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

PRESENT: Hon Joan A. Madden PART _____

Index Number : 602866/2009

YO BRACES ORTHODONTICS

VS

THEODOROU, PETER J.

Sequence Number : 003

AMEND PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 is decided in accordance with the annexed Memorandum Decision + Order.

FILED

APR 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: April 14, 2011

_____ J.S.C.

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: IAS PART 11

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YO! BRACES ORTHODONTICS, PLLC, and
ECIC J. PLOUMIS, D.M.D.

Plaintiffs,

-against-

PETER J. THEODOROU, D.M.D. and
THEODOROU ORTHODONTICS, PC,

Defendants.

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Index No. 602866/09

In this action arising out of a contract for the purchase of the defendants' undivided 50% share in an orthodontics practice, plaintiffs move pursuant to CPLR 3025(b) to amend their original complaint. Defendants oppose the motion and cross-move for partial summary judgment. For the reasons set forth below, plaintiffs' motion is granted in part and denied in part, and defendants' cross-motion is granted.

Background

Eric J. Ploumis ("Ploumis") and Peter J. Theodorou ("Theodorou") founded plaintiff Yo! Braces Orthodontics, PLLC (hereinafter "YoBraces") in October 2006, each holding a fifty percent membership interest. After practicing together for approximately twenty-nine (29) months, Ploumis and Theodorou terminated their relationship. On May 14, 2009, Ploumis purchased all of Theodorou's membership interests in YoBraces pursuant to the terms of a written Separation and Purchase Agreement (the Agreement). The original complaint alleges a single cause of action for breach of contract. Specifically, it alleged that defendants breached the Non-Solicitation of Patients and Staff Members clause of the Agreement by improperly

soliciting YoBraces' referral sources. This clause, which is set forth in Paragraph 26 of the Agreement, provides in relevant part that:

> "For a period of one (1) year commencing on the date hereof, Seller and the Employee agree not to knowingly and intentionally solicit, employ, or retain or attempt to solicit, employ or retain whether for themselves or any third party any current patients (except Pablo Peralta) or staff members of the Company and shall not make any effort or remark to discourage any patient, referral source or staff member of the Company from continuing their relationship with the Company or Purchaser; provided, however, such restrictions shall not be applicable to any person that responds to a general advertisement of the Seller s or the Employee s dental practice or solicitation for employment or retention or who was not a member of the Company s staff or patient of the Company or Purchaser in the twelve (12) months preceding the date hereof. Notwithstanding the foregoing, nothing herein shall preclude or otherwise restrict or prohibit Seller and the Employee from contacting, soliciting and receiving referrals from those referral sources of the Company that prior to the date hereof referred patients to Seller or the Employee at Seller s and the Employee s other places of business..."

After a hearing held on November 6, 2009, the court granted, in part, plaintiffs' application for a preliminary injunction enjoining defendants and their agents from communicating to any of plaintiff YoBraces' referral sources for the purpose of discouraging such referral sources from continuing their relationship with either of the plaintiffs. However, the court rejected plaintiffs' position that by seeking referrals from these sources [i.e. sources located within a certain area in Bushwick, where YoBraces is located], [defendants] are in effect discouraging these sources from referring patients to plaintiff[s] and, thus, are violating paragraph 26 of the Agreement. Transcript, Nov. 6, 2009 hearing, at 24.

Plaintiffs now seek to amend the original complaint to (1) increase the amount of damages sought and rephrase their original first cause of action for breach of contract to allege that defendants acted to discourage referral sources in violation of paragraph 26 of the agreement; (2) add an additional cause of action for breach of contract based on defendants retention of

YoBraces staff members; and (3) add three causes of action based on a claim that defendants intentionally and maliciously blocked access to plaintiffs' patient database.

Defendants argue that the motion to amend should be denied as plaintiffs, with knowledge of the facts underlying the proposed amendments for more than a year, did not move to amend until after all depositions were taken. Defendants argue that as a result of the delay they will suffer substantial prejudice if the motion is granted. Defendants also argue the proposed claims are baseless.

Discussion

CPLR 3025(b) provides, in part, that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of all the parties. Leave should be freely given upon such terms as may be just...."

It is well-settled that leave to amend should be freely granted in the absence of prejudice or surprise upon a showing that the proposed amendment has merit. Centrifugal Associates Inc. v. Highland Metal Industries, Inc., 193 AD2d 385 (1st Dept. 1993); Murray v. City of New York, 43 NY2d 400, 404-405, reargument dismissed, 45 NY2d 966 (1977). To demonstrate merit of a proposed amendment the proponent must allege legally sufficient facts to establish a prima face cause of action or defense in the proposed amended pleading. If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as matter of law. Daniels v. Empire-Orr, Inc, 151 AD2d 370, 371 (1st Dept. 1989).

Defendants' position that the proposed amendment is too late does not provide a ground for denying the motion. Mere lateness does not establish grounds to reject the amendment.

Instead, the delayed request must be accompanied by extreme prejudice as well. Edenwald Contracting Co. Inc. v. City of New York, 60 N.Y.2d 957, 959 (1983). In this context, the courts define prejudice as some special right lost in the interim, some change in position, or some significant trouble or expense which could have been avoided had the original pleading contained what the amended one wants to add. Barbour v. Hospital for Special Surgery, 169 A.D.2d 385, 386 (1sr Dept. 1991)(citations omitted); See also, Siegel, New York Practice, 237, at 379 (3d ed. 1999). Here, plaintiffs do not point to any prejudice of this nature. Moreover, "the mere delay in seeking to amend to simply add a new legal theory of recovery is not sufficient to warrant denial of the motion since the original complaints gave notice of the occurrence giving rise to the proposed new cause of action." Goldstein v. Brogan Cadillac Oldsmobile Corp., 90 AD2d 512, 513 (2nd Dep t 1982).

The court will next consider whether the proposed causes of action are of sufficient merit to be added. The proposed new first cause of action, for breach of contract, alleges that "[d]efendants have repeatedly breached the Agreement by making remarks and efforts to discourage [YoBraces] referral sources from continuing their relationship with plaintiff." Amended Verified Complaint at ¶14. Plaintiffs also submit the affidavit of Dr. Roa, a referral source of YoBraces. In his affidavit, Dr. Rao states that "[s]ometime around June 2009, Dr. Peter Theodorou (Defendant) came to my dental office in Bushwick, Brooklyn to solicit patients for his Jackson Heights office and discourage me from continuing my relationship with and referring patients to his former practice, [YoBraces] Orthodontics." November 1, 2010 Roa Affidavit ¶2. However, defendants submit an "amended affidavit" from Dr. Roa in which he states that "Dr. Theodorou did not make any statements disparaging Dr. Ploumis or

[YoBraces]... Dr. Theodorou, also, did not make any statements that I should stop referring patients to Dr. Ploumis or [YoBraces]." November 10, 2010 Dr. Roa Affidavit ¶4. In addition, Dr. Ploumis testified at his deposition that he received references for patients not only from Dr. Roa but also from Dr. Bennet and Dr. Jacobs, two other doctors referred to in the complaint.

Here, based on the subsequent Roa affidavit provided by defendant and Dr. Ploumis' deposition testimony, plaintiffs have not shown the prima facie merit of the proposed first cause of action for breach of contract based on a violation of the Agreement's prohibition against discouraging referral sources from using YoBraces. Moreover, the first cause of action in the original complaint based on solicitation of referral sources is without merit. Therefore, defendants' cross-motion for summary judgment is granted to the extent of dismissing the first cause of action.

Plaintiffs also seek to add a second cause of action for breach of contract, which alleges that defendants employed staff members of YoBraces, in violation of the Agreement. In support of this claim, plaintiffs rely on that portion of paragraph 26 under which defendants agreed that for a period of year they would not solicit, employ or retain, for themselves or third parties, staff members of YoBraces. Plaintiffs also point to Theodorou's deposition testimony that defendants are employing former staff members of YoBraces. Theodorou Dep., at 71-77. Based on the above, plaintiffs have sufficiently demonstrated the prima facie merit of this claim.

Plaintiffs also seek to add a breach of fiduciary duty claim based on allegations that while he was an employee of YoBraces, Theodorou caused changes in plaintiffs' management software package used to keep track of patient billing records and other patient

data, and that he instructed the software vendor to block certain patient information, and that, as a result of these actions, YoBraces was unable to access patient information. When as, here, an employee is alleged to have acted "n a manner inconsistent with his agency or trust"and thus breached his duty to "exercise good faith and the utmost loyalty," the complaint is sufficient to state a cause of action for breach of fiduciary duty. CBS Corporation v. Dumsday, 268 AD2d 350, 353 (1st Dept 2000).

Plaintiffs also seek to add a claim for prima facie tort and trespass to chattels based on allegations that defendants intentionally caused changes to the software and that as a result, YoBraces could not access certain information. The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal. Del Vecchio v. Nelson, 300 AD2d 277 (2d Dept 2002). Central to this cause of action is that defendant s intent has been solely to injure plaintiff, or that defendant acted from disinterested malevolence, meaning that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another. Beardsley v. Kilmer, 236 NY 80, 90 (1923). In other words, a malicious intention must be defendant s sole motivation in order to recover under prima facie tort. Squire Records, Inc. v. Vanguard Rec. Soc., Inc., 25 AD2d 190 (1st Dept), appeal dismissed, 17 NY2d 870 (1966). Recovery is barred if other motives exist, such as profit, self-interest, business advantage. Id. Here, as the gravamen of the complaint is that defendants sought a competitive advantage over plaintiffs, the prima facie merit of the claim of prima facie tort cannot be established.

The tort of trespass to chattel consists of intentionally dispossessing another of the chattel or using or intermeddling with a chattel in another s possession. Hecht v. Components International, Inc., 22 Misc3d 360, 369 (Sup Ct Nassau Co. 2008), citing Restatement (Second) of Torts 217; see also, School of Visual Arts v. Kuprewicz, 3 Misc3d 278 (Sup Ct New York Co. 2003). Here, allegations that defendants intentionally interfered with software and the database belonging to plaintiffs and that as a result, plaintiffs could not access the information on such software and database, are sufficient to show that prima facie merit of the proposed interference with chattel claim. See Hecht v. Components International, Inc., 22 Misc3d at 370 (finding that interference with information stored on a computer gives rise to a claim of trespass to chattels when plaintiff is dispossessed of the information or the information is impaired as to condition, quality, or value).

Accordingly, with the exception of first proposed cause of action for breach of contract cause of action and the proposed claim for prima facie tort, plaintiffs' motion to amend the complaint is granted.

Finally, the issues raised by plaintiffs' request to compel certain discovery and to extend the note of issue date shall be resolved at the compliance conference scheduled below.

Conclusion

In view of the above, it is

ORDERED that the motion to amend is granted except to the extent that plaintiffs seek to add the first cause of action for breach of contract and the cause of action for prima facie tort; and it is further

ORDERED that within 20 days of the date of this decision and order, a copy of which is being mailed by my chambers to the parties, plaintiffs shall serve and file an amended complaint consistent with this decision and order; and it is further

ORDERED that defendants shall answer the proposed amended complaint within 20 days of service of the amended complaint; and it is further

ORDERED that a compliance conference shall be held on June 9, 2011 in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: April 14, 2011

J.S.C.