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

PRESENT: EDMEAD PART 35

Justice

Index Number : 109155/2008
CHINNICI, ROY
vs.
V. FRAAS USA
SEQUENCE NUMBER : 002
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE 2/18/10
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

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

FILED
MAY 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The instant motion and cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendant V. Fraas USA, Inc.'s motion (sequence 002), pursuant to CPLR 3212, for summary judgment dismissing plaintiff Roy Chinnici's complaint is granted, and the complaint is dismissed, and the Clerk is directed to enter judgment in favor of this defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiff's motion (sequence 003), pursuant to CPLR 3212, for summary judgment dismissing defendant's counterclaims, is granted, and the counterclaims are dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly. And it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

Dated: 5/10/10

HON. CAROL EDMEAD 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 35

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ROY CHINNICI, Index No.: 109155/08

Plaintiff,

-against-

V. FRAAS USA, INC.,

Defendant.

---x

Edmead, J.:

Roy Chinnici, a sales executive, brought this action for damages based on age discrimination, retaliation and hostile work environment in violation of the New York City Human Rights Law (City HRL), Executive Law § 290, *et seq.* and the Administrative Code of the City of New York § 8-101, *et seq.* Defendant V. Fraas USA, Inc. set forth counterclaims alleging that plaintiff stole customers and took confidential and proprietary information to the benefit of his new employer and engaged in negotiations for employment with a new employer while employed by defendant, thereby damaging defendant in the sum of $500,000.

Defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint (sequence 002). Plaintiff moves, pursuant to CPLR 3212, for summary judgment dismissing defendant's counterclaims (sequence 003).[1]

BACKGROUND

Defendant is a family-owned company engaged in the manufacture and sale of scarves. Defendant's parent company and mill are located in Germany. Robert Schmidt (Schmidt) served as defendant's chief executive officer and general manager. Stephen Beatty (Beatty) served as

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[1]Motion sequences 002 and 003 are consolidated for decision herein.

defendant's director. As director, Beatty was charged with developing and implementing strategic policies for the United States operations. He also managed defendant's executive vice president, James Pell (Pell). Pell oversaw defendant's overall day-to-day operations and reported to both Schmidt and Beatty. Annually, Pell prepared defendant's salary budget and made salary recommendations for employees, which were subject to Beatty's approval.

Plaintiff was employed by defendant as vice president and national sales manager from 1986 until his resignation in 2008. Plaintiff's duties included sales, product development, submissions of reports for sales meetings and interviewing new employees. At all relevant times to the instant proceeding, plaintiff was supervised by Pell and Beatty. At the time of plaintiff's resignation, plaintiff was 63 years old.

Plaintiff contends that, during his employment with defendant, defendant subjected him to discriminatory treatment based upon his age. To that effect, plaintiff argues that he was a productive employee and received favorable evaluations until the year 2006. At this point, defendant began to limit his managerial responsibilities, which affected his compensation. In addition, plaintiff contends that a similarly situated younger employee was not treated in the same manner. Plaintiff maintains that, in an effort to get him to agree to retire at age 65, defendant pressured him to accept a demotion and a decrease in his compensation. Succumbing to this pressure, plaintiff took a position with another employer, David & Young, though he left this position after six months. Plaintiff then began working with his present employer, Johnston's Cashmere in January of 2009.

DISCUSSION

"'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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF'S CLAIM OF DISCRIMINATION BASED UPON HIS AGE

Under New York State Executive Law § 296 (1) and Administrative Code § 8-107, it is unlawful for an employer in its employment practices to discriminate against any person because of his or her age. The New York State (*see* Executive Law § 296 [1] [a]) and New York City laws are in accord with the federal standards under Title VII of the Civil Rights Act of 1964 (42 USC § 2000; *Matter of Aurecchione v New York State Division of Human Rights*, 98 NY2d 21, 25-26 [2002]).

The three-step framework established by the Supreme Court in *McDonnell Douglas Corporation v Green* (411 US 792 [1973]) for cases alleging violations of Title VII of the Civil Rights Act of 1964 is relevant here. First, the plaintiff employee must make out a prima facie showing of discrimination. Second, once the plaintiff has satisfied his burden, defendant must articulate a clear nondiscriminatory reason for the termination or other action. Third, the

employee must show that the defendant's proferred reasons are pretextual (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 316-317 [2004]).

In the recent case of *Williams v New York City Housing Authority* (61 AD3d 62, 65 [1st Dept 2009]), the Appellate Division, First Department, made it clear that the City HRL is to be interpreted more broadly than its state and federal counterparts, in the wake of the Local Civil Rights Restoration Act of 2005, "which mandates that courts be sensitive to the distinctive language, purposes, and method of analysis required by the City Human Rights Law ... requiring an analysis more stringent than that called for under either title VII or the State Human Rights Law."

> [T]he Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its state and federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes, and (c) cases that had failed to respect these differences were being legislatively overruled

(*id.* at 67-68).

"A person alleging racial or other discrimination does not have to prove discrimination by direct evidence. It is sufficient if he or she proves the case by circumstantial evidence" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 326). This is because "[i]t is not often that an employer will use overt methods to discriminate" (*id.* at 322). "[T]he record must therefore be examined as a whole in order to ascertain whether, in light of all the circumstances, the evidence supports a finding of such intent" (*Sogg v American Airlines, Inc.*, 193 AD2d 153, 160 [1st Dept 1993]).

In this case, plaintiff has the burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination by demonstrating that (1) he is a member of a protected class; (2) he was qualified to hold the position in question; (3) he was actively or constructively

discharged, or subject to some other adverse employment action; and (4) that the discharge or other adverse employment action occurred under circumstances giving rise to an inference of discrimination (*Bailey v New York Westchester Square Medical Center*, 38 AD3d 119, 122 [1st Dept 2007]).

For the purposes of this motion, defendant concedes that plaintiff was a member of a protected class, and that he was qualified to hold his position as a vice president and national sales manager.

To support his claim that the terms and conditions of his employment were altered such that he was subjected to an adverse employment action, the plaintiff puts forth that he was constructively discharged due to statements made by defendant which were designed to put pressure on him to retire when he reached the age of 65. In addition, plaintiff puts forth that he did not receive a bonus or salary increase in the year 2007, unlike a similarly situated younger employee of defendant.

> An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be material adverse, a change in working conditions must be "more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation [citations and internal quotation marks omitted]

(*Forrest v Jewish Guild for the Blind*, 3 NY2d at 306).

It is well established that a claim of constructive discharge will only survive where there is evidence that an employer has deliberately made an employee's working conditions so intolerable that the employee is forced to involuntarily resign (*Ioele v Alden Press, Inc.*, 145

AD2d 29, 32 [1st Dept 1989]). "[A] claim of constructive discharge should be dismissed as a matter of law, "[u]nless the evidence is sufficient to permit a rational trier of fact to find that the employer deliberately created working conditions that were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign [internal quotation marks and citations omitted]" (*Spence v Maryland Casualty Company*, 995 F2d 1147, 1156 [2d Cir 1993]).

Plaintiff puts forth as evidence that he was constructively discharged certain statements made to him by defendant in person, as well as through certain e-mail conversations, which made his working conditions so intolerable that he was forced to resign.

To this effect, plaintiff alleges that, in May of 2006, at a sales meeting in Vermont, Beatty called plaintiff into his hotel room and told him that in three years he would show plaintiff how to cut back on his work load. In addition, Beatty told him that his house was worth a good bit of money and advised plaintiff that he could live off of it. Also, in May of 2006, Schmidt allegedly asked plaintiff when he was going to start considering retirement, telling him that if he stayed with the company until the age of 65, he and his family would be invited to Germany for a retirement party. Plaintiff also asserts that Schmidt referred to plaintiff and himself as "two old men," and that he got "the drift" that Schmidt wanted "someone younger" in the role of sales manager (Defendant's Notice of Motion, Exhibit D, Plaintiff's Deposition, at 64).

Plaintiff also puts forth that, in certain e-mail conversations between himself and defendant, his position within the company, as well as the amount of his compensation, was threatened. For example, on August 24, 2007, just after plaintiff responded to his somewhat unfavorable 2007 annual review, Pell suggested to Beatty in an e-mail that perhaps they might

suspend plaintiff for a month without pay in order to send a message to him that his career at the company was in need of help.

In addition, in a series of e-mails between Beatty, Pell and plaintiff, plaintiff was presented with two options:

> If the direction (Option "A") to be taken is one of "can do it all" as has been in the past when market conditions were dramatically different, then we continue on the path we are on. Tough reviews, conflict ... and then officially impacting in the reviews (salary). I see this direction as one of "divergence" in what the company needs and what you can provide (and expect in return).
>
> If the direction (Option "B") is to select the playgrounds of competence and strength, then we have greater harmony as expectation and realization are converging rather than diverging. We would need to sit down and examine what these roles are, and the payment associated with them ... I would like to reconvene in 3 months ... to discuss the 2 options. I would appreciate a written response from both of you regarding this proposition

(*id.*).

Plaintiff communicated to defendant that, as Option B meant a reduction in his base pay, he would not accept such a proposal. Strongly suggesting that plaintiff reconsider, Beatty responded that "as the market changes do not play to your strength. This I have outlined ... we have to compensate in getting these tasks done in the company, it means a shift in tasks for you (my Option "B")."

Initially, it should be noted that defendant concedes that the above-mentioned statements were made. However, as defendant asserts, the statements and e-mail conversations at issue were not so frequent, unpleasant or unbearable that a reasonable person in plaintiff's shoes would have felt compelled to resign. Moreover, most of the statements were made two years before plaintiff's resignation.

To this effect, defendant maintains that, when asked whether the company's retirement age was set at 65, Schmidt testified in the negative, explaining "[t]hat goes for Germany and worldwide" (Defendant's Notice of Motion, Exhibit G, Schmidt Deposition, at 37). Schmidt also maintained that he never discussed a particular retirement age with plaintiff or anyone else. He also testified that he did not express to anyone that people should retire at age 65, though he may have shared with plaintiff that he desired to retire at age 65. Schmidt could not remember whether he had ever referred to himself and plaintiff as "two old men" (*id.* at 42).

Beatty testified that "he never specifically" heard Schmidt talk about a retirement age of 65 for anywhere but Germany, though Schmidt had told him that he would retire at age 65 (Defendant's Notice of Motion, Exhibit F, Beatty Deposition, at 43-44). Beatty explained that "retirement at age of 65 was something that happened in Germany" (*id.* at 43). Pell also testified that, in Germany, everyone retires at the age of 65, as "[t]hey have a social system. You don't have to work after 65" (Defendant's Notice of Motion, Exhibit E, Pell Deposition, at 103). It should be noted that Pell testified that defendant employed approximately 22 employees over the age of 60, and one salesman at the company did not retire until he was over 80 years old.

In addition, a closer review of the aforementioned e-mails reveals that defendant's intention in offering plaintiff two options was to reduce costs in response to lost sales attributed to tough market conditions and the aforementioned merger, rather than age discrimination directed at plaintiff. For example, in addition to the options, plaintiff was also advised by his superiors that "[t]hese factors have led to the position we are in right now. Tough times. We have to honestly address what can be done, and by whom" (Exhibit 2, Beatty E-Mail, dated October 4, 2007). Beatty also stated, "Roy, this is the reason why the past reviews have been

rough, and the question comes up-what is it that you do best ... We have to increase our capacities in the key account management area, and [this is] not your strength" (*id.*).

Thus, as the subject statements and e-mail conversations do not rise to such a level as to have been so unbearable that he was forced to resign, plaintiff has not established that he was constructively discharged on this ground (*Matter of Gold Coast Restaurant Corporation v Gibson*, 67 AD3d 798, 799 [2d Dept 2009] [working conditions were not so intolerable, difficult, or unpleasant that a reasonable person would have felt compelled to resign]; *Thompson v Lamprecht Transport*, 39 AD3d 846, 848 [2d Dept 2007]).

It should also be noted that defendant has sufficiently articulated a clear nondiscriminatory reason for the decrease in plaintiff's compensation. To that effect, defendant argues that, along with a warmer than usual winter and a merger of two major retail companies, which had a negative effect on plaintiff's gross sales, plaintiff's declining job performance was an important factor in plaintiff's declining compensation.

Here, defendant put forth through testimonial evidence that executive level employees were subject to an annual employment review. These reviews were conducted in the month of May, and any salary increases or bonus awards were dated retroactively to April 1, the beginning of the company's fiscal year. In the year 2005, following a healthy fiscal year for defendant, plaintiff generated $10,902,793 in bookings and had a positive performance review overall. In addition, plaintiff received a salary increase and a bonus of $33,000 that year, resulting in an overall compensation package of $181,398.96.

However, in the year 2006, the textile accessory market began to undergo a dramatic change as it became more concentrated. Of significance to defendant, there was a merger/buyout

between Federated Department Stores and May Company (the merger), one of plaintiff's largest clients. By year's end, defendant's senior management team was contemplating avenues for making up the revenue shortfall which resulted from the unprofitable year.

In 2006, plaintiff's sales decreased to $6,020,594, a reduction of almost four million dollars from the year before. During plaintiff's employment review, Pell and Beatty noted things that plaintiff could do to improve his sales and customer practices, especially in the area of the men's accounts at Macy's. Plaintiff was informed that he needed to increase his sales volume and/or increase sales to current customers. As a result of plaintiff's unfavorable performance review, plaintiff did not receive a salary increase in the year 2006, though he did receive a bonus in the sum of $33,000.00. Beatty testified that, commencing with the 2006 employment review and thereafter, it was stated that his performance would be directly related to his compensation package.

In the year 2007, plaintiff's sales continued to decline as the company continued to face tough economic turmoil. Plaintiff's sales decreased by approximately $600,000.00, resulting in a total sales of $5,427,333.00. At the May 2007 annual review, Pell and Beatty outlined various failures on the part of plaintiff which led to serious declines in plaintiff's bookings and sales revenue, and thus, plaintiff's compensation. In order to give plaintiff an opportunity to reverse his declining sales trends, Pell and Beatty asked plaintiff to prepare a written plan detailing how the company could recover the lost department store accounts, as well as how plaintiff planned to manage his existing top four accounts and get them back on track. Plaintiff never submitted said plan.

As a result of plaintiff's declining performance, although plaintiff received his base

salary, he did not receive a bonus. Upset after his review, plaintiff prepared a response in which he outlined his concerns regarding the subject accounts. It was at this point that Beatty and Pell presented plaintiff with the two different options as outlined previously in an attempt to come up with a solution. At no time did plaintiff ever allege that he felt that he was being discriminated against, that he suffered retaliation or that he felt compelled to retire due to age discrimination.

Further, while plaintiff argues that he and his co-worker, Ken Kreiger (Kreiger) were similarly situated, as defendant asserts, while Krieger and plaintiff may have held the same position, their job responsibilities and performance levels differed greatly at the time of the merger. For example, as explained by Pell and Beatty, Kreiger was put in charge of all of the ladies' accounts at Macy's. Kreiger was able to solely handle these accounts, because of his superior technical abilities in the area of analysis, systems coordination and customer practices. In addition, Kreiger supervised more employees for defendant, and he serviced a greater volume of sales than plaintiff. Kreiger was also responsible for preparing all of the sales analyses, reports and comparisons for the customers, and he provided these documents to plaintiff for distribution. Most importantly, as defendant notes, against the backdrop of a declining market, Kreiger increased his sales volume in 2007, whereas plaintiff's sales volume decreased.

As plaintiff has failed to establish that defendant's articulated reasons for plaintiff's reduction in compensation were merely a pretext for unlawful discrimination, that is, that they were false and that discrimination based upon plaintiff's age was the real reason for plaintiff's change in compensation, defendant is entitled to summary judgment dismissing plaintiff's age discrimination claim as against it (*see Forrest v Jewish Guild for the Blind*, 3 NY3d at 308).

To this effect, plaintiff cannot meet his burden of proving pretext simply by refuting

defendant's articulated reason (*see Jordan v American International Group, Inc.*, 283 AD2d at 612 [plaintiff proffered nothing beyond bare, unsubstantiated assertions of animus towards her because of her race]; *Ioele v Alden Press, Inc.*, 145 AD2d at 36). In any event, there is ample evidence in this case that plaintiff was discharged because of his unsatisfactory job performance, and not because of his age (*see id.*).

PLAINTIFF'S CLAIM OF RETALIATION

Plaintiff asserts that defendant retaliated against him for expressing his disapproval of defendant's policy that its employees retire at age 65. "Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 312; Executive Law § 296 [7]; Administrative Code § 8-107 [7]). In order to make out a retaliation claim, plaintiff must show that "(1) [h]e has engaged in protected activity, (2) [h]is employer was aware that [h]e participated in such activity, (3) [h]e suffered an adverse employment action based upon [the] protected activity, and (4) there is a causal connection between the protected activity and the adverse action" (*id.* at 312-313).

Even under the broader construction of the City HRL, it is not possible for defendant's actions to be deemed retaliatory. To this effect, evidence in the record demonstrates that plaintiff did not engage in a protected activity. Here, Pell testified that there was nothing in the employment manual that identified defendant's policies and practices with regard to age discrimination. In addition, Pell testified that he is the individual who makes salary recommendations. He explained that plaintiff's compensation was made up of "two components, his salary and his bonus" (Defendant's Notice of Motion, Exhibit E, Pell Deposition, at 65).

Although defendant's employment manual indicates that pay increases are awarded at the discretion of management, the manual is silent as to bonus compensation. Here, plaintiff did not establish that the bonus was an integral part of plaintiff's compensation, and not merely discretionary on the part of defendant and subject to forfeiture (*see Mirchel v RMJ Securities Corporation*, 205 AD2d 388, 389 [1st Dept 1994] [employees may enforce an agreement to pay an annual bonus made at the onset of the employment relationship where said bonus constitutes an integral part of plaintiff's compensation package]; *Weiner v Diebold Group, Inc.*, 173 AD2d 166, 167 [1st Dept 1991]). In addition, there is no evidence in the record that plaintiff ever complained to defendant that he felt that he was being discriminated against because of his age.

Moreover, defendant demonstrated that it had legitimate, nondiscriminatory reasons for its actions, and plaintiff has not successfully raised an issue of fact as to whether those articulated reasons were merely a pretext. Thus, as there is no evidence that the defendant retaliated against plaintiff for opposing their alleged discriminatory practices, defendants are entitled to summary judgment dismissing plaintiff's claim for retaliation (*see Thompson v Lamprecht Transport*, 39 AD3d at 848]).

PLAINTIFF'S CLAIM THAT HE WAS SUBJECTED TO A HOSTILE ENVIRONMENT

To establish a claim for hostile work environment under state law, plaintiff must demonstrate: (1) that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment; and (2) that a specific basis exists for imputing the objectionable conduct to the employer (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 295). To that effect, a "racially hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently

severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment [interior quotation marks and citation omitted]" (*id.* at 310). A hostile environment will be found if it is demonstrated that a reasonable jury would conclude that "the work environment both objectively was, and subjectively was perceived by the plaintiff to be, sufficiently hostile to alter the conditions of employment for the worse" (*Schiano v Quality Payroll Systems, Inc.*, 445 F3d 597, 604 [2d Cir 2006]).

In order to determine whether a hostile work environment exists, a totality of the circumstances must be considered, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance [internal quotation marks and citation omitted]" (*Forrest v Jewish Guild for the Blind, 3 NY3d at 310*).

The First Department has held that under the NYCHRL, the primary issue for the trier of fact is "whether the plaintiff has proven by a preponderance of the evidence that [he] has been treated less well than other employees because of [his age]," and the alleged offensive conduct need not be severe or pervasive in order to establish a hostile environment (*Williams v New York City Housing Authority*, 61 AD3d at 78). However, conduct that amounts to mere "petty slights or trivial inconveniences," such as that in the instant case, is not actionable (*id.* at 80).

Here, as plaintiff has not demonstrated that a reasonable jury could conclude that he was subjected to conduct so severe or pervasive as to have unreasonably interfered with plaintiff's work performance, as discussed previously, defendant is entitled to summary judgment dismissing plaintiff's hostile environment claim (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 311 [while racial slurs were deplorable, the use of three epithets over a nine-year employment

history did not satisfy test for a hostile work environment]; *Thompson v Lamprecht Transport*, 39 AD3d at 847 [no evidence that plaintiff's coworker's isolated remarks and offensive conduct were so severe or pervasive as to permeate the workplace and alter the conditions of her employment]).

PLAINTIFF'S MOTION FOR DISMISSAL OF DEFENDANT'S COUNTERCLAIMS

In the instant case, defendant set forth counterclaims alleging that plaintiff stole customers, took confidential and proprietary information to the benefit of his new employer, and engaged in negotiations with the new employer while still employed by defendant, thereby damaging defendant in the sum of $500,000.

As to defendant's claim for unfair competition, plaintiff is entitled to summary judgment dismissing this counterclaim, as a review of the record indicates that plaintiff and defendant did not enter into any non-compete agreements which would have restricted plaintiff's ability to compete with defendant in the marketplace.

As to defendant's claim that plaintiff took confidential and proprietary information to the benefit of his new employer, plaintiff is entitled to summary judgment dismissing this counterclaim, as defendant cannot establish confidentiality with respect to its customer information, which is readily available from other sources within the marketplace. "Generally, where the customers are readily ascertainable outside the employer's business as prospective users, or consumers of the employer's services or products, trade secret protection will not attach and court will not enjoin the employee from soliciting his employer's customers" (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392 [1972]). In addition, defendant has not demonstrated that plaintiff's new employer obtained any confidential and proprietary information due to plaintiff or

that it benefitted from such information.

In addition, defendants have not set forth any evidence that plaintiff negotiated for employment with his new employer while still employed by defendant, much less how plaintiff's alleged misconduct caused damages to defendant in the sum of $500,000. "'In pleading special damages, actual losses must be identified and causally related to the alleged tortious act'" (*Emergency Enclosures, Inc. v National Fire Adjustment Company*, 68 AD3d 1658, 1660 [4th Dept 2009], quoting *L.W.C. Agency v St. Paul Fire & Mar. Insurance Company*, 125 AD2d 371, 373 [2d Dept 1986]). "'[G]eneral allegations of lost sales from unidentified lost customers are insufficient'" (*id.*, quoting *DiSanto v Forsyth*, 258 AD2d 497, 498 [2d Dept 1999]).

It should also be noted that defendant has not put forth any opposition to plaintiff's motion seeking dismissal of its counterclaims. Thus, as there has been no evidence set forth to establish that plaintiff engaged in any misconduct that resulted in said damages to defendant, plaintiff is entitled to summary judgment dismissing defendant's counterclaims against him.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant V. Fraas USA, Inc.'s motion (sequence 002), pursuant to CPLR 3212, for summary judgment dismissing plaintiff Roy Chinnici's complaint is granted, and the complaint is dismissed, and the Clerk is directed to enter judgment in favor of this defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiff's motion (sequence 003), pursuant to CPLR 3212, for summary judgment dismissing defendant's counterclaims, is granted, and the counterclaims are dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly. And it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

DATED: May 10, 2010

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD