SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

PHILIP TARASCIO and LIGHTHOUSE TELECOMMUNICATIONS, INC.,

Plaintiffs,

INDEX No. 009411/08

MOTION DATE: Nov. 18, 2008
Motion Sequence # 001

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-against-

FRANK DECAPITE, ACTIVE CABLING CO., INC. and ACTIVE CABLE & COMMUNICATIONS INC.,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Opposition..... XX
Reply Affirmation X
Memorandum of Law..... X

This motion, by plaintiffs Philip Tarascio and Lighthouse Telecommunications, Inc., for an Order, pursuant to CPLR 3211 (a)(7), striking and dismissing defendants' first, second, third, fifth and sixth counterclaims for failure to state a cause of action; together with such other, further and different relief as to the Court may seem just and proper; and a cross-motion, by defendants Frank DeCapite, Active Cabling Co., Inc. and

Active Cable & Communications Inc., for an Order, pursuant to CPLR 3211 (a)(7) and Business Corporation Law § 1312 (a), dismissing plaintiffs' complaint; (2) striking plaintiffs' request for punitive damages and attorneys' fees; (3) denying plaintiffs' motion to dismiss defendants' first, second, third, fifth and sixth counterclaims; and (4) granting defendants such other and further relief as the Court deems just and proper, are **both** determined as hereinafter set forth.

FACTS

The plaintiffs' action seeks to recover damages in the amount of $380,000.00 with interest thereon accrued and accruing, plus punitive damages in the amount of $1,000,000.00 plus attorneys' fees for (a) fraud; (b) unfair business practices and unfair competition; and (c) tortious interference with contractual relations by reason of defendants' alleged fraudulent scheme devised to induce plaintiffs to advance substantial sums of money, and to devote substantial time and effort to create a new business entity, Unico.

The individual plaintiff is a principal of the plaintiff corporation.

Frank DeCapite owned and operated Active Cabling Co., Inc. and Active Cable & Communications, Inc.

PLAINTIFFS' CONTENTIONS

This action arose out of a purported series of discussions and negotiations between the parties designed to merge their respective businesses. Plaintiffs assert that they were fraudulently induced by the defendants to turn over to the defendants various technologies and methodologies developed by them over time, made monetary expenditures, and turned over customer lists; and that defendant DeCapite spoke to Tarascio about merging their businesses and creating Unico. The plaintiffs further assert that DeCapite made representations to plaintiffs designed to encourage the plaintiffs to invest in Unico; and that they were led to believe, by the defendants, that in financing the new business, and turning over methodologies, technologies and customer lists to defendants, they were advancing the interests of Unico, in which plaintiff Tarascio was to have a fifty percent interest. The plaintiff argues that one employee of plaintiff Lighthouse, familiar with

Lighthouse's operation, customers and accounts, was convinced by defendants to join the defendants. The plaintiffs seek dismissal of defendants' first, second, third, fifth and sixth counterclaims on the following grounds:

Plaintiffs argue that defendants cannot assert a counterclaim of unfair business practice pursuant to General Business Law § 349 because it is a consumer-oriented claim which is not legally viable where a contract claim is pled; plaintiffs contend that defendants cannot assert a counterclaim of tortious interference with contractual relations, breach of fiduciary duty, conversion, fraud and misrepresentation if they are paired with a claim of breach of contract; and that defendants' cross-motion is baseless, and that the defendants' motion should be denied because the plaintiffs met the appropriate standard to allege sufficient facts to assert the claims of fraud, tortious interference, and unfair business practice.

DEFENDANTS' CONTENTIONS

Defendants assert that plaintiffs abandoned their obligations and duties to Unico, defendants and their affiliated companies, and that plaintiffs failed to abide by the terms of the agreement to form Unico.

The defendants argue that plaintiffs improperly converted and transferred the telephone number utilized by Unico, removed and converted to their own use tools, equipment and other property to which they were not entitled, failed to provide the required funds to Unico as per the terms of the agreement between the parties. Moreover, defendants argue that plaintiffs contacted various entities that plaintiffs knew to be ongoing business relationships of defendants for the sole purpose of pilfering said entities for their own use to the detriment of defendants, maliciously encouraged a creditor of Lighthouse to file a lawsuit against Unico. Plaintiffs allegedly made false representations regarding making contribution of money, loyalty, time, effort, manpower, technology and/or clients. The defendants assert six counterclaims in their answer: (1) unfair business practices and unfair competition; (2) tortious interference with contractual relations; (3) breach of fiduciary duty and the duty of loyalty; (4) breach of contract; (5) fraud and misrepresentation; and (6) conversion.

The defendants argue that the claims against DeCapite should be dismissed because plaintiffs do not allege facts sufficient to pierce the corporate veil; and

that plaintiff Lighthouse Telecommunications, Inc. is no longer a New York corporation, nor is it a corporation authorized to do business in New York State. Therefore, Lighthouse lacks capacity to sue in New York.

The defendants contend that plaintiffs fail to allege facts necessary to support plaintiffs' claims for misrepresentation, fraud, unfair business practices or unfair competition, and tortious interference with contractual relations. The defendants also argue that the plaintiffs cannot recover punitive damages because the action only affects private interests; and that no contract or statute entitles plaintiffs to attorneys' fees.

DECISION

In considering a motion to dismiss a complaint for failure to state a cause of action (see, CPLR 3211 (a) (7)), the pleadings must be liberally construed (see CPLR 3026). (See, **Sotomayor v. Kaufman, Malchman, Kirby & Squire, L.L.P.**, N.Y.S.2d 894; 252 A.D.2d 554, 1998). The sole criteria is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (**Guggenheimer v. Ginsburg**, 43 N.Y.2d 268, 275; see also, **Bovino v. Village of Wappingers Falls**, 215 A.D.2d 619). The facts pleaded are presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to such consideration. (See **Morone v. Morone**, 50 N.Y.2d 481, and **Gertler v. Goodgold**, 107 A.D.2d 481, affd 66 N.Y.2d 946).

With respect to the issue of defendants' counterclaim of unfair business practice, defendants correctly point out that it is not based on GBL § 349. The defendants seek to recover under the common law tort of unfair competition, and the common law tort of unfair business practices.

Defendants' cause of action for unfair business practices and unfair competition is sustained. Defendants correctly point out that "New York courts have long ago recognized the common law tort for unfair business practices." (**Louis Capital Markets, L.P. v. REFCO Group Ltd., LLC**, 9 Misc.3d 283, 288, 801 N.Y.S.2d 490, 494, 2005). Since the law of "unfair competition" stresses the element of unfairness rather than the element of competition, the term is generally applied to any form of unlawful business injury. (See **Electrolux Corp. v. Val-Worth, Inc.**, 6 N.Y.2d 556, 568, 190 N.Y.S.2d 977,

161 N.E.2d 197, 1959). " [T] he labeling of an action as "unfair business practices" rather than "unfair competition" does not change the substance of the claim. (**Louis Capital Markets, L.P.**, 9 Misc.3d at 288). " [A] cause of action for unfair competition can exist when a business misappropriates the skill, expenditures and labors of a competitor." Id. (citing **Int'l News Serv. v. AP**, 248 U.S. 215, 239, 39 S.Ct. 68, 63 L.Ed. 211, 1918). New York courts accept "...the misappropriation of another's commercial advantage as a cornerstone of the tort of unfair competition." Id.

Herein, the defendants claim that plaintiffs improperly converted and transferred telephone number utilized by Unico and/or defendants for plaintiffs' own use, and that plaintiffs contacted various entities for the purpose of pilfering said entities for their own use and to the detriment of defendants, with the knowledge that defendants had ongoing business relationship with those entities. The defendants also claim that the plaintiffs encouraged a creditor of Lighthouse to file a lawsuit against Unico; and that plaintiffs knowingly made false and misleading representations regarding making contributions of money, loyalty, time, effort, etc. for fraudulent purposes. Such assertions are sufficient to support the claim for unfair business practices and unfair competition.

With respect to the defendants' counter-claims for tortious interference with contractual relations, fraud and misrepresentation, and conversion as pled with a breach of contract claim, pursuant to CPLR 3014, causes of action or defenses may be stated alternatively. Prevailing case law in New York holds that the claims for tortious interference with contractual relations, breach of fiduciary duty, conversion, and fraud can be asserted in a pleading with a breach of contract claim.

In the present case, the defendants have set forth that the causes of action for tortious interference, fraud and misrepresentation, and conversion are distinct from the breach of contract claim.

With respect to the defendants' counterclaim for breach of fiduciary duty, a breach of fiduciary duty is a tort and the Court of Appeals, with respect to a tort arising from a breach of contract, has stated: "Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract" (**Rich v. New**

York Cent. & Hudson Riv. R. R. Co., 87 NY 382, 390, 1882). Defendants do not allege here that their relationship with plaintiffs was so unique that defendants trusted them. However, in **Yu Han Young v. Chiu**, (49 A.D.3d 535, 853 N.Y.S.2d, 2nd Dept., 2008), the court held that officers and directors of corporations have a fiduciary duty to their corporation while performing their duties. The defendants allege that plaintiffs at all times knew that they would not contribute money, loyalty, effort, manpower, etc. to their joint enterprise, and the plaintiffs purportedly refused to provide information in their possession which was necessary to Unico. Thus, defendants have made sufficiently supported their claim for breach of fiduciary duty and loyalty.

With respect to the issue of plaintiffs seeking to hold defendant DeCapite personally liable for his operation of the Active defendants, the plaintiffs do not allege sufficient facts in the complaint in order to pierce the corporate veil.

" [P] iercing the corporate veil requires showing that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit fraud or wrong against the plaintiff which resulted in plaintiff's injury." (**Morris v. New York State Dep't of Tax and Fin.**, 82 NY2d 135, 603 N.Y.S.2d 807, 810-11, 1993). "The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party." Id. Thus, the plaintiffs here had to allege that DeCapite exercised complete control and domination of the corporation and used his domination to commit a fraud or wrong against the plaintiff. (See, **Spectra Secs. Software, Inc. v. Munibex.com, Inc.**, 307A.D.2d 835, 836, 763 N.Y.S.2d 313, 313, 1st Dept., 2003). "Allegations that principal made fraudulent statement to induce plaintiff to enter into agreement are insufficient to pierce corporate veil and can be "understood as expressions of opinion, which are nonactionable."(**Spectra Secs. Software, Inc.**, Id, at 835).

The plaintiffs do not allege that DeCapite dominated the Active defendants to defraud plaintiffs. Therefore, all claims against defendant DeCapite are **dismissed**.

With respect to the issue of plaintiff Lighthouse Telecommunications, Inc.'s capacity to sue in New York, the plaintiffs demonstrated the ability of Lighthouse to file a lawsuit in New York by submitting a Certificate from the Division of Corporations of the Department of State and 2008 Certification from the Department of State.

With respect to the issue of plaintiffs' cause of action for tortious interference with contractual relations, and accepting the facts as alleged in the complaint as true, and according the plaintiff the benefit of every possible favorable inference, the plaintiffs have not adequately pleaded a cause of action to recover damages for tortious interference with contractual relations. Therefore, plaintiffs' claim for tortious interference with contractual relations is **dismissed**.

In order to establish a cause of action sounding in tortious interference with contractual relations, plaintiff must allege: "(1) the existence of a contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages to the plaintiff." (**Bayside Carting, Inc. v. Chic Cleaners**, 240 A.D.2d 687, 688, 660 N.Y.S.2d 23, 24, 2nd Dept., 1997; **Burrowes v. Combs**, 25 A.D.3d 370, 373, 808 N.Y.S.2d 50, 53, 1st Dept., 2006). Moreover, "the plaintiff must allege that the contract would not have been breached "but for" the defendant's conduct." (**Washington Ave. Assoc., Inc. v. Euclid Equipment, Inc.**, 229 A.D.2d 486, 487, 645 N.Y.S.2d 511, 512, 2nd Dept., 1996). "Although on a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7) "the [narrow] question presented for review is not whether [plaintiff] should ultimately prevail in this litigation, but whether the complaint states cognizable causes of action." Id.

Herein, the plaintiffs allege that the defendants were aware of the customers and accounts serviced by the plaintiffs, and were aware of the existence of contracts and other such relations between the plaintiffs and such customers and accounts. However, the plaintiffs have failed to allege that defendants intentionally induced those customers (third parties) to breach their contractual relationships with the plaintiffs or render the customers' performance impossible.

With respect to the issue of plaintiffs' claim of unfair business practices and unfair competition, a common law tort of unfair business practices is "an injury to a person's business by procuring others not to deal with him, or by getting away his customers, if unlawful means are employed, such as fraud or intimidation, or if done without justifiable cause." (**Louis Capital Markets, L.P. v. REFCO Group Ltd., LLC**, 9 Misc.3d 283, 288, 801 N.Y.S.2d 490, 494, N.Y. Sup. 2005; citing **Duane Jones co. v. Burke**, 306 N.Y. 172, 190, 1953). "[T] he labeling of an action as unfair business practices rather than unfair competition does not change the substance of the claim". (**Louis CapitalMarkets,**

L.P., 9 Misc.3d at 494). In **Int'l News Serv. v. AP**, 248 U.S. 215, 239, 39 S.Ct. 68, 63 L.Ed. 211, (1918), the Supreme Court held that a cause of action for unfair competition can exist when a business misappropriates the skill, expenditures and labors of a competitor. ...New York courts have accepted the misappropriation of another's commercial advantage as a cornerstone of the tort of unfair competition." (**Louis CapitalMarkets, L.P.**, **Id** at 494, citing **Ruder & Finn Inc. v. Seaboard Sur. Co.**, 52 N.Y.2d 663, 671, 439 N.Y.S.2d 858, rehearing denied, 54 N.Y.2d 753, 443 N.Y.S.2d 1031, 1981).

Plaintiffs verified the assertions are sufficient to support the plaintiffs' cause of action for unfair business practices and unfair competition.

With respect to the issue of plaintiffs' claim of fraud, a plaintiff must allege the facts sufficient to satisfy the elements of the fraud: "representation of material existing fact, falsity, scienter, deception and injury." (**Selinger Enterprises, Inc. v. Cassuto**, 50 A.D.3d 766, 768, 860 N.Y.S.2d 533, 536, 2nd Dept., 2008, citing **New York Univ. v. Continental Ins. Co.**, 87 N.Y.2d 308, 318, 1995). A fraud claim does not lie where the only fraud alleged arises from the breach of contract. (See **Tiffany at Westbury Condominium v. Marelli Dev. Corp.**, 40 A.D.3d 1073, 1076-77 840 N.Y.S.2d 74, 2nd Dept., 2007). "A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud... Conversely, a misrepresentation of material fact, [that] is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud." (**WIT Holding Corp v. Klein**, 282 A.D.2d 527, 528 724 N.Y.S.2d 66, 2nd Dept., 2001).

A cause of action for fraud is defective if it fails to specify the misrepresentation on which he relied to his detriment. (See **Simons v. Lycee Francais de New York**, 47 A.D.3d 416, 416, 850 N.Y.S.2d 23, 24, 1st Dept., 2008, See also, CPLR Rule 3016 (b)). A plaintiff must plead facts giving rise to an inference that the defendant, at the time the promissory representations were made, never intended to honor or act upon his statements. (See, **125 Assocs. v. Cralin Trading Assocs.**, 196 A.D.2d 630, 631, 601 N.Y.S.2d 196, 197, 2nd Dept., 1993). In the case at bar, the plaintiffs' showing is sufficient to state a cause of action.

With respect to the issue of plaintiffs' request for punitive damages, " [D] amages arising from the breach of a contract will ordinarily be limited to the contract damages

necessary to redress the private wrong, but that punitive damages may be recoverable if necessary to vindicate a public right." (**New York University v. Continental Insurance Co.**, 87 N.Y.2d 308, 315, 639 N.Y.S.2d 283, 287, 1995, citing **Rocanova v. Equitable Life Assur. Socy.**, 83 N.Y.2d 603, 612 N.Y.S.2d 339). "Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as "gross" and "morally reprehensible, "and of " 'such wanton dishonesty as to imply a criminal indifference to civil obligations. The pleading elements required to state a claim for punitive damages are: "(1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in **Walker v. Sheldon**, 10 N.Y.2d 401, 404-405, 223 N.Y.s.2d 488, 179 N.E.2d 497; (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally." (**New York University**, 87 N.Y.2d at 316).

In the case at bar, the plaintiffs' claims do not rise to the level that renders punitive damages available.

With respect to the plaintiffs' request for attorney's fees, such is **denied**.

The general rule is that "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." (**Hooper Assocs., Ltd. V. AGS Computers, Inc.**, 74 N.Y.2d 487, 487, 549 N.Y.S.2d 365, 366, 1989). In the present case, the plaintiffs do not allege that there was an agreement according an award of attorneys' fees.

Accordingly, the plaintiff's motion is **denied**; and the defendants' cross-motion is **granted** in part and **denied** in part as set forth herein.

Dated FEB 10 2009 ENTERED Stephen A Bucaria J.S.C.

FEB 13 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE