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

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 116156/2008

CHROME CORPORATE MANAGEMENT

vs

PFEIL, PHILIP F.

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE 2/27/09

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ ... this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
JUN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of defendants' motion to dismiss Tzell's claim for breach of the Corporate Management Agreement, violation of the Business Corporation Law, intentional interference with business relations, violation of General Business Law § 349, an accounting and punitive damages claim, is granted, and such claims are dismissed as to Tzell; and it is further

ORDERED that the branch of defendants' motion to dismiss Tzell's claims under the Travel Marketing Agreement, Tzell's unfair business practices/competition claim, and to vacate the preliminary injunction, is denied; and it is further

ORDERED that defendants serve their Answer within 20 days of service of this order with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference on August 18, 2009, 2:15 p.m., Part 35; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 6/4/09

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

CHROME CORPORATE MANAGEMENT GROUP, LLC and TZELL TRAVEL, INC.,

Plaintiffs,

-against-

JOHN F. PFEIL, DOLPH I. CHIARINO, and MATTHEW DAVLOS,

Defendants.

----------x

Index No. 116156-2008
Motion Sequence 004

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for, *inter alia*, unfair competition, intentional interference with existing and prospective business relations, and breach of agreement and fiduciary duty, defendants Dolph I. Chiarino ("Dolph I."), John F. Pfeil ("Pfeil") and Matthew Davlos ("Davlos") move to dismiss the Complaint as against plaintiff Tzell Travel, Inc. ("Tzell") for failure to state a cause of action and to vacate the temporary and preliminary injunction previously issued by the Court as to Tzell.

Factual Background[1]

Plaintiff Chrome Corporate Management Group, LLC ("Chrome"), is a corporate travel agency that has a business relationship with Tzell which sells, *inter alia*, airline tickets and hotel accommodations in the travel industry. Pursuant to Chrome's Travel Marketing Agreement with Tzell (the "TMA"), Chrome utilizes Tzell exclusively to provide travel arrangement services for its corporate clients. At the time of Chrome's formation, Dolph E. Chiarino ("Dolph E."), and

[1] The factual background is taken largely from the Complaint.

defendants Dolph I. and Pfeil were equal owners of Chrome, and operated Chrome pursuant to a Corporate Management Group Operating Agreement (the "Corporate Management Agreement" or "CMA") dated May 14, 2008. Defendant Davlos later joined Chrome as an employee. According to plaintiffs, Tzell is one of the nation's largest companies in the travel business, with a 50,000 square feet office located in midtown Manhattan, and over 300 employees.

In November 2008, defendants Dolph I. and Pfeil relinquished ownership in Chrome.

The day after defendants Dolph I. and Pfeil relinquished their interests, Davlos sent an email to Evelyn Soto ("Soto"), an employee of one of Chrome's million dollar clients, Rothschild Inc. ("Rothschild") (the "Davlos Email"). The Davlos Email advised Soto that "we were forced to relocate to Pro Travel" International, and that certain employees of Chrome had relocated to Pro Travel. The Davlos Email also provided the contact information for the employees who relocated. Such employees had been provided access to Chrome's and Tzell's proprietary and confidential information while employed at Chrome. Pro Travel International is one of Tzell's closest competitors.

Consequently, Tzell commenced this action, making the following claims and seeking the following relief: Dolph I. and Pfeil breached the CMA; Dolph I. and Pfeil breached the TMA; Dolph I. and Pfeil breached the restrictive covenant not to unfairly compete arising under the TMA; Davlos breached a duty of confidentiality; all defendants engaged in unfair business practices and breached the New York Business Corporations Law ("BCL"); intentional interference with a business relationship against all defendants; deceptive trade practices against all defendants; an accounting from all defendants; injunctive relief against all defendants; and punitive damages against all defendants.

On December 19, 2008, the Court, without objection from the defendants, entered a temporary and preliminary injunction in favor of both plaintiffs and against the defendants (the "injunction").[2]

The defendants now move to dismiss Tzell's claims for failure to state a cause of action, and to have the injunction vacated as to plaintiff Tzell only.

Motion

Defendants argue that Tzell fails to state a cause of action for breach of the CMA and TMA, and breach of the covenant not to unfairly compete arising under the TMA because Tzell had no contract with the defendants.

As to the CMA, Tzell does not and cannot allege it was a party, and thus, has no standing to sue for breach thereof.

As to the TMA, Tzell alleges that, Dolph I. and Pfeil breached covenants in the TMA, to which Tzell is a party. But the only other party thereto is Chrome, and under caselaw, none of the individual defendants is personally liable for the contractual obligations of Chrome. Further, the TMA indicates that Chrome and Tzell are independent contractors "for all purposes." Each has its own employees, its own expenses, and its own ownership. As a reflection of the separate corporate existence of Tzell and Chrome, the TMA contains reciprocal non-disclosure and non-compete agreements, in which each party agrees not to forward to any of the other's

[2] The injunction enjoins defendants from the following: (1) violation of fiduciary and contractual duties to plaintiffs, (2) soliciting, diverting and stealing corporate opportunities belonging to plaintiffs, (3) interfering with plaintiffs' existing contract and prospective business relationships, (4) improperly using confidential and proprietary information belonging to plaintiffs to compete against plaintiffs in breach of an express agreement, (5) engaging in unfair business practices by releasing false and disparaging comments about Chrome and Tzell, (6) contacting clients belonging to Chrome and Tzell by use of non-public information, (7) contacting clients of Chrome and Tzell for the purpose of making disparaging representations or for the purpose of disclosing proprietary information belonging to Chrome and Tzell.

competitors any information as to, *inter alia*, the customers, marketing lists or prices of the other. Each also agrees not to solicit the clients of the other. The Complaint does not allege the existence any contractual or fiduciary relationship between Tzell and the individual defendants named in this action, all of whom are alleged to be employees of Chrome. Similarly, Rothschild is described in the Complaint as "Chrome's biggest client." The Complaint, however, does not allege the existence of any client relationship between Tzell and Rothschild. Defendants are not personally liable under this contract between Chrome and Tzell. Thus, Tzell's claim against the individual defendants for breach of the TMA, or any covenant therein, fails to state a cause of action against those individuals.

Tzell has also failed to allege facts showing that defendants engaged in unfair business practices. Plaintiff failed to allege that a competitor misappropriated a commercial advantage belonging to another by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets. Tzell alleges that defendants misappropriated proprietary information belonging to Tzell, including the email address of a Rothschild employee and Tzell's unpublished airfare rates for its customers. Tzell cannot claim any proprietary right to the email address of a Rothschild employee since Tzell has not alleged a contractual or other direct business relationship between itself and Rothschild, a client of Chrome. Moreover, the Complaint fails to allege that the defendants stole an email address in physical form, or that any of them studiously memorized the alleged proprietary information. The email address of "Chrome's biggest client, Rothschild" is precisely the type of information a former employee of Chrome would casually remember without having to studiously memorize anything. With regard to Tzell's airfare rates, Tzell has not alleged any facts tending to show that they constitute

proprietary information. However, even assuming Tzell's airfare rates could be considered proprietary, the Complaint fails to allege that any of the defendants took Tzell's rates in physical form or studiously memorized this information. Furthermore, the Complaint does not allege that the defendants actually used Tzell's airfare rates or transmitted them to anyone. The Davlos Email is silent about Tzell's prices or rate structure.

Nor does Tzell state a claim under the BCL. Without identifying any section of the BCL, plaintiff alleges that Dolph I. and Pfeil violated the BCL by engaging in acts intended to obtain an unfair competitive advantage. The liability of a corporation's directors and officers is governed by BCL § 719 ("Liability of Directors in Certain Cases") and § 720 ("Action Against Directors and Officers for Misconduct"). Since the Complaint does not allege that the defendants are directors or officers of Tzell, and plaintiff does not fall within the classes of entities specified as authorized to enforce §§ 719 and 720, its claim for breach of the BCL should be dismissed.

Tzell's claim for intentional interference with its business relationship with Rothschild should also be dismissed because it fails to allege defendants acted with malice to injure Tzell, as required. Also, Tzell's claim that defendants intentionally interfered with its business relationship with Rothschild fails because Rothschild is not Tzell's client, but Chrome's.

Tzell's claim that defendants engaged in deceptive trade practices also fails. A claim under General Business Law ("GBL") § 349, entitled "Deceptive Acts and Practices Unlawful" must be predicated on a deceptive act or practice that is consumer oriented" which is of a recurring nature and affects the public interest. Private contract disputes which are unique to the parties do not fall within the ambit of the statute. Here, Tzell has not alleged that defendants engaged in deceptive business practices that are directed at the public generally, or are of a

recurring nature, and its claims are unique to the parties herein.

Tzell's claim for an accounting should also be dismissed because Tzell does not and cannot allege, that it has a fiduciary relationship with any of the individual defendants, as required.

Further, Tzell is not entitled to injunctive relief and the preliminary injunction in favor of Tzell, and same should be vacated. The preliminary injunction in favor of Tzell should be vacated because the injunction would not serve any of the objectives the remedy is designed to achieve, and, for the reasons set forth above, the Complaint fails to state a cause of action against the defendants. In light of this failure, Tzell cannot demonstrate, among other things, the likelihood of success on the merits.

Further, Tzell's claim for punitive damages should be dismissed. New York does not recognize an independent cause of action for punitive damages. Moreover, "punitive damages are not recoverable in an ordinary breach of contract case, as their purpose is not to remedy private wrongs but to vindicate public rights." Punitive damages for an action sounding in tort are available only for "the purpose of vindicating a public right only where the actions of the alleged tortfeasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the pubic generally or are activated by evil or reprehensible motives." Tzell alleges no violation of a public right. Neither is there any allegation that the defendants acted with "evil or reprehensible motives." Tzell's claim for punitive damages should be dismissed.

Opposition

Defendants' papers are entirely argumentative, contain no statement of fact sworn to by an individual with requisite knowledge, and fail to establish that Tzell has no cause of action.

The business relationship that had existed by and between Tzell and defendants was as follows: in return for a portion of Chrome's revenues, Tzell provides Chrome with office space, mail, utilities, telephone, receptionists, Tzell letterhead, invoicing, billing, and various other back-office services and staff and, more importantly, access to the highly favorable airlines, hotels and car rental rates. To that end, during the time that defendants were working at Chrome (out of Tzell's offices) they were each able to obtain access to Tzell's computer network and electronically stored information by entering a unique 'username' and 'password' combination. Defendants were once registered on Tzell's 'active directory users and computers' list. Dolph I. and Pfeil had been shareholders and officers of Chrome and thus, Tzell has set forth a claim of breach of the TMA by the defendants. Paragraph 9 to the TMA entitled "Non Disclosure; Non Compete" expressly provides that "Contractor [Chrome] (and all of its principals and shareholders) agrees not to furnish to any . . . company . . . engaged in a business competitive with Tzell, any information as to Tzell's relations with its suppliers, its clients . . . including its mailing list, list of customers . . . [and] prices . . . concerning Tzell, other employees, contractors or their business." Tzell alleges that defendants had violated their obligations arising under paragraph 9 of the TMA, and defendants' motion does not challenge or dispute the truthfulness of plaintiffs' allegations; instead, defendants challenge only the sufficiency of the allegations.

In addition to signing the TMA, in order to induce Tzell to provide defendants access to Tzell's proprietary data, such as negotiated airline rates unique to Tzell, the defendants each signed personal guarantees located at the end of the TMA. The personal guarantees also constitute an express contractual relationship by and between the defendants and other non-parties, and Tzell. By signing the TMA and by signing the personal guarantees and,

thereafter, by expressly disavowing their contractual obligations with Tzell as part of a written statement, sufficient documentary proof exists demonstrating a contractual relationship between the defendants and Tzell, warranting denial of movants' application to dismiss at this early stage in the lawsuit. Here, it is also more than likely that discovery will bolster Tzell's breach of contract claims, and Tzell should not be deprived of the opportunity to examine the facts and events surrounding defendants' execution of the TMA, the personal guarantees, and their termination letters.

Further, Dolph I.'s and Pfeil's typewritten statements dated November 12, 2008 purporting to relinquish and disavow all responsibility and liability under the TMA, as well as their obligations arising pursuant to the personal guarantees, constitute an admission of a contractual relationship by and between Pfeil and Dolph I. and Tzell, and also operate as documentary proof contradicting movants' unsupported claims that a contractual relationship does not exist. Discovery will bolster Tzell's breach of contract claims, and Tzell should not be deprived of the opportunity to examine the facts and events surrounding the written statements that Dolph I. and Pfeil had prepared and served.

It is also undisputed that Tzell is the designated vendor for the travel needs of Rothschild which, incidentally, is co-plaintiff Chrome's largest client. Tzell contends that the Davlos Email is a direct solicitation of Rothschild, and the circumstances surrounding this email solicitation constitutes an unfair business practice pursuant to the BCL, to the extent that (I) it contains false and misleading information intended to injure plaintiffs' reputation and to divert business from plaintiffs; (ii) it provides the reader with the impression that the authors are disclosing information that is non-public as well as proprietary and confidential to Tzell, that was obtained

during their employment at Tzell's place of business, and (iii) that its mere existence demonstrates the misuse of non-public and proprietary and confidential information belonging to both plaintiffs. Plaintiffs also argue that the Davlos Email provides no facts describing this highly provocative statement, leaving the reader with the unmistakable impression that a problem had existed at Tzell, the extent of which is left solely to the imagination of the reader. For instance, the Davlos Email vaguely refers to "unforeseen events at Tzell," without providing any details regarding the dates, locations or participants and witnesses to these events. In light of the reasonable presumption that, as former employees of Chrome and signatories to a contract with Tzell possessing non-public information regarding the business activities of Tzell, a reasonable trier of fact may find defendants' failure to provide any details of the facts or events mentioned in the Davlos Email to have been intentional and meant to cause Chrome and Tzell injury. A reasonable person can conclude that the omissions were malicious and designed to disparage Chrome and Tzell, causing them irreparable injury. Plaintiffs assert that, but for their prior employment relationship with plaintiffs, none of the signatories to the Davlos Email would have had access to the relevant contact information at Rothschild (regarding its corporate travel needs) without expending substantial resources. Arguably, the business email address of Evelyn Soto is not readily accessible; nor is information regarding Nancy Rivera, another Rothschild employee specifically mentioned by name in the Davlos Email. Also, the reference in the Davlos Email to a "conversation with Nancy Rivera" at some unspecified time prior to its transmission to Evelyn Soto, leads a reasonable person to conclude that defendants had contacted Rothschild during their employment relationship with plaintiffs, in violation of their fiduciary duty. By virtue of the fact that defendant Dolph I. is also the son of the sole owner of Chrome, he has a

fiduciary relationship with Chrome and, by extension, to Tzell.

Further, the Davlos Email implies that, unless restrained, defendants and their agents will use information pertaining to the unpublished rates for flights that Tzell has been able to negotiate with the air carriers improperly and in a manner to gain an unfair and unearned competitive advantage as against Tzell. The record herein indicates that Tzell has adequately set forth a cause of action for unfair business practice, breach of confidentiality as well as breach of fiduciary duty; read together, the allegations are sufficient to warrant denial of movants' request for dismissal.

Reply

Since defendants have moved to dismiss the Complaint for failure to state a cause of action, the court is required to "ignore the affidavits submitted by defendants and responsive affidavits are irrelevant. Thus, Tzell's repeated references to the absence of an affidavit from the defendants, misses the point of the pending motion.

Tzell's apparent attempt to bolster its Complaint through the use of an affidavit from David Buda, its executive vice president, is similarly unavailing. That affidavit simply restates the allegations of the Complaint and the arguments in Tzell's brief, demonstrates no additional circumstances sufficient to create a justiciable issue.

As to the CMA, Tzell's opposition papers are silent as to any argument relating to the defendants' alleged breach of the CMA.

Tzell has necessarily released Chrome from liability for the complained-of breaches of the TMA, thereby vitiating any claim against defendants Dolph I. and Pfeil under the alleged guaranty. The joint representation of plaintiffs Tzell and Chrome necessarily entails

Tzell's release of chrome for the complained-of breaches. Under DR 5-105 (22 NYCRR 1200.24), (a) A lawyer shall decline proffered employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under subdivision (c) of this section. . . ." Subdivision (c) provides that " [A] lawyer may represent multiple clients if a dis-interested lawyer can competently represent the interests of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. An attorney cannot represent multiple parties to the same action where one party has a viable claim against the other, since the attorney would not be able to zealously represent the interests of both parties. In the present case, if plaintiff Tzell has a viable claim under the TMA against the ostensible guarantors of the TMA, it would necessarily have the same claim against Chrome itself. But Tzell has asserted no such claim, choosing instead to align itself with Chrome as co-plaintiffs represented by the same counsel. This alignment and joint representation would be ethically permissible only if Tzell has given up its contractual and other possible claims against Chrome. Although Tzell's submission does not address this point, it must necessarily have released its claim against Chrome.

Defendants also contend that defendants, as guarantors, are discharged from liability since the principal debtor, Chrome, was released from liability. Since the guarantor is not liable unless the principal is bound, a creditor's release of a principal debtor operates to discharge guarantors, who are only secondarily liable on a debt or obligation. Even a mere alteration of the principal's contractual obligation releases the guarantor. Defendants argue that even if no formal

written release exists, Tzell's joining forces with Chrome and the joint representation by counsel necessarily entail an abandonment of any right Tzell may have against Chrome under the TMA. Chrome has been effectively released from liability. Thus, the alleged guarantors, *i.e.*, Dolph I. and Pfeil, have been discharged.

Nothing in the TMA imposes individual liability on defendants. Paragraph 9(a) of the TMA declares that Chrome's principals and shareholders must abide by the contract terms. In all contracts between two corporations, however, the principals are so bound. But if a principal takes action causing the corporation to breach a contract, liability for that breach falls upon the contracting entity — the corporation employing the principal — not upon the principal. Moreover, the Complaint provides no facts to establish that anyone breached Paragraph 9(a). As demonstrated in defendants' motion, Davlos's alleged utilization of the e-mail address of one employee of Rothschild (a Chrome customer) violated no property or other interest of Tzell's. Neither does the Davlos E-mail divulge anything to anyone concerning Tzell's "mailing list, list of customers, suppliers, prices, terms and negotiations or other information concerning Tzell, other employees, contractors or their business." Nothing in the TMA bars a Chrome employee from soliciting clients of Chrome, as opposed to clients of Tzell. Since Rothschild was not Tzell's client, Tzell has no claim against either Chrome or its principals for the solicitation.

Tzell's claim for violation of the BCL should be dismissed because the defendants' alleged actions violated no interest of Tzell's.

Tzell's claim for intentional interference with a business relationship should be dismissed because Tzell failed to allege a sufficient business relationship between itself and Rothschild to make out a claim for intentional interference with a business relationship. Moreover, Tzell's

conclusory statement that defendants were motivated by malice is unsupported by factual allegations. Nor are there sufficient facts from which such a finding could be made.

Tzell's claim for deceptive trade practices under the GBL fails to allege a consumer-oriented activity causing harm to the public interest. Tzell's claim that competitors also have standing to assert this claim is devoid of legal support. First, the claim is found in the affidavit of Tzell's representative, and courts strongly disapprove of legal arguments contained in affidavits. In any event, the fact that a plaintiff may be a competitor of the defendant is completely irrelevant, since Tzell's claims constitute a private dispute, not of public concern.

Tzell's claim for an accounting also fails since Tzell failed to allege sufficient facts to show a fiduciary relationship between itself and any of the defendants. The fact that defendant Dolph I. is related to the owner of Chrome, Dolph E. does not impose any fiduciary duty to a corporation with which Chrome conducts business. The defendants' relationship with Chrome cannot create a fiduciary relationship with Tzell.

Further, Tzell does not challenge the dismissal of its claim for punitive damages.

Analysis

CPLR 3211(a)(7): 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 Corporation.*, 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), and 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" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2D 83, 87-88, 614 NYS2D 972 [1994]).

On a motion to dismiss for failure to state a cause of action, where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" 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 NYS2D 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corporation.*, 257 AD2D 76, 81, 692 NYS2D 304 [1st Dept 1999], *affd* 94 NY2D 659, 709 NYS2D 861 [2000]).

Tzell's Claims Under the CMA and TMA

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v Jamie Towers Housing Co., Inc.*, 294 A.D.2d 268, 743 N.Y.S.2d 85 [1st Dept 2002]; *Barrow v Lawrence United Corporation.*, 146 AD2D 15, 18, 538 NYS2D 363 [3d Dept 1989]), remaining "consistent[ ] with the over-all manifest purpose of the ... agreement." The fundamental, neutral precept of contract interpretation is that agreements are

construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2D 966, 967, 488 NYS2D 645, rearg denied 65 NY2D 785, 492 NYS2D 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2D 1016, 1018, 584 NYS2D 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2D 29, 32, 744 NYS2D 358, *rearg denied* 98 NY2D 693, 747 NYS2D 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2D 157, 162, 565 NYS2D 440 [1990]).

If the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v Community Hosp. of W. Suffolk*, 87 NY2D 514, 520, 640 NYS2D 472 [1996]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2D 630, 638, 290 NYS2D 721, *rearg denied* 22 NY2D 827, 292 NYS2D 1031 [1968]). Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v East River Sav. Bank*, 55 NY2D 550, 555, 450 NYS2D 460 [1982]).

As to Tzell's claim for breach of the CMA, there is no indication that Tzell was a party to this contract. It is uncontested that this contract is the operating agreement for Chrome among Dolph I, Dolph E. and Pfeil. Thus, Tzell has no standing to sue for breach thereof. Notably, Tzell offers no legal support in opposition to dismissal of this claim. Therefore, Tzell's claim for breach of the CMA is dismissed.

As to Tzell's claim for breach of the TMA and breach of the covenant not to unfairly compete arising under the TMA, it is uncontested that Chrome and Tzell are the only parties to

the TMA. However, it is uncontested that Dolph I. and Pfeil each signed personal guarantees at the end of the TMA, thereby personally binding themselves to the obligations contained in the TMA. Yet, paragraph 9 of the TMA provides that:

> (a) During the term of this Agreement and after its termination for any reason, Contractor (*and all of its principals and shareholders*) agrees not to furnish to any person, firm, company or corporation engaged in a business competitive with Tzell, any information as to *Tzell's relations with its suppliers, its clients (or the clients of other commission agents or contractors working with Tzell) including its mailing list, list of customers, suppliers, prices, terms and negotiations or other information concerning Tzell, other employees, contractors or their business.*

Under the plain language of paragraph 9 above, and in light of the guarantees signed by Dolph I. and Pfeil, both of these defendants agreed to refrain from providing to any of Tzell's competitors information regarding Tzell's suppliers and clients, and the Complaint alleges that Rothschild is Chrome's client, not Tzell's. However, paragraph 9 also prohibits said defendants from providing information to Tzell's competitors *concerning Tzell, other employees, contractors (i.e., Chrome) or their business*, and "*clients of other contractors* working with Tzell" (*i.e.*, Chrome). It is alleged that while Dolph I. and Pfeil were working at Chrome, they each had access to Tzell's computer network and information stored thereon. When they ceased working at Chrome, the Davlos Email was sent to a client of Chrome, one of Tzell's contractors, explaining that said defendants went to Tzell's competitors. The Davlos Email implies that defendants will divulge Tzell's information regarding unpublished airfares that Tzell negotiated with the air carriers as well as client information from one of Tzell's contractors (Chrome) to Tzell's competitor. Thus, since Rothschild is a client of one of Tzell's contractors, Chrome, it cannot be said that Tzell failed to state a claim that Dolph I. and Pfeil breached their independent obligation to refrain from divulging protected information to Tzell's competitors.

Further, Tzell should be given an opportunity to explore discovery surrounding this claim.

Defendants' argument that Tzell's "release" of Chrome from liability for the complained-of breaches of the TMA, vitiates its claim against defendants Dolph I. and Pfeil under their guarantees, lacks merit. The Dolph I. and Pfeil are being sued in their individual capacities for breaching their independent obligations under the TMA, which allegedly caused damages to Chrome and Tzell. Plaintiff offers no legal support for the proposition that the fact that Tzell's counsel also represents Chrome in an adversarial proceeding against Chrome's principals constitutes a release of the obligations owed by said principals under their guarantees.

Thus, defendants' application for dismissal of Tzell's claims under the TMA is denied.

Unfair Competition Claim[3]

In order to state an unfair competition claim, plaintiff must allege either (1) that defendant has acted unfairly in some manner, or (2) that defendant's activities have caused confusion or mistake, or are likely to cause confusion or mistake, with plaintiff's activities, in the mind of the public [Sup Ct New York County 1956]). The "cornerstone of the tort" of unfair competition is the "misappropriation of another's commercial advantage," with the "primary concern in unfair competition (being) the protection of a business from another's misappropriation of the business' organization or its expenditure of labor, skill and money" (*Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 NY2D 663, 439 NYS2D 858 [1981]). A claim of unfair competition is generally predicated "upon the alleged bad faith misappropriation of a commercial advantage belonging to

[3] The 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. v. REFCO Group Ltd., LLC*, 9 Misc 3d 283, 801 NYS2D 490 [Sup Ct New York County 2005]).

another by exploitation of proprietary information or trade secrets" (*Alpha Funding Group, Inc. v Aspen Funding LLC*, 17 Misc 3d 1126, 851 NYS2D 67 [Sup Ct Kings County 2007], *citing Ruder & Finn Inc. v Seaboard Sur. Co.*, 52 NY2D 663, 439 NYS2D 858 [1981]).

Here, Tzell alleges that defendants misappropriated it property by utilizing proprietary information belonging to Tzell, including the email address of a Rothschild employee and Tzell's unpublished airfare rates, in violation of the TMA. Although Tzell cannot claim any proprietary right to the email address of a Rothschild employee since Rothschild is not a client or resource of Tzell, Dolph I. and Pfeil allegedly had full access to Tzell's proprietary information, to wit: unpublished airfare rates, and are attempting to provide same to Tzell's competitor. Whether such information is the type of information a former employee of Chrome would casually remember without having to studiously memorize and whether Tzell's airfare rates in fact constitute proprietary information, are issues to resolved after discovery. Therefore, dismissal of the unfair competition claim by Tzell is unwarranted.

New York Business Corporation Law

Plaintiff failed to cite which BCL section defendants allegedly violated. Further, plaintiff failed to cite any caselaw to support its contention that the Davlos Email solicitation constitutes an unfair business practice pursuant to the BCL.

Nor does plaintiff dispute defendants' contention that plaintiff does not fall within the classes of entities specified as authorized to enforce BCL §§ 719 and 720, which governs the liability of a corporation's directors and officers, respectively.[4] Nor is there any allegation that

[4] In the one case this Court uncovered discussing an unfair competition claim under the BCL, the case noted "the obligation imposed upon officers and directors to 'discharge the duties of their respective positions in good faith'. (Business Corporation Law, § 717.)" (*Rodgers v Lenox Hill Hosp.*, 239 AD2d 140, 657 NYS2d 616 [1st Dept

the defendants are directors or officers of Tzell. Thus, Tzell's claim for breach of the BCL is dismissed.

Intentional Interference with Business Relations

The elements of a cause of action for tortious interference with business relations are as follows: (1) the plaintiff's business relations with a third party; (2) the defendant's interference with those business relations; (3) the defendant acted with the sole purpose of harming the plaintiff or used wrongful means; and (4) injury to the business relationship (*Advanced Global Technology LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 836 NYS2D 807 [Sup Ct 2007] *citing Guard-Life Corporation. v Parker Hardware Mfg. Corporation.*, 50 NY2D 183, 194 (1980]). Plaintiff must also allege that defendants' conduct was motivated solely by malice or to inflict injury by unlawful means, beyond mere self-interest or other economic considerations (*see Shared Communications Services of ESR, Inc. v Goldman Sachs & Co.*, 23 AD3D 162, 803 NYS2D 512 [1st Dept 2005]). The tort of interference with business relations "applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant" (*M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2D 488, 490 [2d Dept 1995], *citing WFB Telecommunications v NYNEX Corporation.*, 188 AD2D 257 [1st Dept 1992]). "In such an action '[t]he motive for the interference must be solely malicious, and the plaintiff has the burden of proving this fact'" (72 N.Y. Jur 2d, Interference, § 44, at 240; *John R. Loftus, Inc. v White*, 150 AD2D 857, 860).

Here, Tzell had no direct business relationship with Rothschild, since Rothschild was a

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1997]). Such case underscores defendants' argument that the BCL governs the liability of a corporation's directors and officers of corporations.

client of Chrome. Therefore defendants' solicitation of Rothschild cannot constitute an interference with Tzell's business relations. Even assuming there was a business relationship between Tzell and Rothschild, Tzell failed to allege that defendants were motivated solely by malice and an intent to injure Tzell, and Tzell's conclusory statement that it alleges malice against defendants is insufficient. As Tzell failed to assert any facts indicating that plaintiff had business relations with a third party, and that defendants' interference with those business relations was done with the sole purpose of harming the plaintiff or by wrongful means, Tzell's intentional interference with business relations claim is dismissed.

General Business Law § 349

Section 349 governs consumer-oriented conduct (*Small v Lorillard Tobacco Co.*, 94 NY2D 43, 698 NYS2D 615 [1999]). To allege a GBL § 349 claim, a plaintiff must allege three elements: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Freefall Express, Inc. v Hudson River Park Trust*, 16 Misc 3d 1135, 847 NYS2D 901 [Sup Ct New York County 2007] *citing Stutman v Chemical Bank, N.A.*, 95 NY2D 24, 29 [2000]). With respect to the first element, the challenged conduct "need not be repetitive or recurring but defendants' acts or practices must have a broad impact on consumers at large; [p]rivate contract disputes unique to the parties would not fall within the ambit of the statute" *Freefall Express, Inc. citing New York Univ. v Continental Ins. Co.*, 87 NY2D 308, 320 [1995]). The challenged acts must be "consumer-oriented in the sense that they potentially affect similarly situated consumers ... [The test is] whether a reasonable consumer in plaintiffs' circumstances might have been misled by the ... conduct" (*Freefall Express, Inc. citing Oswego Laborers' Local*

214 Pension Fund v Marine Midland Bank, N.A., 85 NY2D 20, 25 [1995]). While the statute is not precluded to disputes between businesses *per se*, it does severely limit it (*Freefall Express, Inc. citing Cruz v NYNEX Information Resources*, 263 AD2D 285, 290 [1st Dept 2000]). However, where the alleged deceptive practices occur between relatively sophisticated entities with equal bargaining power, such does not give rise to liability under GBL § 349 (*Freefall Express, Inc. citing Exxonmobil Inter-America, Inc. v Advanced Information Engineering Servs., Inc.*, 328 F Supp 2d 443, 449 [SDNY 2004]). "Large businesses are not the small-time individual consumers GBL § 349 was intended to protect" (*Freefall Express, Inc. citing Genesco Entertainment v Koch*, 593 F Supp 743).

Here, the Complaint alleges sufficient facts indicating that the Davlos Email contains false and misleading information intended to injure Tzell' reputation and to divert business from Tzell, and gives the impression that defendants are misusing and disclosing information that is non-public as well as Tzell's proprietary and confidential, that was obtained during defendants' employment at Tzell's place of business. However, Tzells's claim is not predicated on a deceptive act or practice that is "consumer oriented" but involves a unique dispute between it and defendants. Nor has Tzell alleged that defendants engaged in any deceptive business practices that are directed at the public generally; Tzell alleged that the individual defendants essentially misappropriated its proprietary information and solicited of it's contractor's clients for the benefit of Tzell's competitor. None of defendants' alleged deceptive practices, i.e., contacting a client of one of Tzell's contractors, are alleged to be aimed at the public at large or to consumers. Therefore, Tzell failed to state a claim under GBL § 349, and such claim is dismissed.

Accounting Claim

The right to an accounting rests upon the existence of a fiduciary relationship in connection with the subject matter in question (*Dong Waked Park v Michael Parks Dori Group*, Inc., 12 Misc 3d 1182, 824 NYS2D 761 [Sup Ct Nassau County 2006]). The Complaint fails to allege any facts indicating that any of the defendants owed Tzell a fiduciary duty. Tzell's claim in opposition that Dolph I. is the son of the sole owner of Chrome, gives rise to a fiduciary relationship between Dolph I. and to Tzell is insufficient. Tzell failed to cite any caselaw in support of this proposition, and there is no basis for extending any fiduciary duty owed to Tzell by Chrome's sole owner, to the son of Chrome's sole owner. Therefore, Tzell's claim for an accounting is dismissed.

Punitive Damages

In order to establish a claim for punitive damages, the movant must "allege facts demonstrating that the [attorney's] conduct was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations (*Zarin v Reid & Priest*, 184 AD2D 385, 388 [1 Dept 1992], *citing Walker v Sheldon*, 10 NY2D 401, 405 [1961]). Thus, the harmful conduct must be "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" (*McDougald v Garber*, 73 NY2D 246 [1989]). Furthermore, an award of punitive damages must be supported by "clear, unequivocal and convincing evidence" (*Munoz v Puretz*, 301AD2d 382 [1st Dept 2003]). Further, it is well settled that the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights (*see Garrity v Lyle Stuart, Inc.*, 40 NY2D 354, 358 [1976]). Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he was aggrieved and which is actionable as an independent tort, but also that

such conduct was part of a pattern of similar conduct directed at the public generally (*see New York University v Continental Ins. Co.*, 87 NY2D 308, 315-316 [1995]; *Rocanova v Equitable Life Assurance Society of United States*, 83 NY2D 603, 613 [1994]).

The Complaint fails to allege facts indicating that the actions undertaken by defendants were so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations. Further, as this action involves a private dispute among parties to a contract, there is no indication in the Complaint or the submissions before the Court that defendants' actions were part of a pattern of similar conduct directed at the public generally. Therefore, Tzell's punitive damages claim is dismissed.

Preliminary Injunctive Relief

CPLR § 6314 permits the court "to vacate or modify" a temporary restraining order or preliminary injunction. A motion to vacate a preliminary injunction should be granted where injunctive relief would not serve the objectives the remedy is designed to achieve, and where the elements required for imposing a preliminary injunction are not met (*Canwest v Mirkaei Tikshoret*, 804 NYS2D 549, 567 [Sup Ct New York County 2005]).

Defendants' request to vacate injunctive relief is premised upon Tzell's purported failure to state a claim and unlikelihood of success on the merits of any of its claims. However, as this Court finds that Tzell has stated a claims for which relief may be granted, vacatur of preliminary injunctive relief is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion to dismiss Tzell's claim for breach of

the Corporate Management Agreement, violation of the Business Corporation Law, intentional interference with business relations, violation of General Business Law § 349, an accounting and punitive damages claim, is granted, and such claims are dismissed as to Tzell; and it is further

ORDERED that the branch of defendants' motion to dismiss Tzell's claims under the Travel Marketing Agreement, Tzell's unfair business practices/competition claim, and to vacate the preliminary injunction, is denied; and it is further

ORDERED that defendants serve their Answer within 20 days of service of this order with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference on August 18, 2009, 2:15 p.m., Part 35; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 3, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

JUN 05 2009

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NEW YORK