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

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice PART 10

Index Number : 110457/2009

NORTHERN STAR LLC

VS.

CSG OFFICE ASSISTANTS, INC.

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

n this motion to/for _____

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Δ failed to appear - submit on default (11:20 am).

Motion is granted in accordance with annexed decision & order. PC scheduled for 4/1/10 @ 9:30 am.

FILED
MAR 08 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/2/10

HON. JUDITH J. GISCHE 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:: Part 10

NORTHERN STAR LLC,

Plaintiff,

Decision/Order

-against-

Index# 110457/09
Seq. No.: 001

CSG OFFICE ASSISTANTS, INC. d/b/a
CONCEPT SOLUTIONS GROUP and
CARAL LOPEZ and ANTHONY MARTINEZ,

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
Notice of Motion	1
Pltf's affirm. Dated 9/29/09, exhibits	2
Def's opp w/ affid. Dated 10/09/09, exhibits	3

Gische, J.

Upon the aforementioned papers the decision and order of the court is as follows:

This is a breach of contract action arising from two lease agreements between plaintiff Northern Star, LLC. ("Northern Star") as landlord and defendants CSG Office Assistants Inc. (d/b/a Concept Solutions Group) ("CSG"), Caral Lopez ("Lopez") and Anthony Martinez ("Martinez") as tenants. Defendant Lopez is the principal of CSG.

Presently, before the court is Northern Star's pre-answer motion to dismiss the counterclaims proffered by defendant Martinez for: (1) tortious interference with contractual relations, (2) tortious interference with prospective contractual relations and (3) tortious interference with economic relationship. Northern Star contends that the counterclaims are barred by the applicable statute of limitations (CPLR §3211 [a] [5]). Alternatively, Northern

Star argues that Martinez has failed to state a cause of action (CPLR §3211 [a] [7]). Martinez, who is *pro se*, opposes the motion to dismiss.

In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the challenged pleadings a liberal construction, take the allegations as true, and provide the pleader with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st Dept. 1997]). In deciding Northern Star's motion to dismiss, the court must consider whether, accepting all Martinez' facts, that they support the counterclaims asserted (Rovello v. Orofino Realty Co., 40 NY2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 NY3d 561 [2005]).

If a motion to dismiss is based upon the affirmative defense that a claim is time barred, once the movant establishes that defense, the burden then shifts to the proponent of the pleading to "aver evidentiary facts that the case falls within an exception to the Statute of Limitations" (Assad v. City of New York, 238 AD2d 456 [2nd Dept. 1997] *lv dism* 91 NY2d 848 [1997]).

Where the party whose pleadings are being challenged submits affidavits and/or other evidentiary materials in opposition to the motion, they may be considered to remedy any defects in the pleading (Leon v Martinez, 84 NY2d 83, 88 [1994]).

Applying these legal principals to the facts of this case, the court's decision is as follows:

Facts and Arguments Presented

Northern Star is the owner and landlord of Units 300 and 301, located at 15-17 West 39th Street, New York, New York 10018 (collectively "Units"). Northern Star entered into two lease agreements for the Units with CSG, Lopez and Martinez, respectively dated June 24, 2003 and August 10, 2004; the terms of each lease terminate on November 30, 2013. The underlying action seeks unpaid rent and other consequent damages based upon the alleged breach of the two leases.

Martinez' counterclaims, as amplified by his affidavits allege:

CSG/Lopez entered into a "License and Consulting Agreement" with Martinez on March 3, 2003. As per the Licensing and Consultation Agreement, Martinez was to provide legal, copying, scanning and printing services to CSG/Lopez. The License and Consulting Agreement was renegotiated and subsequently renewed on February 1, 2004 ("Consultation Agreement"). It remained in effect until 2008.

In pertinent part, the consultation agreement provided that:

(a) Martinez was to receive a fee of $65,000 per year to be paid at the rate of $2,500 every two weeks.

(b) The fee was to be drawn from Martinez' original fee of 50% of the net profits.

(c) If CSG grossed $75,000 in a particular month and had a net profit of $40,000, then CSG would pay Martinez an additional $15,000.

(d) In exchange for this payment, Martinez would license his logo "Litigation Logic" and its associated slogan to CSG. He would also be responsible for providing day to day litigation support services; management and

training of staff; and creating workflow, operating and sales procedures;

(e) The agreement was for a term of one year, automatically renewable for successive additional terms of three years, unless either party at the end of a term sent a notice of termination.

Martinez continued to receive payments under the Consultation Agreement until October 10, 2006.[1]

Martinez alleges that Northern Star, via its agent Philip Silverstein ("Silverstein") and property manager Anthony Doe ("Doe"), began to entice CSG/Lopez to "entertain new business opportunities" from late-2004 to mid-2005. These business opportunities involved renting offices and cubicles, at above market rates, creating a virtual office environment and providing full service staffing for the tenants that Northern Star obtained.

Martinez alleges that Northern Star knew this new business plan would be detrimental to and interfere with Martinez' existing business relationship with Lopez/CSG. Thus, Martinez contends that Northern Star approved terms in the Units' leases allowing the construction of cubicles and approved subleasing arrangements, despite having knowledge of Martinez's consultation agreement with CSG/Lopez. Martinez asserts that on or about March or April of 2005, Lopez notified the New York Department of State that he would no longer be operating under the assumed names of "Litigation Logic" and "Concept Solutions Group."

Martinez further alleges that Silverstein, on behalf of Northern Star, entered into an

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[1] See, Affidavit of James C. Knecht, Vice president of Capco Financial Corporation ("Capco") affixed to defendants Affirmation in Opposition to Plaintiff's Motion to Dismiss the Counterclaims. CSG/Lopez used Capco in connection with its accounts receivables. The last payment submitted on behalf of CSG to Capco was on October 10, 2006.

"off the books partnership" with CSG/Lopez, whereby Silverstein, as an "exclusive marketing agent," would solicit and secure individual persons and businesses to rent space in the Units, in exchange for a fee or percentage of the rent.

Martinez further contends that Silverstein, through "misrepresentation and dishonest means," convinced Lopez that he "already" had tenants available and ready to move in, as well as a marketing strategy in place that would "fill up" the spaces quickly. Martinez asserts that CSG/Lopez, relying on Silverstein's representations, elected to breach its contract with Martinez so it could instead engage in a new line of business under the assumed name of "Suites NY."

Martinez alleges that but for Northern Star's interference with his business relationship with CSG/Lopez, the Consultation Agreement, in all likelihood, would have been extended for the full term of the leases.

In support of its motion to dismiss, Northern Star argues that Martinez' counterclaims, which all sound in tort, are time barred, by the applicable three year statue of limitations under CPLR 214(4), because the counterclaims accrued no later than mid-2005, but this action was commenced on September 14, 2009.

In the alternative, Northern Star argues that all the counterclaims should be dismissed because Martinez has failed to properly plead a cause of action for each counterclaim. In particular, Northern Star argues that Martinez has not alleged facts to establish tortious interference with contractual relations because he has not shown that either Silverstein or Doe intentionally induced CSG/Lopez to breach the Consultation Agreement. Further, it claims that Martinez has failed to allege facts to establish that Northern Star used wrongful means to induce tortious interference with prospective

contractual relations. Finally, Northern Star argues that in New York, no separate cause of action exists for tortious interference with economic relationship.

Discussion

(1) Statute of Limitations

The statute of limitations for both tortious interference with a contract and a prospective contract is three years. It begins to run on the date of the injury, which is the date the plaintiff first had a right to relief. (Kronos, Inc. v. AVX Corp., 81 NY2d 90, 92, [1993]); CPLR 214(4). Accrual cannot occur until the injured party is legally entitled to issue the complaint (LaBello v. Albany Medical Center Hosp., 85 NY2d 701, 707 [1995]). In this case, Northern Star argues that the counterclaims all accrued no later than mid-2005. Therefore, applying the applicable three year statute of limitations to the counterclaims, interposed on September 14, 2009, Northern Star argues the counterclaims are time barred.

In Kronos, Inc. v. AVX Corp., *supra,* the court held that a claim for interference with contract does not necessarily accrue on the date that the underlying contract was breached. The court reasoned that the plaintiff in *Kronos* was not injured at the time of breach because the contracting party continued to honor the financial terms of the contract with the plaintiff by continuing to make payments. The court held instead that the injury to the plaintiff occurred, and the tortious interference claim accrued when the defendant ceased making payments under the contract with plaintiff. It was only then that the plaintiff could allege all of the elements of the tortious interference. Thus, the question before the court on this case is, when did defendant sustain injury by reason of plaintiffs' allegedly

tortious interference (Marshall Investments Corp., et al v. Harrah's Operating Co., Inc., et al., 2009 WL 2440285 (N.Y.Sup.).

The court holds that the claims, as plead, are not time barred. Although Martinez primarily refers to events that transpired in mid-2005, he also alleges that he continued to receive the benefit of the Consultation Agreement until October 10, 2006.

Affording his pleading every favorable inference, the accrual date for the statute of limitations is October 10, 2006, when defendant first sustained the injury. Martinez includes, in his affirmation in opposition to plaintiff's motion to dismiss counterclaims, the Affidavit of James C. Knecht, Vice president of Capco Financial Corporation ("Capco"). Capco was the company CSG/Lopez used in connection with its accounts receivables. He factually supports Martinez' allegation that Martinez continued to receive benefits until October 10, 2006.

The same analysis applies to the other torts, which, according to the allegations, accrued in October 2006. Thus, no claim can be considered time barred at this time.

(2) Failure to State a Cause of Action

(A) First Counterclaim: Tortious Interference with Contractual Relationship.

The elements of a cause of action for tortious interference with contractual relations are: "[1] the existence of a contract between plaintiff and a third party; [2] defendant's knowledge of the contract; [3] defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and [4] damages to plaintiff" (Kronos, Inc. v. AVX Corp., 81 NY2d 90, 92 [1993]). Northern Star claims that Martinez failed to properly plead the third element, which requires a showing that either Silverstein or Doe

intentionally induced Lopez/CSG to breach the contract with Martinez.

In support of his first counterclaim, Martinez states that Northern Star interfered with his contract with Lopez/CSG by engaging and enticing Lopez/CSG with new business opportunities, although Martinez already had a business relationship with Lopez/CSG. Martinez states that Northern Star knew about the Consultation Agreement. Martinez contends further that Northern Star's actions were damaging, causing him to lose the benefit of the Consultation Agreement he had with CSG/Lopez. Further, Martinez alleges that Silverstein, on behalf of Northern Star, not only solicited and secured individual persons and businesses to rent space from CSG, but already had them "lined up." In addition Doe, on behalf of Northern Star, had Northern Star's own people provide the construction of new cubicles at the Units and provided building access key cards to all new tenants of CSG's new business venture. These facts, as plead, support a cause of action against defendants for tortious interference with contractual relationship. See: Shared Communication Services ESR, Inc. v. Goldman Sachs & Co. 23 AD2d 162 (1st Dept 2005).

(B) Second Counterclaim: Tortious Interference with Prospective Contractual Relationship.

Tortious interference with business relations is a distinct and separate claim from tortious interference with contract (Carvel Corp. v. Noonan, 3 NY3d 182 [2004]). It applies to those situations where a third party would have entered into, or extended, a contractual relationship with movant but for the wrongful and international acts of the proponent of the pleading. Where, as here, the alleged interferer is a business competitor, then unless wrongful means are employed, an interference that is intended to advance the competing interest of the interferer is not actionable. In Carvel Corp. v. Noonan, *supra*, the Court of

Appeals held that in order to constitute "wrongful means" the conduct by the competitor must: [1] amount to a crime or [2] constitute an independent tort or [3] be for the sole purpose of inflicting intentional harm on plaintiffs.

In support of his second counterclaim, Martinez states that Silverstein through "misrepresentation and dishonest means" convinced Lopez that he already had tenants available and ready to move in and a marketing strategy in place that would fill up all the spaces. Martinez' allegations do not constitute a crime, nor do they rise to the level of an independent tort. There is also no indication Northern Stars conduct was for the sole purpose of intentionally inflicting harm on Martinez, rather the conduct was to advance Northern Star's business purposes as a competitor. Thus, the second cause of action is severed and dismissed. See: Shared Communication Services ESR, Inc. V. Goldman Sachs & Co., *supra*.

(C) Third Counterclaim: Tortious Interference with Economic Relationship.

The third counterclaim is severed and dismissed because tortious interference with economic relationship is not a recognized cause of action in New York apart from tortious interference with a contractual relationship and a prospective contractual relationship. See: Rest 2d Torts, Div. 9, Ch. 37, GM, p.1 (1979); Id. at §766, p.1; Id. at §766B, p.1.

Conclusion

In accordance with the foregoing, it is hereby:

Ordered that plaintiffs motion to dismiss the counterclaim is granted only to the extent that the second and third counterclaims are hereby severed and dismissed; and it is further

Ordered that plaintiff is to answer to the remaining counterclaim within twenty (20) days of the date of this decision and order; and it is further

Ordered that this case is scheduled for a preliminary conference on **April 1, 2010 at 9:30 am.** No further notices will be sent from the court.

Ordered that any requested relief not otherwise expressly granted herein is deemed denied; and it is further

Ordered that this constitutes the decision and order of the court.

Dated: New York, NY
March 2, 2010

So Ordered:

Hon. Judith J. Gische, J.S.C.