 2002. *Id.*, Ex. 8.

Leave to amend should not be denied as long as there is no prejudice to the opposing party. *See, Cherebin v Empress Ambulance Service, Inc.*, 43 A.D.3d 364 (1<sup>st</sup> Dept. 2007). Prejudice requires "some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of [her/his] position" *Id.* Ultimately, this counterclaim's amendment affects the monetary amount, if any, that Mr. D'Antonio will receive. Moreover, he does not deny that MBM lent him \$104,341.36 in total

and that said loan is evidenced by the promissory notes. *See*, June 25, 2007 D'Antonio Aff'd, at 3, ¶¶ 12-14. Accordingly, the cross-motion to amend is granted.<sup>4</sup>

MBM also moves for summary judgment on this counterclaim. An affidavit from someone with first-hand knowledge accompanied by documentary evidence is sufficient to support a motion for summary judgment. *See, Marine Midland Bank, NA v Embassy East, Inc.*, 160 A.D.2d 420 (1<sup>st</sup> Dept. 1990). Here, Mr. Hiller attests that these notes were executed in favor of MBM, *See*, June 11, 2007 Hiller Aff'd at 2, ¶ 4 ; and that Mr. D'Antonio paid back \$66,399.06 with \$37,942.32 outstanding, *See*, July 20, 2007 Hiller Aff'd at 2, ¶¶ 5-6. Additionally, copies of the notes and extension agreements are submitted along with MBM's balance sheet reflecting the loan's history. *See*, Pergament Aff., Ex. 7, 8, & 11.

In opposition, Mr. D'Antonio does not dispute that he executed the promissory notes in MBM's favor. *See*, June 25, 2007 D'Antonio Aff'd, at 3, ¶¶ 10-11. He further attests that:

Since my departure \* \* \* I have not received any proceeds from the MBM profits \* \* \* It is my understanding that the profits due to me for the quarterly periods following my departure in November 2005 were being utilized for the payments of my loans from MBM \* \* \*.”

*Id.*, ¶¶ 12-17.

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<sup>4</sup> Mr. D'Antonio's motion for summary judgment on the original first counterclaim is therefore denied as moot.

Implicit in this attestation is Mr. D'Antonio's acquiescence that he remains liable to MBM on the promissory notes. His belief that profits due to him were diverted back to MBM to satisfy the loan support this. Accordingly, there is no issue of fact that Mr. D'Antonio owes MBM \$37,942.32 and the cross-motion to reduce any potential recovery by that amount is granted.

*Cross-Motion to Disqualify Mr. D'Antonio's Counsel*

Defendants argue that Dennis D'Antonio, Esq. and Weg & Meyers, P.C. should be disqualified from representing Mr. D'Antonio because his testimony is necessary to the determination of the second and third counterclaims.<sup>5</sup> Pursuant to the New York Code of Professional Responsibility, an attorney cannot offer representation in an action where she/he will be called as a witness. *See*, 22 NYCRR 1200.21. Disqualification is a drastic remedy, and the Court must take all relevant factors into consideration before removing a party's choice of counsel. *See, S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437 (1987).

Here, Defendants basis for the disqualification is that Dennis D'Antonio, Esq. represented Mr. D'Antonio at the September 12, 2005 board meeting and may be called to

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<sup>5</sup> The contention that their testimony is necessary to the fourth counterclaim is moot.

testify at deposition and trial regarding the discussions about Mr. D'Antonio's ability to work for a MBM competitor prior to October 31, 2005. *See*, Pergament Aff., at 12, ¶¶ 48, 50. In this Court's view, disqualification is not warranted. First, counsel for both sides agreed that their representation at the board meeting would not preclude the same if litigation over Mr. D'Antonio's ouster ensued. *See*, Mallin Aff., Ex. F, Transcript from September 12, 2005 Meeting, at 10, ¶¶ 21-25; at 11, ¶¶ 1-5. In fact, it was Defendants' counsel who first raised this issue at the meeting.

Second, Mr. D'Antonio did not join Bounty until January 2006, which is well-passed the October 31, 2005 deadline discussed at the board meeting. Moreover, the second and third counterclaims contain allegations that Mr. D'Antonio took MBM assets and diverted opportunities from it to him and Bounty. Defendants do not allege that counsel are necessary witnesses in the testimony that involves these two causes of action. Accordingly, the cross-motion is denied.

#### *Motion to Amend the Complaint*

While a motion to amend a complaint is freely given, a Court must examine the amendment's underlying merits. *See*, *Megarix Furs Inc.*, *supra*. Here, Mr. D'Antonio alleges in his proposed claim for fraud that

“Defendants’ action constitute fraud whereby they knowingly deprived [Mr.] D’Antonio of his right to sell his stock to a third party; \* \* \* to participate in the corporation as a 22% shareholder \* \* \* [and] board member; \* \* \* to know

the financial status of the corporation [and to] examine the financial books and records; \* \* \* to receive dividend payments; \* \* \* and not compensating him for the value of the stock.

Mallin Aff. in Support of Amending the Complaint, Ex. A, Proposed Amended Complaint, at 15-16, ¶ 99.

\* \* \*

“By taking the actions that they did, Defendants compelled plaintiff to rely, to his detriment, on the representations that they were purchasing his MBM stock in accordance with the terms and conditions of the Shareholder Agreement \* \* \*.”

*Id.*, ¶ 100.

In order to plead a claim for fraud, the plaintiff must allege that there was “a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury.” *Sokolow, Dunaud, Mercadier & Carreras L.L.P. v. Lacher*, 299 A.D.2d 64, 70 (1<sup>st</sup> Dept 2002). It is well-settled under New York law that a fraud claim cannot proceed when it “is based on the same facts as underlie the contract claim and is not collateral to the contract \* \* \*.” *J.E. Morgan Knitting Mills, Inc. v. Reeves Bros., Inc.*, 243 A.D.2d 422, 423 (1st Dept. 1997).

Here, the allegation that Defendants committed a fraud when they failed to purchase Mr. D'Antonio's stock is identical to his breach of contract claim, and therefore it cannot be

added to the complaint. While the allegations that Defendants precluded Mr. D'Antonio from participating in MBM's management post-termination are extraneous to the breach of contract claim, it does not state a claim for fraud. Indeed, Mr. D'Antonio does not plead that Messrs. Hiller and Laimo misrepresented that he could continue to manage the company, have access to its financial documents, and get paid dividends post-termination when in fact they had no intention to do this, and that he suffered an injury as a result of this. Accordingly, the proposed fraud claim lacks merit, and the motion to amend the complaint must be denied.

Accordingly, it is hereby

ORDERED that the motion for summary judgment on the first counterclaim is DENIED as moot; and it is further

ORDERED that the motion for summary judgment on the second, third, fourth and fifth counterclaims is DENIED, with leave to renew after the completion of discovery; and it is further

ORDERED that the motion for summary judgment on the defamation counterclaim is GRANTED, and it is dismissed as time-barred; and it is further

ORDERED that the motion for partial summary judgment on the First-Third installment payments is DENIED; and it is further

ORDERED that the motion to squash the Subpoena *Duces Tecum* is DENIED, and the parties are directed to prepare a confidentiality agreement and submit it to the Court to be so-ordered; and it is further

ORDERED that the cross-motion to amend their answer is GRANTED; and it is further

ORDERED that the cross-motion for summary judgment on the amended first counterclaim is GRANTED; and it is further

ORDERED that the cross-motion to disqualify Mr. D'Antonio's counsel is DENIED; and it is further

ORDERED that Mr. D'Antonio's motion to amend his complaint is DENIED.

This constitutes the Decision and Order of the Court.

Dated: April 25, 2008

Enter:

**FILED**  
APR 29 2008  
COUNTY CLERK'S OFFICE  
NEW YORK



Hon. Eileen Bransten