

Kaplan v BST Advisory Network, LLC

2009 NY Slip Op 33086(U)

December 24, 2009

Supreme Court, New York County

Docket Number: 602820/07

Judge: Michael D. Stallman

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

Index Number : 602820/2007

PART 7

KAPLAN, ELLIOT L.

vs
BST ADVISORY NETWORK, LLC

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 602820/07
MOTION DATE 10/19/09
MOTION SEQ. NO. 003
MOTION CAL. NO. 86

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... <i>(+meas)</i>	<u>1-6</u>
Answering Affidavits — Exhibits <u>A-D</u> <i>(+meas)</i>	<u>7-8</u>
Replying Affidavits <i>(+meas)</i>	<u>8 9</u>

(+ papers on seq 04)
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed memorandum decided and order*

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/24/09

[Signature]

J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 7

-----X

ELLIOT L. KAPLAN,

Index No. 602820/07

Plaintiff,

DECISION AND ORDER

- against -

BST ADVISORY NETWORK, LLC, BOLLAM,
SHEEDY, TORANI & CO., LLP, BST
ADVISORS, LLC, JOSEPH A. TORANI,
BRIAN W. NOBIS, STEPHEN L. FERRARO,
RONALD L. GUZIOR, JOHN R. JOHNSON,
JEFFREY L. SAPPER, JEFFREY P. ROUDE,
ANDREA MILLER and JOHN and JANE DOES
1-10,

Defendants.

-----X

HON. MICHAEL D. STALLMAN, J.:

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

Motion Sequence Nos. 003 and 004 are consolidated for disposition. In Motion Sequence No. 003, plaintiff Elliot L. Kaplan moves, pursuant to CPLR 3212, for summary judgment dismissing defendant's counterclaim, and granting him partial summary judgment on his first, second, fourth and fifth causes of action, or alternatively, for an order precluding defendants from introducing certain evidence at trial due to their spoliation of evidence. In Motion Sequence No. 004, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's first through fifth causes of action.

BACKGROUND

This action arises out of plaintiff's alleged termination as a

member of defendant BST Advisors, LLC (BST Advisors) and a partner of defendant Bollam, Sheedy, Torani & Co., LLP (BST Partners). In 2005, plaintiff Elliot L. Kaplan, a licensed Certified Public Accountant, joined the accounting firm of Hoffberg, Oberfest, Burger & Berger CPA's (HOBB) as a partner, pursuant to a written agreement (the HOBB Agreement). On October 2, 2006, the partners of HOBB, including Kaplan, and defendant BST Advisory Network, LLC¹ (BST) entered into a written agreement (the Merger Agreement), whereby the HOBB partners would become partners and/or members in BST and/or its affiliated entities, BST Advisors and BST Partners. Pursuant to the Merger Agreement, plaintiff, inter alia, would obtain a one percent equity interest in BST Partners and a one percent equity interest in BST Advisors. In the instant action, plaintiff alleges that, in June 2007, he was terminated as a member and partner of BST Advisors and BST Partners, respectively (the BST entities).

The instant complaint alleges five causes of action: breach of contract against BST (first), tortious interference with prospective economic advantage (second), defamation (third), violation of the New York Payment of Wages Statute, Labor Law § 190 (fourth), and

¹ According to defendants, BST is the parent and umbrella company of all BST entities, including BST Advisors and BST Partners.

conversion (sixth) against all defendants, and breach of fiduciary duty (fifth) against defendants Joseph A. Torani, Brian W. Nobis, Stephen L. Ferraro, Ronald L. Guzior, John R. Johnson, Jeffrey L. Sapper, and Jeffrey P. Roude, alleged members and/or partners of BST Advisors and BST Partners.

Defendants filed an answer and counterclaims. The counterclaims allege causes of action for breach of fiduciary duty (first), and breach of a restrictive covenant (second).

I

The parties move for summary judgment in their respective favors with respect to plaintiff's causes of action. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

In support of his first cause of action for breach of contract by BST, plaintiff claims that BST breached the Merger Agreement by terminating him, and failing to provide him with the benefits he was

entitled thereunder, including his capital account of \$50,000, termination benefits of \$100,000 and a deferred compensation payment of \$120,000. He also claims that, under the BST entities' policy, he was entitled to a payment of his accrued and unused vacation time of \$13,041.70.

In opposition, defendants argue that plaintiff forfeited his entitlement to termination benefits and deferred compensation, because he violated the non-compete provisions contained in the Operating and Partnership Agreements of BST Advisors and BST Partners (the Operating Agreements), provisions which were incorporated by reference into the Merger Agreement. They also maintain that plaintiff's entitlement to his capital account is also subject to the non-compete provisions, as well as a set-off provision contained in the BST Advisors Operating Agreement. With respect to his accrued and unused vacation time, they maintain that the Merger Agreement relied on by plaintiff does not contain a provision, expressly or by incorporation, providing this benefit.

In response, plaintiff contends that his termination is governed by the Merger Agreement, and not the Operating Agreements, including the restrictive covenants therein. He further argues, that defendants' reliance on the Operating Agreements as controlling is disingenuous, because they did not follow the termination

provisions therein. Furthermore, he maintains that he would have been entitled to payment of his capital account, and a pro rata share of the bonus pool of BST Partners, regardless of competition, which defendants have failed to pay to him.

To prevail on a breach of contract action, a plaintiff must establish the existence of a valid contract, plaintiff's performance of his obligations thereunder, defendant's breach and resulting damages (*see Morris v 702 East Fifth St HDFC*, 46 AD3d 478 [1st Dept 2007]). Plaintiff must set forth the terms of the contract upon which liability is predicated, and whether the alleged agreement was written or oral (*see Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 [1st Dept 1994]).

Here, plaintiff relies on the provisions in the Merger Agreement, and Schedule A attached thereto, regarding his termination and deferred compensation, and his capital account. He acknowledges that the Merger Agreement makes reference to the operating agreements of BST dated January 1, 2002, BST Advisors dated January 1, 2005 and BST Partners dated January 1, 2005 (Plaintiff's affidavit dated 9/4/09, ¶ 8, at 3; plaintiff's deposition taken on 10/21/08, at 55-56; 59), and relies on, inter alia, the involuntary termination benefits provided in the Merger Agreement, as summarized in Schedule A (Plaintiff's affidavit,

supra, ¶ 12, at 4; plaintiff's deposition, *supra*, at 96-97). He, however, claims that the Merger Agreement called for the amendment of those agreements following the merger, and not for its incorporation by reference, as argued by defendants.

The doctrine of incorporation by reference requires that "the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document 'beyond all reasonable doubt'" (*Shark Information Services Corp. v Crum & Forster Commercial Insurance*, 222 AD2d 251, 252 [1st Dept 1995], quoting *Board of Matter of Commrs. of Washington Park of City of Albany of*, 52 NY 131, 134 [1873]). A review of the Merger Agreement, submitted and admittedly executed by plaintiff, discloses that it was "intended to outline the general terms and agreements made between [BST and HOB] and their partners, pursuant to executing addendums to the Operating Agreement and Schedules of the BST Advisory Network, LLC" (Plaintiff's supporting affidavit dated 9/4/09, Exhibit B, the Merger Agreement, Preamble). Further, the Merger Agreement contains references to specific provisions in the aforementioned Operating Agreements, concerning the rights of HOB's partners, including Kaplan, as to, *inter alia*, vesting requirements, deferred compensation, and termination benefits. With respect to the deferred compensation provision, it provides, in relevant part,

that plaintiff "shall receive retirement benefits in accordance with the [Operating Agreements] and schedules" (*id.* at 4). As for termination benefits, it states in the "Insurance Policies and Termination Benefits" provision, that plaintiff "shall receive termination benefits in accordance with [BST's Advisor's] operating agreements and schedules (*id.* at 6). Further, Schedule A, an attachment to the Merger Agreement, lists various forms of termination by a partner, i.e., death, disability, voluntary termination and involuntary termination, and refers to specific provisions in the Operating Agreements (*id.*). Thus, the Merger Agreement clearly and expressly incorporates by reference the Operating Agreements and schedules within the deferred compensation and termination benefits provisions provided therein. Plaintiff fails to point to any provisions in the Merger Agreement, which suggest that an amendment to the Operating Agreement was later intended.

Further, the alleged fact that plaintiff did not receive or read a copy of the Operating Agreements prior to his execution of the Merger Agreement does not excuse him from his obligations thereunder (*see Shah v Monpat Construction, Inc.*, 65 AD3d 541 [2d Dept 2009]). "[H]is ignorance of its provisions must be attributed to "negligence or inexcusable trustfulness"" (*id.* at 544, quoting

Matter of Level Export Corp. [Wolz, Acken & Co.], 305 NY 82, 87 [1953]). Furthermore, he testified in his deposition that he signed the Merger Agreement without seeing a copy of the Operating Agreements because he had negotiated a walkaway provision (Plaintiff's deposition taken on 10/21/08, at 88-89), i.e., a provision that entitled him to voluntarily leave the firm and take his clients (*id.* at 89, 95).

With respect to the specific benefits, the BST and BST Advisors operating agreements provide that deferred compensation benefits are subject to Article 25, Vesting and Competition (BST's Articles of Partnership and Agreement and Schedules dated 1/1/05, Article 21, § 21.1, at 25; BST's Operating Agreement dated 1/1/05, Article 22, § 22.1, at 24-25, respectively). The BST Advisors' operating agreement also states that termination benefits are subject to Article 25, Vesting and Competition (BST's Operating Agreement dated 1/1/05, Article 22, § 22.1, at 24-25). Article 25 of both agreements provides that termination of an individual equity member's interest does not require vesting to obtain his termination and deferred compensation benefits (Article 25, § 25.1). The BST Advisors' operating agreement further provides:

In the event [the] terminated individual equity member does not engage in public accounting (or in any other services which were previously provided by [BST Advisors]

and its affiliates), either on his own account or as a member, partner, independent contractor, or employee of another firm, within a radius of fifty (50) miles from any office of [BST Advisors] or its affiliates within three (3) years of that equity member's termination, and does not violate the terms of Article 32 of this Agreement, then the termination benefit ..., and the deferred compensation ... shall be subject to the vesting percentage listed on Schedule C

(BST Advisors' Operating Agreement, Article 25, Vesting and Competition, § 25.3 [a] at 28). It further states that

[I]n the event such terminated Equity Member does engage in financial/tax consulting or public accounting (or in providing any other services which were previously provided by [BST Advisors] or its affiliates), either on his own account or as a member or employee of another firm within a radius of fifty (50) miles from any office of [BST Advisors] or its affiliates within three (3) years of that individual equity member's termination, or violates the terms of Article 32 of this Agreement, then the Termination Benefits ... and the deferred compensation ... shall be zero

(*id.*, § 25.3 [b], at 28-29). The BST operating agreement also provides similar non-compete provisions (BST's Articles of Partnership and Agreement and Schedules dated 1/1/05, Article 25, Vesting and Competition, §§ 25.3 [a], [b] at 29-30).

Relying on case law regarding non-compete covenants in employment agreements, plaintiff argues that assuming, *arguendo*, that the subject non-compete provisions apply, they are unreasonable, and, thus, unenforceable.

Covenants not to compete contained in employment agreements are

governed by the standard of reasonableness (*BDO Seidman v Hirshberg*, 93 NY2d 382 [1999]). "In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" (*id.* at 389, quoting *Reed Roberts Associates v Strauman*, 40 NY2d 303, 307 [1976]). "[C]ovenants not to compete pursuant to the sale of a business are not treated as strictly as those whose sole purpose is to limit employment" (*Town Line Repairs, Inc. v Anderson*, 90 AD2d 517, 517-518 [2d Dept 1982], citing *Mohawk Maintenance Co., Inc. v Kessler*, 52 NY2d 276 [1981]). "[T]he sole limitation on such a covenant is that the restraint must be reasonable, 'that is, not more extensive, in terms of time and space, than is reasonably necessary to the buyer for the protection of his legitimate interest in the enjoyment of the asset bought'" (*Shearson Lehman Bros. Holdings, Inc. v Schmertzler*, 116 AD2d 216, 222-223 [1st Dept 1986], quoting *Purchasing Associates, Inc. v Weitz*, 13 NY2d 267, 271-272 [1963]).

As argued by defendants, the non-compete provisions were incident to the sale of HOBBS's accounting business and good will to BST, and not a separate employment agreement between plaintiff and BST. The language in the Merger Agreement expressly explains the

transaction as "the aforementioned firms desire to merge their respective professional service firms" (the Merger Agreement, at 1), and sets forth the terms of the merger, including, inter alia, each partner's respective ownership interests, overhead allocation, and transition accounting. Additionally, the Merger Agreement provides for plaintiff's receipt of a \$50,000 credit for his goodwill and clients acquired by BST therein. Thus, the instant non-compete provisions are enforceable as long as they are reasonable as to time and geographical scope (see *Mohawk Maintenance Co. v Kessler*, 52 NY2d 276, *supra*; see also *Purchasing Assocs., Inc. v Weitz*, 13 NY2d 267, *supra*). The subject restrictive covenant of three years within a 50-mile radius is a reasonable means of protecting BST's investment in the asset it purchased (see *FTI Consulting, Inc. v Pricewaterhouse Coopers LLP*, 8 AD3d 145 [1st Dept 2004]).

While there is evidence demonstrating that plaintiff provided services for some of his clients subsequent to his termination, the parties fail to demonstrate that those services were performed within the requisite 50-mile radius. Torani claims that plaintiff performed accounting services within a 50 mile radius from its New York City office, while Kaplan maintains that his New Jersey office in Surf City was outside the requisite 50-mile radius. Thus, there is a question of fact as to whether plaintiff's performance of

accounting services was within the 50 requisite 50 mile radius, and, thus, whether he forfeited his rights to his deferred compensation and termination benefits.

As for plaintiff's claim for his capital account in the amount of \$50,000, defendants do not dispute that, under the Merger Agreement, plaintiff is entitled to recover such amount. However, they argue that, under Article 25, the capital amount due to the plaintiff is subject to the set-off provisions contained in sections 25.4 and 25.5 of the BST operating agreement. These provisions provide as follows:

In the event such terminated individual equity partner does engage in any activities prohibited by this section of the Operation Agreement, then that equity partner must remunerate [BST] for the loss of any clients to that individual equity partner.

The remuneration for each client lost by [BST Advisors] to that equity member shall be the lower of: a) one hundred (100) percent of the annual fee charged by [BST] to each such client during the last year [BST] rendered services to such client; or b) the average of the fees charged by [BST] to each such client during the three years prior to the loss of the client ... Such remuneration shall be paid in equal quarterly installments over a period of three years with interest, commencing when such client is lost

(BST's Articles of Partnership and Agreement and Schedules dated 1/1/05, Article 25, Vesting and Competition, §§ 25.4 & 25.5, at 30-31). The express language in these provisions provides a method for compensating BST for damages due to a party's competition in

violation of the operating agreement. These provisions, however, contrary to defendant's argument, do not require the application of any setoff to plaintiff's capital account.

As for plaintiff's claim for unpaid vacation time, in the amount of \$13,041.70, he relies on the existence of BST's policy as to accrued and unused vacation time at termination, as acknowledged by Joseph Torani, BST's managing partner, in his deposition (Torani's deposition taken on 11/5/08, at 135). Defendants do not dispute that plaintiff would be entitled to receive unpaid vacation pay, pursuant to their vacation pay policy. They, however, dispute the amount. Bruce Woods, BST's firm administrator, claims that all partners in 2007 were entitled to 264 hours per year of unpaid vacation time, earned at the rate of 22 hours per month; and that, for book keeping purposes, a partner was given a full year's vacation time on the books at the beginning of each year. He further contends that, since plaintiff left on June 27, 2007, he only earned 132 hours, and after deducting 47 hours for time that he took, he is entitled to only 85 hours (Woods' affidavit dated 10/8/09, ¶ 4). Woods, however, fails to produce a copy of the policy or a calculation of what is purportedly due to plaintiff. Thus, there is a question of fact as to the amount due to plaintiff for his unpaid vacation time.

Therefore, based on the foregoing, the parties' respective motions for summary judgment on plaintiff's first cause of action for breach of contract are denied. Also, in view of the foregoing, that branch of plaintiff's motion for dismissal of defendants' second counterclaim based on plaintiff's alleged violation of the non-compete provision is denied.

II

The parties also move for summary judgment in their respective favor on plaintiff's second cause of action for tortious interference with prospective economic advantage. To prevail on a claim for tortious interference with prospective contractual relations, a party must show that the alleged tortfeasor wrongfully interfered with the contract for the sole purpose of harming the plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980]; *Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312 [1st Dept 2004]).

Plaintiff alleges that defendants acted to solely harm him in his prospective business relationships by, inter alia, falsely telling his clients, when they called defendants to retrieve their files, that plaintiff took the files from the office or that he deleted them from the computer server when he was there, or refused

to provide his clients with their files. He claims that, on the day of his termination, he was escorted out of his office by Jeffrey Sapper, a BST partner; that he was required to leave many personal items, information and data in his office, including his business and personal address book which had been converted by BST and then saved in Lotus Notes; and that he was required to leave all historical client files, including all electronic data files and information.

He submits affidavits from Michael Lobosco and Livio Forte, his clients, wherein they allege that defendants refused to retrieve their files for them after plaintiff's termination (Plaintiff's moving papers, Lobosco's affidavit dated 9/9/09; Forte's affidavit dated 9/3/09). Lobosco also claims that he was later informed by defendants that if he paid them, they might be able to provide him with any files they had, which Lobosco did. Plaintiff also submits an affidavit from Robert Manning, his colleague, who alleges that, when he attempted to retrieve the files of Richard Saunders from defendants, he was initially advised that the files may have possibly been deleted by plaintiff, since they could not be found on the computer (Plaintiff's moving papers, Manning's affidavit dated 9/7/09). Manning further asserts that, subsequently, he went to defendants' office, and was then able to retrieve some files.

In opposition, Sapper denies Lobosco's account of what allegedly transpired regarding Lobosco's files. He alleges that he told Lobosco that the payment of money involved invoices totaling \$4,722.50 for work that was allegedly performed for personal and business returns, which he agreed to accept a discount for. Sapper further claims that he prepared a CD of Lobosco's records, which Lobosco picked up. Sapper also disputes plaintiff's assertions regarding his day of termination, and instead claims that plaintiff packed approximated six boxes that day, which were not inspected.

Woods also contends that defendants' interactions with plaintiff's clients occurred due to defendants' difficulty in accessing plaintiff's computer files and locating the actual physical files, and not to harm plaintiff's relationships with his clients.

Because there are questions of fact regarding, inter alia, what occurred between plaintiff's clients and colleagues, and defendants regarding the retrieval of their files, and the alleged reasons given for their refusal and/or inability to return them, and whether defendants' conduct was done to solely harm him in his prospective business relationships with his clients (*Newport Serv. & Leasing, Inc. v Meadowbrook Distrib. Corp.*, 18 AD3d 454 [2d Dept 2005]), summary judgment in favor of either party on plaintiff's second

cause of action for tortious interference with prospective economic advantage is denied.

III

The parties also move for summary judgment in their respective favors on plaintiff's fourth cause of action, pursuant to New York Labor Law § 191 for unlawfully withholding wages from him, and, pursuant to Labor Law § 198, for costs and attorneys' fees. Defendant opposes plaintiff's application, claiming that plaintiff is excluded from the scope of Labor Law § 191, since he is a professional making more than \$900.00 a week.

Article 6 of the New York State Labor Law governs the payment of wages and benefits by employers to their employees. In order to prevail on a claim under Article 6, a plaintiff "must first demonstrate that he or she is an employee entitled to its protections" (*Bhanti v Brookhaven Memorial Hosp. Medical Center, Inc.*, 260 AD2d 334, 335 [2d Dept 1999]). Labor Law § 190 (2) defines an "employee" as "any person employed for hire by an employer in any employment." Various subcategories therein include manual workers, railroad workers and commission salesmen (Labor Law §§ 190 [4], [5], & [6]). Labor Law § 190 (7) is a catch-all provision that defines "clerical and other worker" to encompass any employee not included in the aforementioned categories except those

"employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week." Thus, while a professional may qualify as an employee under Labor Law § 190 (see *Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609 [2008]), section 190 (7) clearly excludes those professionals whose earnings exceed \$900 a week (*Lauria v Heffernan*, 607 F Supp 2d 403 [ED NY 2009]). Here, it is undisputed that plaintiff earned in excess of \$900 per week; plaintiff therefore does not qualify as the type of other worker contemplated statute (*id.*).

Therefore, summary judgment is granted in favor of defendants dismissing the plaintiff's fourth cause of action, pursuant to New York Labor Law §§ 191 and 198.

IV

The parties also move for summary judgment in their respective favors on plaintiff's fifth cause of action for breach of fiduciary duties. "In order to establish a breach of contract claim, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct" (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). A fiduciary owes a duty of undivided loyalty to those whose interest the fiduciary is to protect (*Birnbaum v Birnbaum*, 73 NY2d 461 [1989]).

Plaintiff here relies on his relationship with defendants as "members and/or partners in [BST] and BST Advisors" (Complaint, ¶ 54). It is undisputed that a partner owes a fiduciary duty to other partners (*Birnbaum v Birnbaum*, 73 NY2d 461, *supra*), and a member of a limited liability company also owes a fiduciary duty to other members (*Out of Box Promotions v Koschitzki*, 55 AD3d 575 [2d Dept 2008]). Partners are constrained by their fiduciary duties through the life of the partnership (*Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180 [1st Dept 2000], and a dissolution of a partnership dissolves the fiduciary duty between partners (*Allied Bingo Supplies of Florida v Hynes*, 27 AD3d 597 [2d Dept 2006]). This court finds that plaintiff's termination ended the fiduciary relationship between him and defendants, and thus, the alleged acts that arose after his termination, specifically with regard to his clients, cannot constitute breach of fiduciary duty claims. However, those circumstances surrounding his termination, including, *inter alia*, the alleged events leading up to his termination, which are disputed by defendants, constitute issues of fact as to whether defendants breached their fiduciary duty to him. Contrary to defendants' arguments, these alleged acts prior to his termination are not duplicative of his breach of contract claim (*see William Kaufman Organization, Ltd. v Graham & James LLP*, 269 AD2d 171 [1st Dept

2000]; see also *Morgenroth v Toll Bros., Inc.*, 60 AD3d 596 [1st Dept 2009]).

Thus, summary judgment in defendants' favor on plaintiff's fourth cause of action for breach of fiduciary duty is granted only to the extent of dismissing those claims arising after plaintiff's termination.

V

Plaintiff also moves for summary judgment dismissing defendants' first counterclaim for breach of fiduciary duty. This claim is based on plaintiff's competition with defendants while in their employ, solicitation of defendants' clients for plaintiff's future business and diverting defendants' business for his own benefit (Answer, first counterclaim, ¶¶ 7-8).

Plaintiff claims that defendants do not establish that he breached a fiduciary duty. Plaintiff notes that, while Torani testified that plaintiff prepared a few free tax returns, he also admitted that other accountants within the BST entities have prepared free tax returns for friends and family, and that he did not view that as competing (Torani deposition, at 154-158). Torani further admitted that he knew that plaintiff had prepared free tax returns, and did not view it as competing (*id.* at 157).

In opposition, Woods alleges that plaintiff, inter alia, failed

to record time and/or bill for work he performed on defendants' files, which they allegedly never recovered, and proffers names of those client that were not billed, which plaintiff denies.

Because there are disputed facts as to whether plaintiff breached his fiduciary duties while in defendants' employ, that branch of plaintiff's motion for summary judgment dismissing defendants' first counterclaim is denied.

VI

Defendants also move for summary judgment dismissing plaintiff's third cause of action for defamation. In support of his claim, plaintiff relies on the affidavits by his clients, Forte, Lobosco, and Manning, claiming that the statements made to them, i.e., that plaintiff may have taken or destroyed their files unbeknownst to the clients, constitute slander per se. He maintains that they tended to injure him in his business and profession.

"The elements [of a defamation action] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Slander per se is any oral statement that: (1) charges plaintiff with a serious crime; (2) tends to injure another in his

or her trade, business or profession; (3) implies that plaintiff has a loathsome disease; or (4) imputes unchastity to a woman (*Epifani v Johnson*, 65 AD3d 224 [2d Dept 2009]). A plaintiff seeking to recover on a case of action asserted on the basis that defendants' statements have hurt his trade, business or profession must prove that the defamation is of the "'kind incompatible with the proper conduct of the business, trade, profession or office itself' [citations omitted]" (*Liberman v Gelstein*, 80 NY2d 429, 436 [1992]). "The statement must be made with reference to a matter of significance and importance for that purpose'" (*id.*, quoting Prosser § 112, at 791)). In evaluating whether a statement is defamatory, "the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction" (*Dillon v City of New York*, 261 AD2d at 38). Whether words are defamatory presents a question of law for the court to decide in the first instance (*Mondello v Newsday, Inc.*, 6 AD3d 586 [2d Dept 2004]).

A review of the proffered affidavits fails to demonstrate the inclusion of any statement that could be viewed as tending to injure plaintiff in his business or profession. An alleged statement by

Sapper that "it was possible that Kaplan deleted the files because they alleged that they could not find certain files on the computer" (Manning Affidavit dated 9//7/09, ¶ 6) cannot be viewed as slander per se.

Therefore, that branch of defendants' motion for summary judgment dismissing plaintiff's third cause of action for defamation is granted.

VII

Alternatively, plaintiff moves for an order precluding defendants from introducing certain evidence at trial due to their spoliation of evidence. A party seeking spoliation sanctions is required to demonstrate that a "litigant, intentionally or negligently, dispose[d] of crucial items of evidence ... before the adversary ha[d] an opportunity to inspect them" [citations omitted]" (*Kirschen v Marino*, 16 AD3d 555, 555-556 [2d Dept 2005]).

Plaintiff specifically seeks to preclude defendants from introducing signed copies of the aforementioned operating agreements and scheduling records relevant to defendants' counterclaim of breach of fiduciary duty. With respect to the agreements, Torani asserts that he made a mistake when he testified that there were signed copies of the agreements, and confirms that there exist no signed copies of these agreements (Torani affidavit dated 10/7/09,

¶ 11). Thus, a spoliation sanction is not warranted with respect to the operating agreements.

As for the scheduling records requested by plaintiff, defendants have annexed them to Sapper's affidavit dated October 8, 2009, thus providing plaintiff an opportunity to inspect them. In view of the foregoing, that branch of plaintiff's application for an order precluding defendants from introducing the aforementioned evidence at trial is moot.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment, or, alternatively, an order of preclusion is denied; and it is further

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted to the extent of severing and dismissing and the third and fourth causes of action; and it is further

ORDERED that the remainder of the action shall continue.

Dated: December 24, 2009
New York, New York

EMERSON
FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE
S. C.