SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

GRASSI & CO., CPAs, P.C.,

Plaintiff,

INDEX NO.: 015743/2008
MOTION DATE: 09/23/2009
MOTION SEQUENCE: 002

- against -

JANOVER RUBINCOTT, LLC, JAMES LOGAN and BARRY SCHOSID,

Defendants.

The following papers read on this motion:

Notice of Motion & Affidavits 1
Exhibits 1 – 93 to the Affidavits of Defendants James Logan and Barry Schosid and Affidavit of Alan Hoffman in Support of Defendants' Motion for Summary Judgment 2
Defendants' Memorandum of Law in Support of their Motion for Summary Judgment Dismissing Plaintiff's Verified First Amended Complaint 3
Plaintiff's Memorandum of Law Opposing Motion for Summary Judgment 4
Affidavit of Laurent S. Drogin, Esq. in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment & Exhibits Annexed 5
Affidavit of Louis C. Grassi in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment 6
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PRELIMINARY STATEMENT

Defendants Janover Rubinrot, LLC, James Lohgan and Barry Schosid (the defendants) move pursuant to Civil Practice Law & Rules § 3212 for summary judgment in favor of defendants dismissing the amended complaint in its entirety.

BACKGROUND

Affidavit of James Logan

This action centers on the movement of the defendants Logan and Schosid between their various former employers. The focus of the action is centered on one Alan Hoffman (Hoffman), an obviously successful accountant, whose clients were sufficient to provide work for both him and the defendants in this action. Hoffman began as an accountant in 1977 and ultimately became a partner in an accounting firm of Shanholt, Glassman, Hoffman & Klein (SGHK), where he was able to develop a profitable group of clients with whom he has maintained a long-standing relationship. SGHK hired Schosid in 1984 and Logan. in 1993. As these men developed their own practices, they also devoted substantial time to servicing Mr. Hoffman's clients. In 1990 Hoffman joined American Express Tax and Business Services (AETBS). Logan and Schosid followed him.

When that company was acquired by a national accounting firm, RSM McGladrey, Inc. (RSM), Hoffman left, but the two individual defendants remained. While at RSM Schosid and Logan continued to service their clients and those of Mr. Hoffman, who was subject to a 2-year non-compete and non-solicitation clause from AETBS. While at RSM they entered into employment agreements which contained 2-year restrictive covenants. In 2006 they left RSM and joined a small accounting firm called Feldman Meinberg & Co. (FM). On November 27, 2006 RSM commenced a lawsuit against Schosid and Logan in which it claimed that they had wrongfully serviced clients of RSM at their new location.

Soon thereafter, in December 2006, they were recruited to join Grassi & Co. After several meetings, it was agreed that they would join Grassi. During the course of the discussions they advised Mr. Grassi that there was an active lawsuit against them on the part of RSM. They also explained that there were a number of clients for whom they were working who were originally developed by Hoffman, who was still obligated under his restrictive covenant with

AETBS, and it was likely that, at some point, he would seek to recover the clients that he had left behind. The restrictive covenant was to end in September 2007.

On May 17, 2007 Schosid and Logan entered into separate employment letters with Grassi. They also executed separate Non-Equity Officer Agreements, on the same date, which set forth the details of their employment. Among the provisions was one which permitted the new employees to take with them any pre— Grassi clients and to copy and use client data associated with those clients if their employment with Grassi terminated for any reason within one year of its commencement. Each of them brought with them their laptop computer, which contained client data which they had used at their previous places of employment. Grassi downloaded the information from the hard drive to two new hard drives which Grassi gave them and which were compatible with Grassi's software and computer systems.

Grassi was clearly aware not only of the lawsuit by RSM, but also of the impending release of Hoffman from his restrictive covenant, and the fact that he may well seek to regain many of the clients which were just recently brought to the Grassi firm. Through a business acquaintance, Grassi met with Hoffman in early 2007 and discussed the possibility of Hoffman joining forces with Grassi. Hoffman made it clear to Grassi that he was going to contact former clients with whom he had strong relationships to see if they would reconsider returning to him as their accountant upon the expiration of the covenant. He also met with the managing partner of Janover Rubinroit (JR) to discuss a potential partnership at that firm.

Ultimately Hoffman entered into a memorandum of understanding in which Hoffman and JR agreed that Hoffman would join JR as a partner, effective November 1, 2007. Grassi continued to attempt to have Hoffman join his firm, and it was only in or about November that Hoffman advised Grassi that he had reached an agreement with JR. This decision by Hoffman had an impact on Logan and Schosid in their employment relationship with Grassi. Initially, the resolution of the RSM matter provided that Grassi would be the primary obligor for payment to RSM the sum of $248,000. Payments were to be made in quarterly installments between October 15, 2007 and January 1, 2011. The proposed settlement also provided that Grassi's obligation would cease if Schosid and Logan ceased working at Grassi.

After Grassi learned that Hoffman had rejected his offer and joined JR, the settlement

agreement with RSM was revised. That proposed agreement, circulated on December 3, 2007, made Schosid and Logan the primary obligors of the $248,000 payable to RSM, and included a provision that Grassi would serve solely as a guarantor. The agreement also included a schedule C, which divided the settlement amount of $248,000 among 11 client groups. The amount would decrease, depending upon the loss of certain clients, but would not be reduced by more than $148,000. For one year, commencing November 1, 2007 and ending October 31, 2008, if any of the 11 identified client groups became a "Lost Client", that is, ceased using Grassi for any services, and transferred such business to Hoffman, or any business by which he was employed, they would be deleted from the $248,000 owed under the agreement.

According to Defendants, the following client groups became "lost clients", and thereby reduced the amount owed under the original agreement as follows:

The Germont Group	$33,000
The Lovett Group	$3,000
Krumholz Group	$42,400
Young Woo Group	$52,000
TOTAL	$130,000

Thereafter, on June 12, 2008 the Schwalbe Group rejoined Hoffman and, at that point, Grassi wrote to RSM advising it that Schwalbe had also become a loss client and as a consequence, the amount to RSM had been reduced to the agreed floor of $100,000.

Grassi fired Schosid on June 9, 2008, and Logan soon followed voluntarily. Each of them had as their last day June 30, 2008. The Non-Equity Agreement which they each had signed required a 90-day notice of intention to resign which affected only Logan. As it turned out, June 30, 2008 was a propitious date, in that Grassi's next payment of $24,800 to RSM was due on July 1 and under the agreement with RSM, Grassi could avoid that payment if Schosid and Logan were already gone. Ultimately, the $100,000 balance was paid by JR. Both of them received their last paychecks but neither was compensated for unused vacation days which amounted to $6,931.73 for Schosid and $5,062.50 for Logan.

Both Schosid and Logan then commenced working for JR. As in their prior experience in moving to Grassi, they brought along with them the laptops which they had been utilizing ,

containing both proprietary and non-proprietary software, and client information from Grassi. The client data contained on the hard drives was downloaded to a new drive and placed in their laptops. The old drives were returned to Grassi, together with handheld devices with which they had been provided. Defendants claim that no software of Grassi's, whether proprietary or non—proprietary, was copied by Janover into their system.

Affidavit of Barry Schosid

As stated in his first paragraph, the purpose of this affidavit was to corroborate the more lengthy affidavit submitted by Logan and to include facts with which he was personally familiar. For example, he described the acquisition by him of the Wessels Group, the Caton group and the Rhapsody Group, all after he started working for Grassi. He also described circumstances, later confirmed by Hoffman, as to the Gamont Group's departure.

After he and Logan joined JR, the vast majority of their clientele which predated their involvement with Grassi, as well as the Wessels Group and the Caton Group, terminated Grassi and followed them to JR. Notably, of the 11 clients which were listed on Schedule C to the RSM settlement agreement, four were solicited and taken by Hoffman before Grassi fired Schosid. Serota, one of his pre-Grassi clients determined to remain there. Of the remaining six, Schwalbe was solicited by Hoffman and joined him at Janover a few days after Schozid's firing. The remaining five clients were all his pre-Grassi clients, which then joined him at JR.

Affidavit of Alan Hoffman

Hoffman asserts that he has reviewed the affidavits of the individual defendants and concurs with their statements. He alleges that over the years, since 1977, he has developed a large and profitable group of accounting clients. In 1984, while he was associated with SGHK, the firm hired Schosid, and, in 1993 it hired Logan. From those days until 2005 Logan and Schosid worked with him servicing his clients, as well as their own. In May 2006 Logan and Schosid left RSM to join a small accounting firm, FM, where they brought with them many of the clients which he had developed at both SGHK and AETBS. He confirms the fact that he was recruited by Mr. Grassi to join his accounting firm and at the same time, during the summer of 2007, he met with JR's managing partner. He ultimately determined that he would accept a partnership with JR, commencing November 1, 2007.

He further relates the circumstances under which some of the more significant clients including Gamont, Lovett and Krumholz transferred their business to JR. With respect to the Woo Group he was not only their accountant, but also a part owner of three of their entities and was intimately familiar with their accounting needs and practices. On May 21, 2008 Young Woo and Associates terminated Grassi and joined him at JR. The same was true for the Schwalbe Group, which moved to JR on June 12, 2008.

Toward the end of this affidavit Hoffman makes the point that while the action ostensibly involves clients who terminated Grassi and followed him, Logan, and Schosid to JR, the true genesis of this action, he believes, is the inability of Grassi to recover from transferred and transferring clients the amounts claimed as Accounts Receivable and, more contentiously, Work In Progress. There were issues with the manner in which Grassi rendered and demanded payment of bills which were in excess of the original payment agreement, but also in which work in progress was not clearly defined. It was, in his opinion, those problems which generated this action.

Affidavit of Louis C. Grassi in Opposition to Motion for Summary Judgment

Grassi identifies himself as the founder of Grassi & Co. He relates his meetings with Hoffman in the summer and fall of 2007, involving the possibility of his joining Grassi. He believes that Hoffman had been dishonest with him with respect to his employment plans after the expiration of the covenants that he had signed with the former employer. Meanwhile, he met with Logan and Schosid, whom he had learned of through an employee of his company. He was fully aware of the RSM lawsuit but felt that by bringing these accountants on at Grassi, with access to the resources they needed, he would be able to resolve the litigation which they were confronting.

He was obviously concerned that once Hoffman re joined the practice of accountancy, the clients which were transported to Grassi by Logan and Schosid, would very possibly leave them and return to Hoffman. He claims that he would not have enlisted them as non-equity partners at Grassi had he not relied upon the representations they made that, while the return of the clients to Hoffman was a possibility, it was not a likelihood. He claims that he obtained a settlement that terminated the RMS litigation against Logan and Schosid, and allowed them to

service former RSM clientele at Grassi. Relying upon their representations, he committed Grassi & Co. to guarantee and pay their settlement fees of $248,000.

Contrary to the statements in the prior affidavits, Grassi claims that while Logan and Schosid continued to make representations as to their ability to maintain Hoffman clients, they did nothing to prevent them from leaving Grassi, and, in fact, as early as January 2008, were planning to leave Grassi to rejoin Hoffman. Grassi also disputes representations allegedly made upon the termination of Schosid. He claims that all he said to him when he departed was that he expected him to live up to the terms to which he had agreed upon when becoming a non— equity partner. The departure of Logan came as a surprise to him, but coming within four days of the firing, he became more suspicious that they had planned to depart for JR for some time.

He explained that the requirement for the 90 – day notice of termination was to enable Grassi to collect Accounts Receivable by people who had been working on the accounts and enabling clients to become familiar with the new accountants who would be assigned to their matters. In fact, the rapid departure was not acceptable to Grassi, but he could not force Logan to continue working for an additional three months. As far as he was concerned, the permission for Logan to leave on two weeks notice did not affect, in any way, their right to the 90-day notice requirement. As it turns out, Grassi immediately encountered difficulty in collecting from clients who had been serviced by Logan, which only emphasized the need for the notice requirement. He specifically denied advising either of them they could take any Grassi clients with them upon departure.

Grassi alleges that the departing accountants violated their employment agreements by leaving with the hard drives containing data that had been installed in their laptops when they first came to Grassi. If this material was then copied by Janover, neither he nor anyone else at Grassi gave either of the departing accountants the written permission required that would have allowed them to leave with Grassi property and information , let alone share it with a direct competitor. A final allegation in the affidavit is that each of the named Defendants, through Hoffman, interfered with the Grassi collection efforts from clients who are now at JR.

The Verified First Amended Complaint

According to the complaint the action involves tortious interference with

contracts between Grassi & Co. and its clients. This includes, among other things, inducing and encouraging Logan and Schosid to breach their agreement with Grassi & Co., and to deliver confidential information which information was then converted by JR, and wrongly used for its own benefit. JR also allegedly interfered with Grassi's contracts with clients by encouraging them to withhold payment from Grassi for services previously rendered. With respect to the two individual defendants, Grassi claims that they have breached their restrictive covenant and confidentiality provisions of their employment agreements by soliciting, diverting, or taking away clients of Grassi in violation of those agreements.

The confidentiality agreement to which the complaint refers is contained in paragraph 5 of the Grassi & Co. Agreement. It provides in pertinent part as follows:

> (g) The Clients of the Employer, regardless of how they became clients, or who may have been responsible for introducing the client to the employer, are assets of the employer. Material and irreparable injury would be done to that employer if, within two (2) years after termination of employment, the Employee were to solicit Clients for the Employer and/or the Employee are or were performing services, solicit the employers referral sources and/or share with the Employer's competitors the Employer's trade secrets, intellectual property, confidential and proprietary business, financial and marketing information, and/or client relationships. Notwithstanding this paragraph 5 (g), paragraph 12 of this Agreement provides an exception to the Employee for those clients whom the Employee serviced prior to coming to the Employer . . . Employee is willing to enter into this agreement to protect those client relationships and Employer's referral sources, confidential information and property, as described herein.

Paragraph 10 of the Agreement deals with rights to information received by the Employee. With respect to all memoranda, notes, records, administrative and technical manuals, of virtually every type and description, subparagraph (c)states that they "shall be the Employer's property and shall be delivered by the Employee to the Employer on the termination of the Employee's employment or at an earlier time on the request of the Employer." It further prohibited the Employee from transmitting or disclosing any of the information contained in such documents to any person, firm or organization outside the Employer without the Employer's

written consent.

The Non-Solicitation Provision is set forth at paragraph 12 as follows:

> If, without the specific written consent of the President of the Employer or his designee, the employee performs, by himself or through a firm with which he is or becomes associated, or arranges for such a firm to perform engagements involving accounting, auditing, tax and/or management consulting services, and/or any related services offered by the Employer, for a Client . . . or uses proprietary business information of the Employer, or both, or the Employee induces any such Clients to terminate or modify their relationship with the Employer, or in any way interferes with the relationship between the Employer and any of its Clients, within two (2) years following his termination, then the Employee will compensate the Employer, in addition to whatever other equitable remedies may be available to the Employer as liquidated damages for any and all loss and damages suffered by the Employer by reason of the lost engagement (s) by a payment of an amount equal to one and one-half times the fees charged for such engagements by the Employer over the last full fiscal year during which the Client was a client of the Employer . . . . Such amounts shall be paid by the Employee to the Employer in twelve (12) equal monthly installments commencing 30 days after violation and request for payment. Anything to the contrary notwithstanding in this in this Paragraph 12, to the extent that the employment of the Employee ends for any reason prior to _____ (the "First Anniversary Date"), the Employee shall have the option to take with him those Clients and only those Clients who the Employee serviced prior to coming to the Employer and as to whom the Employer did not have to compensate Feldman Meinberg ("Feldman") and/or RSM McGladrey ("McGladrey") or otherwise expend money acquiring rights to provide services to such Clients. With respect to any Client(s) the Employee serviced at Feldman and/or McGladrey, and to the extent that the Employee resigns and/or is terminated prior to the first Anniversary Date of his employment; then, to the extent the employer incurred expenses and/or assumes liability to compensate Feldman and or McGladrey for the right to provide professional services for any such Client(s), the Employee shall have the right prior to the First Anniversary Date to take any such Client(s) with him if and only if the Employee first compensates the Employer in an amount equal to that which the Employer has assumed or paid for the Client(s), plus

> twenty-five percent (25%) over that amount, plus all out-of-pocket expenses incurred by the Employer to negotiate, settle, mediate, arbitrate, or litigate with Feldman and/or McGladrey as a result of the Employee joining the Employer . . . . Employee shall compensate Employer by first assuming all of the Employer's remaining obligations to Feldman and/or McGladrey, then remitting the balance to the Employer in twelve (12) equal monthly installments commencing thirty (30) days after date of Employee's termination.

Among the factual allegations set forth in the complaint are that neither of the individual defendants were authorized to take with them laptops or handheld devices which had been provided to them by Grassi and which were exclusively for their use in servicing Grassi clients. Nevertheless, they both deliver them to JR, who then downloaded the material from the computer to their own information base. Grassi also complains that the failure of Logan to give 90 days notice, as was required, hampered Grassi in the collection of accounts receivable and for work in progress from the clients who soon thereafter followed the employees to Janover. A further impact of the failure to give the 90 – day notice was that Grassi lost the opportunity to provide additional services for this 90 day period.

There then follow Nine Causes of Action:

- for injunctive relief against Janover, Logan and Schosid:
- tortious interference with contract or business relations against all defendants ;
- unfair competition against Janover by misappropriating the converted confidential business information of Grassi & Co.;
- unfair competition against Janover in that they took affirmative steps to induce Logan to breach the 90 day notice period contained in the Grassi agreement for the purpose of usurping to itself the opportunity to earn fees from Grassi clients during that period;
- conversion against Janover by virtue of their company downloading data and files from hard drives and/or handheld devices onto its own computer system;

• breach of contract against Logan for soliciting, diverting or taking away several of Grassi clients and interfering with the relationship between Grassi and its current or former clients, and providing confidential information to Janover for its use and benefit in violation of the confidentiality provision of the Grassi & Co. Agreement;

• breach of contract against Schosid in that he violated the Confidentiality Provision of the Grassi & Co. Agreement by soliciting and diverting or taking away Grassi clients, interfering with the relationship between Grassi and its current or former clients, and providing confidential communications to Janover for its use and benefit;

• declaratory judgment against Logan and Schosid pursuant to section 12 of the Agreement, to the effect that Grassi was caused to expend funds and assume liability to resolve claims by RSM in order to enable Logan and Schosid to service clients at Grassi, which were formerly at RSM McGladrey, Inc. and Feldman Meinberg & Co., LLC, and that, as a consequence, they are obligated to reimburse Grassi 125% of the amount paid by Grassi, and assuming future payments to which Grassi is obligated; and,

• breach of a duty of loyalty, and faithless servant claim against Logan and Schosid.

Defendants' Affirmative Defenses and Counterclaims

In their answer to the First Amended Verified Complaint defendants included seven affirmative defenses:

• Schosid's termination on or about June 9, 2008 voided any restrictions on his solicitations or servicing of former clients of Plaintiff or use of information pertaining to such clients ;

• the former clients of plaintiff who elected to have their accounting work

performed by Janover are "lost clients" within the meaning of the December 2007 agreement and cannot be the subject of any claim by the plaintiff;

• in section 12 of the Plaintiff's Non— Equity Officer Agreement with Logan, Plaintiff agreed that if clients who were the subject of the settlement and release agreement of December 2007 were taken by either Logan or Schosid, Plaintiff's sole remedy was a stipulated sum;

• clients of Plaintiff who were serviced by Logan or Schosid prior to their beginning work for Plaintiff are not covered by the settlement and release agreement of December 2007 and are exempted from the restrictive covenant contained in the Non— Equity Officer Agreement executed by Logan and Schosid, and Plaintiff is not entitled to any relief for their providing service to these clients at Janover.

• the restrictive covenants are over-broad, unduly burdensome and unreasonable;

• the sought-after injunctive relief is over-broad and inequitable;

• Plaintiffs equitable claims are barred by their own inequitable conduct and unclean hands;

The Answer also interposes the five following Counterclaims:

• On or about October 2, 2008 Plaintiff issued identical Subpoenas Duces Tecum and Ad Testificandum on eight separate companies, seven of whom were clients of Logan and/or Schosid to whom they provided professional services prior to joining Grassi. The eighth subpoena was upon Wessels Financial Services, Inc., a Schosid client acquired and developed while he was an employee of Grassi. Because his employment terminated within one year of its commencement, he was entitled to solicit all of the pre— Grassi clients, including all recipients of a subpoena with the exception of Wessels. Schosid was fired on or about June 9, 2008, before the expiration of one year and without cause. This constituted a

material breach of Schosid's employment agreement and, as a result, he should have the right to solicit and provide professional accounting services for Wessels while an employee of JR. It is further claimed that JR had the right to solicit all of the subpoenaed businesses. Plaintiff knew or should have known that the subpoenas were served for an ulterior purpose, that is, to intimidate the departing clients of Grassi. Further claim is made that the subpoenas were defective in a variety of ways, including that they were returnable in a county in which the recipient did not reside. Claimed damages are in excess of $20,000;

• The second and third counterclaims allege failure to pay unused vacation time for Schosid in the amount of $6,418.60 and a similar claim on behalf of Logan in the amount of $4,687.50;

• the fourth counterclaim relies upon the section 8 (b) of the employment agreement which provides that if a party is terminated by mutual consent of the employer and the employee the employee is entitled to the sum of $25,000 after the expiration of two years following such termination provided there has been no breach of the employment agreement by the employee. The involuntary termination of Schosid was a material breach which excused him from further performance under the employment agreement. The commencement of this action by Grassi is an anticipatory breach and a repudiation of its obligations under the agreement, and Schosid therefore believes that Grassi will not honor the agreement to pay $25,000 in two years. Defendant Schosid requests a declaratory judgment that he is not in breach of the employment agreement, that he is no longer bound to further performance under the employment agreement because of Grassi's breach, and that Grassi is presently obligated to pay him the sum of $25,000 discounted from June 27, 2010 to present value as of the date of payment;

• the fifth counterclaim makes similar allegations with respect to anticipatory breach on the part of Grassi on behalf of Logan, and also claims entitlement to the sum of $25,000 discounted to present value from June 27, 2010.

DISCUSSION

The foregoing scenario brings to mind the observation of former Chief Judge Kaye in *Graubard Mollen Dannett & Horowitz v. Moskovitz,* 86 N.Y.2d 112 (1995), that the "revolving door" had become a fixture in the modern-day law firm. The only significant difference in this case is that it involves accountants as opposed to attorneys. While the parties have clearly divergent views of the import of the of the agreements which Logan and Schosid signed with Grassi, the one fact that seems incontrovertible is that the major player in this drama is Alan Hoffman. The seven "pre-Grassi" clients whose services were the sought-after prize, were clients of Hoffman, who Logan and Schosid were minding during the 2-year period during which Hoffman was precluded from servicing them as a result of his own non-competition clause with his former employer, AETBS.

Plaintiff's Position as to Reimbursement for Clients Serviced by Logan and Schosid

Plaintiff's position is best summarized by the Appendix annexed to its Memorandum of Law in Opposition to the Motion, which divides 45 clients into four categories:

A. Hoffman clients serviced by Logan;

B. Hoffman clients serviced by Schosid;

C. Logan/Schosid clients developed at RSM/Feldman;

D. Logan/Schosid Clients developed at Grassi & Co.

Columns "A" and "B" are the 11 client groups contained in Exh. "C" to the RSM Settlement Agreement. Plaintiff contends that Defendants are responsible for 150% of the fees earned pursuant to paragraph 12, the non-solicitation portion of the agreement. The schedule of fees charged and 150% of those fees is as follows:

Column	Fees Charged	150% of Fees Charged
A	$478,006.00	$717,008.00
B	$80,519.00	$120,779.00
C	$360,437.00	$540,655.50

D	$38,750.00	$58,125.00
TOTAL		$1,436,567.50

Recovery of Costs Incurred by Grassi in RSM Settlement

The following time frame may prove instructive:

September 2005 - AETBS, the employer of Hoffman, Schosid and Logan, is acquired by RSM;

September 30, 2005 - Hoffman leaves AETBS, leaving behind Logan and Schosid, who sign 2-year restrictive covenants as part of their employment agreements with RSM;

May, 2006 - Logan and Schosid leave RSM to join Feldman, Meinberg & Co. (FM);

November 27, 2006 - RSM commences actions against Logan and Schosid for wrongfully servicing RSM clients at FM;

January 1, 2007 — May 15, 2007 - Logan and Schosid have meetings with Grassi;

May 17, 2007 - Grassi hires Logan and Schosid, who enter into Employment Letters;

July 1, 2007 - Effective date of Logan and Schosid's employment with Grassi, bringing with them pre-Grassi clients;

November 1, 2007 - Hoffman joins JR;

November 15, 2007 - Hoffman notifies former clients of his partnership at JR;

December 2007 - RSM suit against Logan and Schosid resolved by agreement providing for damages of $248,000, but providing in the attached Schedule "C" 11 client groups eligible to become "lost clients", at which time a designated amount of the $248,000 would be reduced from the amount payable, but in no event would the reduction exceed $148,000.

January 2008 - Joy Germont advises Grassi that returning to Hoffman at Janover effective February 1, 2008;

March 8, 2008 - Lovett terminates relationship with Grassi and engages Hoffman;

May 21, 2008 - Young Woo & Associates rejoins Hoffman at Janover;

June 12, 2008 - Schwalbe Group rejoins Hoffman, reducing the $248,000 to $100,000.

June 30, 2008 - Logan and Schosid depart Grassi.

It is clear from the foregoing that neither Logan nor Schosid took with them any of the foregoing clients, since they had already departed by the time they left. Paragraph 12 of the Grassi Employment Agreement requires a departing employee who takes with him a client who Grassi was required to pay a previous employer to obtain or retain, to reimburse Grassi 125% of the amount that the Employer has paid to obtain the client, plus all Employer's out-of-pocket expenses in connection with negotiations to resolve such controversies. There appear to be only two of these pre-Grassi clients who were taken by Schosid after his firing, and for whom Grassi had incurred expenses in resolving the claims made by RMS, the Caton and Wessels Groups.

Grassi's total claimed expenditures to obtain the right to service the pre-Grassi clients who migrated from RSM appear to be $48,514.00, consisting of 125% of the $24,800 paid by Grassi to RSM and $17,514 in legal fees to settle the RSM actions. Parenthetically, had either Schosid or Logan remained past June 30, 2008, a further payment of $24,800 would have been required toward the reduced liability of $100,000. As pointed out by movant, the pre-Grassi clients who went to Hoffman accounted for 85.2% of the $248,000, for which no reimbursement to Grassi is due. The balance of 14.8% is attributable to Schosid. If Schosid is responsible on the basis of paragraph 12 of the Agreement, he is indebted to Grassi in the amount of $7,180.02.

Defendants contend that Schosid is not responsible at all because his discharge relieved him from obligations under the non-solicitation portion of the agreement. This position is sustained by the Court of Appeals. (*Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 N.Y.2d 84 [1979]). Recognizing the strong public policy against non-competition agreements, and forfeiture of benefits for engaging in competition, the Court stated that "(w)here the employer terminates the employment relationship without cause, however, his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability

to impose a forfeiture." *Id.* at 89.

There is no reason to address the reasonableness of the repayment provision. The discharge of Scosid without cause terminated his obligations under the non-solicitation and non-competition of the employment contract. While the Court in *Post* concluded that the voluntariness of Plaintiff's termination was not an issue for summary judgment, there is no controversy in this case that Schosid was discharged against his will and without cause. Plaintiff is not entitled to recover from either Logan or Schosid for the cost incurred to arrange for the servicing of clients who were previously clients of RSM.

Logan/Schosid Clients Developed At RSM/Feldman

These clients, contained in Column "C" of Plaintiff's Appendix, are not among those for whom Grassi was required to pay RSM in the settlement agreement. They are, as defined in paragraph 12, clients Defendants are entitled take with him in the event of their termination or discharge prior to the first anniversary of their employment at Grassi. Plaintiff is not entitled to recover for the loss of these clients.

Logan/Schosid Clients Developed at Grassi & Co.

The Employer's "legitimate interest" argument would seem to have its strongest footing in this Class of clients. But it is less so than, for example, if the clients were acquired directly by Grassi who were then assigned to Logan or Schosid. The claim that Grassi was the owner of the "good will" represented by these clients would be far stronger if it had not been Logan or Schosid who actually developed the client and presented them to Grassi.

Of the three clients in Column "D", two of them, Beth Caton and Wessels were acquired by Schosid, who was discharged without cause. As a consequence, the covenant not to compete was unenforceable. *Post, supra. See also, Sifco Industries, Inc. v. Advanced Plating Technologies,* 867 F.Supp. 155, 158 (S.D.N.Y. 1994). The third client, Mrs. Wong, was a client of Logan's. His experience with advancing to her $400 of the $1,650 bill received from Grassi for Accounts Receivable and Work in Progress is discussed at page 20 of his affidavit attached to the motion.

The fundamental principle involving restrictive covenants is that they are generally disfavored by New York courts, and will be enforced only if they meet the three-pronged test that the restraint 1) is no greater than is required for the protection of the legitimate interest of the employer, 2) does not impose undue hardship on the employee, and 3) is not injurious to the public. (*BDO Seidman v. Hirshberg,* 93 N.Y.2d 382 [1999]). An employer has a legitimate interest in retaining the good will of a client who comes to the firm, and on behalf of whom the firm has made expenditures to acquire and service the client. The only employer interests which will justify enforcement of non-competition or non-solicitation agreements are "protection against misappropriation of the employer's trade secrets of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." *Id.* At 388 — 389.

A fair reading of *BDO Seidman* leads to the conclusion that the sole remaining client in Column "D" propounded by Plaintiff, was not a client of Grassi which the company developed through a client expansion program or other unusual expenditure. It is true that Grassi paid Logan to perform work for Wong, but Grassi received the profit from those efforts, despite the fact that they did not develop or otherwise subsidize the client. Plaintiff is not entitled to recover 150% of the fees charged any of the clients set forth in the Appendix submitted by Plaintiff.

It seems abundantly clear that Grassi, a true entrepreneur, sought as his ultimate goal the joinder by Hoffman into a partnership at Grassi & Co. Toward that end, he offered employment to Logan and Schosid, who were, to a very large extent, servicing the substantial clients previously developed by Hoffman. It was a well-reasoned approach to the expansion of the company he founded, and his efforts would have been fully requited had not Hoffman decided to affiliate with JR instead.

Logan's Failurt to give 90-Day Notice of Termination

Plaintiff contends that Logan was obligated to give 90 days notice prior to his termination of employment. As a consequence, Plaintiff alleges, it was deprived of the opportunity to perform an additional one-quarter years work, and further, that it hampered their collection of open accounts receivable and for work in progress from departing clients. It claims in addition,

that given a 90-day window, they may have been able to retain some of the clients by integrating them into the firm and assigning existing employees to their matters.

Defendant Logan contends that his early departure was approved by Grassi, to which Grassi responds, somewhat ambivalently, that he did not give such approval, but he was hardly in a position to compel Logan to work an additional three months, essentially against his will.

While the damages claimed as a consequence of the failure to give the requisite notice are somewhat speculative, the issue with respect to Grassi's alleged waiver of the 90-day notice requirement is a factual question which precludes summary judgment on this question.

Tortious Interference alleged against All Defendants.

Plaintiff's contention in this regard is that Defendants interfered with its collection of unpaid accounts receivable and work in progress from their clients who departed to JR. Based upon a review of the pleadings, transcripts, and arguments propounded by both parties, there is no credible basis upon which a fact finder could reasonably conclude that any of the Defendants took affirmative steps to interfere with Grassi's efforts to recover for work which they performed. The previously cited example of Mrs. Wong is emblematic. While Plaintiff contends that Mrs. Wong's statement was that she was advised not to pay the bill rendered by Grassi, the full story is that she was told not to pay the bill until she received Logan's own $400 to make up the difference between what she agreed she owed and what she was billed.

There is no substantial evidence in the record presented that any of the Defendants actively sought to interfere with the recovery by Grassi of payment for accounts receivable or for work in progress. The mere fact, as stated in the affidavit of Ms. Glattfelder, that some of the outgoing clients questioned the efficacy of charges for previously unbilled services, is certainly not surprising. But there is no evidence that any resistance on their part to pay such bills as rendered was engendered by Defendants. Neither does there appear to be any rational basis for Defendants to do so. It was no financial benefit to them if the returning clients did not pay the bills of the outgoing firm.

Misuse of Plaintiff's Property by Janover

These claims appear to be much ado about nothing. It is true that the hard drives and handheld devices which Logan and Schosid took with them when they left Grassi were property of the Employer. It was certainly not the intention to steal the drive or the handheld device, which are worth a few hundred dollars. It is the use of the contents of the drive and handheld which Plaintiff challenges. There is no evidence that JR did any more with the information than Grassi did with the same items brought by Logan and Schosid from RSM when they arrived at Grassi. Logan and Schosid were entitled to take with them clients whom they had brought with them to Grassi, because they left within the first year. Of necessity, this includes the client information contained on their laptops, which is also contained in Grassi's computers.

Other than this information, there is no evidence that JR acquired any economic advantage by virtue of the acquisition of proprietary information belonging to Grassi. This is particularly apt in view of the fact that no Grassi client who wasn't either brought or developed there by the individual Defendants has migrated to JR.

Certainly, if an employer has information , such as a formula, data compilation, or process , the value of which is enhanced because it is not generally known in the community, and the employer takes reasonable steps to maintain the secrecy of the information , it is referred to as a trade secret, and is regarded as proprietary, and is entitled to protection from misappropriation. (*Ashland Management, Inc. v. Janien,* 82 N.Y.2d 395, 407 [1993]). There is no allegation that Defendants misappropriated proprietary software programs, and there has been no evidence during the course of extensive discovery that they did. Defendants were entitled to the client data for the clients who preceded or followed them to JR, and there is no showing that they downloaded or retained more than that to which they were entitled.

Defendants acknowledge that they had in their possession the hard drives and handheld devices belonging to Grassi for some three weeks. All of the information on these devices was also in the possession of Grassi, and they were not deprived of anything other than the use of the hard drive and handheld for three weeks. This is inconsequential.

Wrongful Solicitation of Clients

Plaintiff's claims with respect to the alleged improper solicitation of clients are based on no more than surmise. Logan and Schosid, as well as everyone else, recognized that the Hoffman clients they were servicing at Grassi were very likely to return to him upon the expiration of his two-year restrictive covenant. The fact that they did not fight valiantly to retain them at Grassi, or even helped one of the Hoffman clients draft their notice of termination of services to Grassi, does not reflect disloyalty, only acceptance of the inevitable. Plaintiffs attempts to correlate the migration of clients to JR while Logan and Schosid were in the employ of Grassi with the resistance of some of those clients to pay for work in progress or for previously unbilled services has no factual foundation. As previously noted , there is no rational reason why Defendants would discourage payments of bills from Grassi . There is certainly no evidence that they did .

CONCLUSION

The motion for summary judgment dismissing the complaint against the Defendants is granted as to the First Cause of Action seeking injunctive relief against all Defendants. There is no evidence that Plaintiff has sustained damage as a result of conversion of confidential and proprietary information, or tortious interference with contracts which constitute the premise for the relief requested. Neither has Plaintiff demonstrated that even if they were damaged, that they could not be made whole by the payment of monetary damages.

The motion is granted as to the Second Cause of Action, alleging tortious interference with contract or business relations on the part of all Defendants.

It is also granted as to the Third and Fourth Causes of Action alleging unfair competition against Janover. Plaintiff has failed to elicit any evidence that JR misappropriated confidential information or billed former Grassi clients for work actually performed by Grassi. Neither has it adduced any evidence that Janover induced Logan to depart from Grassi without providing the ninety-day notice provided for in the contract between Logan and Grassi.

Summary judgment dismissing the Fifth Cause of action is granted. In order to succeed on this claim, Plaintiff would have to establish a misappropriation and misuse of proprietary

information belonging to Grassi. The material which JR obtained and retained was client information for their own clients, which they were entitled to. There is no evidence that Grassi software or other "trade secrets" were acquired, much less used by JR.

The Sixth Cause of Action alleges breach of contract against Logan. It claims that Logan solicited and attempted to divert Grassi clients, interfered with the relation ship between Grassi and its clients in the collection of final bills, and provided confidential information to JR in violation of the Confidentiality Provision of the Grassi Agreement. Plaintiff has failed to submit any evidence as to such action by Logan. The motion for summary judgment dismissing this cause of action is granted.

The Seventh Cause of Action alleges the same misconduct on the part of Schosid. Aside from the fact that Plaintiff has produced no evidence of such activities, Schosid was terminated without cause, and the mutuality of contract ceased to exist at that time.

The Eighth Cause of Action seeks a declaratory judgment against Logan and Schosid to the effect that they are responsible under Paragraph 12 of the Grassi Agreement to reimburse Grassi for 125% of the amount paid by Grassi to Feldman or McGladrey (RSM) to permit them to service the clients who followed them to Grassi. For the reasons previously stated, neither Logan nor Grassi are obligated to reimburse Grassi under Paragraph 12. The motion for summary judgment dismissing this Cause of Action is granted.

The motion for summary judgment dismissing the Ninth Cause of Action is denied as to Logan but granted as to Schosid. This cause of action alleges failure to give proper notice of intention to leave the employ of Grassi, falsely advising Grassi that there were no disputes with respect to outstanding Grassi and company invoices as to departing clients, furnishing JR with electronic data which pertained to Grassi clients, and communicating with Grassi clients as to their intention to join JR so as to induce clients to terminate their relationships with Grassi, and to facilitate the ability of JR to commence a business relationship with these clients.

The only evidence adduced as to the notification by Logan and Schosid to clients that

they were relocating to JR was on June 27 and 30, when their employment at Grassi terminated. Such notification is not improper since clients are certainly entitled to know that the person who has been servicing their account is departing . Whether a client decides to follow the departing accountant or not, is strictly their decision . The other bases for this cause of action have already been discussed and shown to be without merit, with the sole exception of the failure of Logan to give Grassi the ninety-day notice which he was required to do. There is no doubt that he left within 30 days of advising Grassi of his intentions , but there is a serious factual issue as to whether or not Grassi acquiesced in this shortened notice .

Therefore, to the extent that the motion seeks to dismiss the ninth cause of action, insofar as it alleges the failure of Logan to give appropriate notice before departing , the motion is denied. It is in all other respects granted.

Submit Judgment.

This constitutes the Decision and Order of the Court.

Dated: October 26, 2009

J.S.C.