

B&H Assoc. of N.Y., LLC v Cafarella
2010 NY Slip Op 30335(U)
February 3, 2010
Supreme Court, Nassau County
Docket Number: 000235-10
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**B&H ASSOCIATES OF NY, LLC d/b/a
PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE,**

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiff,

**Index No: 000235-10
Motion Seq. No: 1
Submission Date: 1/25/10**

- against -

**BART CAFARELLA, FERN L. KARHU, REALTY
CONNECT USA, LLC and REALTY LEADERSHIP
GROUP, LLC**

Defendants.

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The following papers have been read on this Order to Show Cause:

- Order to Show Cause, Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affidavits in Opposition (2).....X**
- Memorandum of Law in Opposition.....X**
- Reply Affidavit of J. Dauman and Exhibits.....X**
- Reply Affidavit of R. Depierro.....X**
- Reply Affidavit of J. Wyckoff-Thompson.....X**
- Reply Affidavit of D. Herman and Exhibits.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff on January 6, 2010 and submitted on January 25, 2010, seeking certain injunctive relief. For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause and vacates the

Temporary Restraining Order issued on January 7, 2010.

BACKGROUND

A. Relief Sought

Plaintiff B&H Associates of NY, LLC d/b/a Prudential Douglas Elliman Real Estate (“Prudential” or “Plaintiff”) moves for an Order, pursuant to CPLR § 6301, 1) enjoining and restraining Defendants Bart Cafarella (“Cafarella”), Fern L. Karhu (“Karhu”), Realty Connect USA, LLC (“RCU”) and Realty Leadership Group, LLC (“RLG”) from disclosing, copying, disseminating and/or utilizing any of the confidential and proprietary information of Prudential including, but not limited to, the confidential and proprietary information of Prudential related to its business, including contact information, Listing Agreements, Contracts, Listing Sheets, Lead Sheets, Deal Sheets, notes and memoranda concerning pending and prospective deals and projects, and confidential and proprietary information concerning Prudential’s financial arrangements with its brokers, agents and clients (“Confidential Information”), that Defendants Cafarella, Karhu and others acting in concert with them, allegedly took from Prudential’s offices; 2) directing Defendants immediately to return to Prudential the Confidential Information in the Defendants’ possession, whether in paper and/or electronic form; 3) enjoining and restraining Defendants from using the Confidential Information to solicit any of Prudential’s clients or agents; 4) enjoining and restraining Defendants from using the Confidential Information to divert Prudential’s business to Defendants, or any other person or entity; and 5) directing Defendants immediately to provide Prudential with an accounting of the Confidential Information that Defendants allegedly removed wrongfully from Prudential’s Office, even if that Information is no longer in Defendants’ possession and/or has been destroyed.

Defendants oppose Plaintiff’s application.

B. The Parties’ History

In support of its motion, Prudential provides an Affidavit in Support of Dorothy Herman (“Herman”), the President of Prudential, dated January 5, 2010. Herman affirms as follows:

Prudential owns and operates real estate brokerage offices throughout Long Island and New York City. Prudential hires licensed real estate salespeople and associate brokers to provide real estate brokerage services, on a commission basis, in each of its offices. Prudential also

employees licensed individuals to oversee the management of the salespeople and associate brokers. Herman submits that Prudential owns its listings, contracts, agreements and related information (“Confidential Information”), and that Prudential’s brokers and agents have no proprietary interest in this Confidential Information.

Cafarella is a licensed real estate broker (“broker”) who has worked for Prudential since 1993. Cafarella most recently worked for Prudential in the position of Senior Vice President for Nassau County. In that capacity, he oversaw and managed Prudential’s branch offices in Nassau County. Cafarella was responsible for the marketing and selling of Senior Housing for Prudential. Cafarella earned over \$2.8 million in salary and commissions over the last five (5) years.

Karhu has worked for Prudential since 1990 (Compl. at ¶ 19). Most recently, Karhu served as Manager of Prudential’s Syosset, New York branch office (“Syosset Office”). Her duties included managing the daily operations of the Syosset office, recruiting and training agents and listing properties for sale or lease. Karhu earned over \$2.3 million in salary and commissions over the last five (5) years.

Cafarella and Karhu (“Individual Defendants”), allegedly at Prudential’s “cost and expense” (Aff. of Herman at ¶¶ 11 and 17) developed relationships with real estate developers and builders involved in the construction and sale of senior housing developments (“Senior Housing Projects”) on Long Island. In his role as Senior Vice President, Cafarella was privy to all aspects of Prudential’s Long Island operations, including its commission arrangements with brokers and advertising budgets. Karhu also had access to this information by virtue of the storing of the Senior Housing files in an office in the Syosset Office (“Senior Housing Office”).

On November 30, 2009, Cafarella and Karhu advised Herman that they were leaving Prudential and opening their own brokerage firm. Herman affirms that following the resignations of Cafarella and Karhu from Prudential, Herman learned that Cafarella and Karhu had been planning the formation of this new business, called RCU, for many months, while still employed by Prudential. Herman provides a printout from the New York State Department of State (Ex. 4 to Herman Aff.) reflecting that RCU was formed on November 18, 2009. Herman also provides a printout from RCU’s “Facebook” account asking recipients to join RCU at a get-

together on January 14, 2010.

Herman alleges that the Individual Defendants engaged in improper conduct including 1) “stealing or destroying” every Senior Housing file in a particular office (Herman Aff. at ¶ 25); 2) instructing Prudential employees to shred documents; 3) stealing, destroying, or directing the destruction of documentation pertaining to Prudential’s Syosset Office including a) deal sheets containing information including the contract date, closing date and sales price of transactions completed by Prudential’s Syosset Office (“Deal Sheets”), b) Expense Reimbursement sheets pertaining to the reimbursement of agents’ expenses, and c) an Office Ledger containing information regarding completed transactions (“Ledger”); and 4) instructing a Prudential employee to advise the Syosset agents of a mandatory “emergency meeting” at Karhu’s home (Herman Aff. at ¶ 33) at which Karhu and Cafarella advised the Syosset agents of the opening of RCU and encouraged them to leave Prudential and join RCU.

Prudential filed its verified complaint (“Complaint”) on January 6, 2010. The Complaint contains ten (10) causes of action which are as follows:

- 1) against Cafarella for breach of duty of loyalty and/or fiduciary duty,
- 2) against Karhu for breach of duty of loyalty and/or fiduciary duty,
- 3) against all Defendants for misappropriation of Prudential’s confidential and proprietary information,
- 4) against all Defendants for unfair competition,
- 5) against all Defendants for a constructive trust based on Defendants’ alleged unjust enrichment,
- 6) a permanent injunction against all Defendants seeking the same relief that Plaintiff seeks in the instant order to show cause,
- 7) against Defendants RCU and Leadership for aiding and abetting breach of fiduciary duty,
- 8) against all Defendants for breach of loyalty,
- 9) against all Defendants for an accounting, and
- 10) against all Defendants for corporate waste.

On January 7, 2010, the Court signed a temporary restraining order (“TRO”) that directed that, pending further Order of the Court, Defendants and persons acting under their direction or control are enjoined and restrained from: 1) disclosing, copying, disseminating and/or utilizing any of the Confidential Information of Plaintiff that is not otherwise publicly available; 2) utilizing the Confidential Information to solicit business from any of Prudential’s clients or agents; and 3) utilizing the Confidential Information to divert Prudential’s business to Defendants, or any other person(s), business or entity.

In opposition to Prudential’s application, Defendants provide Affidavits in Opposition of Cafarella and Karhu (“Individual Defendants”) dated January 19, 2010 in which the Individual Defendants affirm as follows:

Cafarella affirms that Herman’s allegations are false. He notes that Herman does not state that she has personal knowledge of her allegations and does not identify the people who allegedly provided her with information regarding Defendants’ alleged wrongdoing.

Cafarella affirms that, in late 2009, colleagues in the real estate industry approached Cafarella about taking on an ownership position in a new company, and managing the daily operations of this new company. This new company (“New Business”) was based on the concept of virtual real estate branch offices that operated electronically, through the internet, rather than out of a physical building. These same colleagues offered Karhu the opportunity to join the New Business as an owner and officer. The participants in this New Business reached an agreement and, in November 2009, formed RLG as the vehicle for the New Business. Cafarella and Karhu intended to resign from Prudential prior to implementing the New Business plan.

Word of the New Business spread in the real estate industry. On November 30, 2009, while at home, Cafarella received telephone calls directing him to attend a staff meeting at Prudential’s corporate headquarters in Huntington (“Headquarters”). One of the callers was Ann Conroy, a Prudential manager in Suffolk County, who told Cafarella that the purpose of the staff meeting was to address the potential competition to Prudential that the New Business might pose. Cafarella, believing that it would be inappropriate to discuss this issue in light of his interest in the New Business, advised Herman that he was involved in organizing the New Business, and therefore would not attend the meeting. He also tendered his resignation to Herman who

accepted it “amicably” (Cafarella Aff. in Support at ¶ 7). In response to Herman’s inquiry, Cafarella told Herman that Karhu was also involved in the New Business. Cafarella then called Karhu and advise her of his conversation with Herman. Karhu advised Cafarella that, under the circumstances, she too would resign from Prudential immediately.

Cafarella disputes many of Herman’s allegations, affirming that 1) after leaving Prudential headquarters on November 30, 2009, he never again entered any Prudential office; 2) he did not take any paperwork or other property from any Prudential office, either before or after his resignation; 3) since his resignation, he has not had access to any of Prudential’s computer files; 4) the photographs that Herman provides of the Senior Housing Office, purporting to constitute proof of Defendants’ unlawful removal of property, are of no evidentiary value because that Office appeared in that condition as early as last Spring; 5) Cafarella and Karhu were primarily responsible for developing the Senior Housing Projects for Prudential; 6) in 2008, due to a decrease in Senior Housing profits attributable in part to the failing economy, the Senior Housing program wound down; 7) by the time the Senior Housing Office closed for business at the end of 2008, all of the files regarding developer customers and unit sales had been delivered to Prudential’s Headquarters; 8) what remained in the Senior Housing Office included a) prospectuses for developments that had sold out, b) batches of builders’ brochures and signage, c) other promotional materials, and d) “the other unwanted detritus of sales campaigns that had long since concluded” (Cafarella Aff. at ¶ 14).

In May of 2009, Karhu expressed her desire to make better use of the former Senior Housing Office, and Cafarella concurred. Karhu and her staff then emptied the same shelves, drawers and desks that appear empty in the photographs that Herman provides in support of Plaintiff’s application. The items that Karhu and her staff took did not contain Prudential’s Confidential Information, which had previously been sent to Prudential’s Headquarters, but rather information that Senior Housing developers had assembled for public dissemination. The items that Karhu and her staff collected were emptied into the dumpster behind the Syosset Office well before Cafarella and Karhu discussed participating in the New Business.

Cafarella affirms that Prudential was aware that the Senior Housing Office had been emptied prior to the Individual Defendants’ departure from Prudential. As proof thereof, he

avers that, in October 2009, Prudential sponsored a fund-raiser and encouraged members of the public to bring items to be sold at a “garage sale” (Cafarella Aff. at ¶ 15). Due to inclement weather that forced the fund-raiser to be held inside, Prudential used the Senior Housing Office for the garage sale, and displayed the donated items on the desks and shelves that had previously been emptied. Many Prudential employees and agents attended the fund-raiser, and none raised any issue regarding the condition of the Senior Housing Office.

With respect to documentation that Herman affirms are missing, Cafarella affirms that those items were routinely forwarded to Prudential’s accounting office at its Headquarters. Moreover, Prudential would not approve agents’ commissions or expenses unless the accounting office had received the supporting documentation. Cafarella submits that the fact that no agent complained that he or she had not received a commission or expense supports his claim that he did not remove or destroy any of these items.

In her Affidavit in Opposition, Karhu confirms the statements in Cafarella’s Affidavit. She also affirms that she never took anything from any Prudential Office, including documents from the Senior Housing Office, and confirms that the Senior Housing information was regularly forwarded to Prudential’s Headquarters where, she suggests, it is probably located now.

Plaintiff provides Reply Affidavits of Herman, Jill Dauman (“Dauman”), Jean Wyckoff-Thompson (“Wyckoff”) and Ruth Depierro (“Depierro”).

In her Reply Affidavit, Herman affirms that Cafarella and Karhu formed RLG in September of 2009, not November of 2009 as Defendants affirm. In support thereof, she refers to the Department of State printout, Exhibit 6 to Plaintiff’s Order to Show Cause, which reflects that RLG was formed on September 9, 2009.¹ She submits that the September 2009 formation of RLG corresponds with the alleged destruction of Prudential documents in September and October of 2009.

Herman also disputes Defendants’ claim that the Senior Housing Projects were winding down in late 2008. Herman submits that, in her capacity as President, she alone has the

¹ This is a different printout than the printout that is Exhibit 4 to Plaintiff’s Order to Show Cause, discussed *supra*, reflecting the formation of RCU on November 18, 2009. Cafarella affirms that he is a managing member of RLG, a real estate broker, which is, in turn, the sole member of RCU, also a licensed real estate broker (Cafarella Aff. in Opp. at ¶ 1).

authority to direct a particular Prudential office to cease operations, and she never directed Cafarella, Karhu or any other Prudential employee to shut down the Senior Housing Projects. She affirms that, at the time of the Individual Defendants' resignations, Prudential still had active Senior Housing listings. For example, Prudential was the exclusive broker for a Senior Housing Development called Plymouth Estates, located in Mount Sinai, New York. On November 23, 2009, the developer of this project sent a letter to Cafarella and Karhu, terminating Prudential's services effective January 1, 2010. Herman provides a copy of that letter (Ex. 8 to Herman Reply Aff.) in which a representative of that development advised Cafarella that, effective January 1, 2010, the development would no longer be using Prudential's services.. Herman suggests that the date of this termination coincided with the opening of RCU.

Herman affirms that, for months prior to his termination, Cafarella was running advertisements for Plymouth Estates. In support thereof, she provides copies of e-mails between Cafarella and Shara D'Ambrosio, a Prudential employee, exchanged in September, October and November of 2009 purportedly regarding that project ("E-mails") (Ex. 11 to Herman Reply Aff.). The penultimate E-mail exchange between Cafarella and D'Ambrosio took place on November 2, 2009. The final E-mail exchange is dated November 30, 2009. In this final exchange, D'Ambrosio asked Cafarella whether he wanted to "run [his] Plymouth ad," and Cafarella responded "Hold off." There is no affidavit from D'Ambrosio confirming that these e-mails pertained to a Senior Housing Project.

Herman also provides a copy of a "Powerpoint" presentation that, she affirms, Karhu created on September 22, 2009 in connection with a future Senior Housing development known as Kensington Estates (Ex. 9 to Herman Reply Aff.). The Powerpoint documentation does not contain a date reflecting when it was created.

Herman avers, further, that on or about September 11, 2009, Karhu conducted a mass mailing of post card solicitations regarding Kensington Estates. She affirms that Karhu submitted this to Prudential as a business expense, for which Prudential reimbursed her. Herman provides a copy of an Expense Report (Ex. 10 to Herman Reply Aff.) that reflects a "Manager Reimbursement" of \$505.00 for postage on September 11, 2009. This entry does not reflect the project or property to which this reimbursement corresponds.

Herman also affirms that Cafarella and Karhu received commissions for the sale of the Senior Housing units until their departure from Prudential on November 30, 2009. She submits that this fact, along with the documentation she provides regarding the Kensington and Plymouth projects, undermines Defendants' claim that Prudential discontinued its Senior Housing division in late 2008.

Herman also disputes the Individual Defendants' claim that the Confidential Information was forwarded to Prudential's Headquarters. Herman provides copies of seventeen (17) exclusive Multiple Listing Service ("MLS") listings with Prudential for a new housing development known as the Horizon. Herman affirms that Prudential is unable to locate Listing Agreements and other pertinent documentation regarding the Horizon listings, which expired between December 16, 2009 and were kept in the Syosset Office. She avers, further, that Defendants subsequently listed three of these Horizon units and provides MLS documentation that lists RCU as a "Listing Broker" for these units (Ex. 14 to Herman Reply Aff.). Herman submits that "[a]s these listings used to be exclusives to Prudential, it appears the defendants [sic] plan to utilize Prudential's confidential and proprietary information to compete with Prudential has come to fruition" (Herman Reply Aff. at ¶ 23).

Herman also makes affirmations regarding information she learned as a result of her conversations with third parties including Barbara Drucker and Michael Constantine. As the statements by those third parties constitute hearsay, the Court will not consider this information in deciding the instant application.

In her Reply Affidavit, Depierro affirms as follows:

Depierro is a broker for Prudential. Karhu, as manager of the Syosset Office, was Depierro's supervisor. On November 30, 2009, Depierro was summoned, via a voicemail broadcast over Prudential's telephone system, to attend an emergency meeting at Karhu's home.

Depierro attended the meeting at which Karhu and Cafarella encouraged Prudential agents to leave Prudential and join Defendants at RCI, their new venture. Depierro affirms that she decided to stay with Prudential.

Depierro also provides affirmations regarding her conversation on December 1, 2009 with another Prudential agent, whom Depierro declines to name. As this third person's

statements constitute hearsay, the Court will not consider those statements in deciding this application.

In her Reply Affidavit, Dauman affirms as follows:

Dauman is an Administrative Assistant at the Syosset Office. Dauman affirms that, at the request of Karhu and Andrea McCarthy (“McCarthy”), Dauman assisted Karhu in removing documents from the Senior Housing Office, “not realizing what they were up to at the time” (Dauman Reply Aff. at ¶ 2). Specifically, Dauman avers that, in September or October of 2009, she observed Karhu remove documents from a file cabinet in the Senior Housing Office and place them on a chair with wheels. Karhu disposed of those documents by placing them in the dumpster in the Syosset parking lot. Dauman could not see which documents Karhu placed in the dumpster because the documents were in folders.

Dauman also affirms that, in September or October 2009, she saw McCarthy, who has since joined Karhu at RCU, shred certain Prudential documents that were kept in the Syosset Office. At the request of Karhu, Dauman assisted Karhu and McCarthy in shredding these documents. Dauman saw the documents that Karhu and McCarthy shredded which included reimbursement forms, with copies of checks attached, that agents had submitted seeking reimbursement for expenses. Dauman was unaware, at the time that she assisted Karhu and McCarthy, that they intended to leave Prudential to join RCU.

Dauman also confirms that, with respect to completed transactions, copies of Deal Sheets and commission checks are sent to Prudential’s central accounting office. She affirms, however, that with respect to pending transactions, both the Syosset Office and Prudential’s central accounting office would maintain copies of the Deal Sheet.

Dauman also discusses an individual named Craig Bell (“Bell”), a Prudential agent who left to join RCU. After Bell’s departure, Dauman noticed that the file for a property on Locust Lane in Syosset, with which Bell was involved, was missing. Plaintiff’s counsel subsequently sent a letter to Defendants’ counsel demanding the return of this file, and on or about January 14, 2010, Bell returned this file to the Syosset Office.

Dauman also avers that in late December 2009, Prudential received a commission check dated December 23, 2009 that contained the notation “Kantor #392” on the bottom of the check.

Dauman affirms that she contacted the closing attorney and received information that this check corresponded to a unit at the Seasons at East Meadow, a Senior Housing development. She affirms, further, that she searched for and was unable to locate a Deal Sheet for this transaction. Dauman also recounts a conversation that she had with a homeowner regarding another property. As Dauman's affirmations regarding these matters are based on hearsay, the Court will not consider them in deciding this application.

Wyckoff, in her Reply Affidavit, affirms as follows:

Wyckoff is the Facilities Director and Vice President for Administration for Prudential whose office is located at Prudential's Headquarters. Wyckoff confirms that Headquarters maintains copies of the Deal Sheets and commission checks with respect to completed transactions. With respect to Cafarella's affirmation that the files regarding closed Senior Housing transactions were forwarded to Headquarters, Wyckoff affirms that she searched for those documents at Prudential's Corporate Headquarters and did not locate any such documents.

C. The Parties' Positions

Prudential submits that it has demonstrated its right to injunctive relief. Prudential argues that it has demonstrated its likelihood of success on the merits by demonstrating that Cafarella and Karhu breached their fiduciary duty and duty of loyalty to Prudential by 1) organizing and forming a competing real estate brokerage firm during their employment with Prudential; and 2) engaging in a scheme to destroy Prudential's business operations by destroying the Senior Housing files. Prudential contends, further, that it will suffer irreparable injury absent injunctive relief because Defendants' alleged misappropriation of the Confidential Information has rendered it impossible for Prudential to compete for Senior Housing business. Finally, Prudential submits that the balance of harm tips in Prudential's favor because Prudential may irretrievably lose business without the injunctive relief, while the Individual Defendants' ability to earn a living will not be substantially affected by the granting of injunctive relief.

Defendants oppose Prudential's application. First, Defendants note that many of Herman's affirmations are not based on her personal knowledge, but rather are allegations based on hearsay, which are insufficient to support Plaintiff's application for injunctive relief. Moreover, Individual Defendants have provided sworn affirmations, in admissible form, refuting

many of Plaintiff's allegations. Finally, Plaintiff has not demonstrated that the client information that Defendants allegedly misappropriated is not ascertainable through public sources and, therefore, not protected as confidential. Accordingly, Defendants submit, Prudential has not made the requisite showing that Defendants improperly appropriated or used confidential documents and is not entitled to injunctive relief.

In its Reply Memorandum of Law, Prudential submits, *inter alia*, that 1) the affirmations of Cafarella and Karhu are belied by the documentary evidence provided by Herman and Dauman; 2) Cafarella and Karhu do not dispute certain of Prudential's allegations, including that a) Cafarella and Karhu instructed Prudential brokers and agents to take Prudential files and computer systems with them when they left prudential; and b) Cafarella and/or Karhu stole the Syosset Office Ledger for the year 2008. Prudential reaffirms its position that it has demonstrated its likelihood of success on the merits, irreparable harm without injunctive relief and a balancing of the equities in its favor.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

B. The Causes of Action in the Complaint

The elements of a claim for breach of fiduciary duty are: (1) existence of a fiduciary relationship, (2) misconduct, and (3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007).

A cause of action for aiding and abetting breach of fiduciary duty requires a *prima facie* showing of 1) a fiduciary duty owed to plaintiff by another, 2) a breach of that duty, and 3) defendant's substantial assistance in effecting the breach, and 4) resulting damages. *Keystone Int'l v. Suzuki*, 57 A.D.3d 205, 208 (1st Dept 2008).

An employee owes a fiduciary duty to his employer as a matter of law and is prohibited from acting in any manner inconsistent with that relationship and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. *Lamdin v. Broadway Surface Advertising Corp.*, 272 NY 133, 138 (1936); *DDS Partners, LLC v. Celenza*, 16 A.D.3d 114, 115 (1st Dept. 2005).

The Court notes the absence of any agreement between the parties restricting Defendants from leaving Prudential and working for another real estate business. Moreover, even in cases in which there is such a covenant, trade secret protection will not attach and their solicitation by the employee will not be enjoined where the employer's past or prospective customers' names are readily ascertainable from sources outside its business, *H & R Recruiters, Inc. v. Kirkpatrick*, 243 A.D.2d 680, 681 (2d Dept. 1997).

The essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff's labors and expenditures by obtaining access to plaintiff's business idea either through fraud or deception, or an abuse of a fiduciary or confidential relationship. *Telecom International v. AT&T*, 280 F.3d 175, 197 (2d Cir. 2001), citing *Katz Dochtermann & Epstein, Inc. v. Home Box Office*, [citations omitted], (S.D.N.Y. March 31, 1999).

In order to maintain an action for an accounting, the party seeking the accounting must establish that a fiduciary or trust relationship exists. *Schantz v. Oakman*, 163 N.Y. 148 (1900);

Akkaya v. Prime Time Transport, 45 A.D.3d 616 (2d Dept.2007); *Darlagiannis v. Darlagiannis*, 48 A.D.2d 875 (2d Dept.1975).

The four elements of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance on the promise, and (4) unjust enrichment. *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976); *O'Brien v. Dalessandro*, 43 A.D.3d 1123, 1124 (2d Dept. 2007).

C. Plaintiff has not Demonstrated a Likelihood of Success on the Merits

The Court concludes that Plaintiff has not demonstrated a likelihood of success on the merits. First, the Court notes that the Defendants did not execute a restrictive covenant that limited the nature and location of their employment if they left Prudential. Second, there are conflicting factual allegations regarding several issues including 1) the circumstances under which Cafarella and Karhu left Prudential, 2) the viability of the Senior Housing Projects in 2009, and 3) the nature and importance of the documentation removed from the Senior Housing Office.

Moreover, the documentation provided by Prudential does not clearly refute Defendants' affirmations. By way of example, 1) it is not clear that the e-mails between D'Ambrosio and Cafarella pertain to a Senior Housing Project, and there is no affidavit from D'Ambrosio regarding the subject of those e-mails; 2) the Powerpoint presentation does not contain a date; and 3) the Expense Report, purporting to demonstrate that Karhu requested reimbursement for mailings related to Kensington, does not reflect the project or property to which this reimbursement corresponds.

Finally, many of Plaintiff's affirmations are based on hearsay statements that the Court may not consider in determining whether injunctive relief is appropriate. Those hearsay statements include 1) Dauman's claim, based on her conversation with an attorney who has not provided an affidavit, that a commission check dated December 23, 2009 pertained to a Senior Housing project, and 2) Herman's affirmations regarding information she learned as a result of her conversations with third parties including Barbara Drucker and Michael Constantine.

In light of the Court's conclusion that Plaintiff has not demonstrated a likelihood of success on the merits, the Court declines to reach the issues of whether Plaintiff has demonstrated 1) that it will suffer irreparable harm without injunctive relief; and 2) that a balancing of the equities favors Plaintiff.

In light of the foregoing, the Court denies Plaintiff's Order to Show Cause in its entirety, and vacates the TRO issued by the Court on January 7, 2010.

All matters not decided herein are hereby denied.

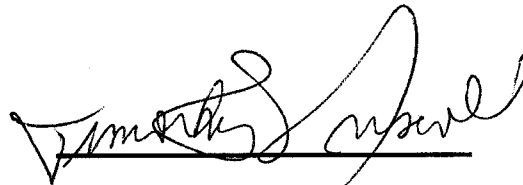
This constitutes the decision and order of the Court.

The Court directs counsel to appear before the Court for Preliminary Conference on March 2, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

February 3, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
FEB 09 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE