

Ryan Pierce Group, Inc. v Brown

2011 NY Slip Op 31199(U)

April 27, 2011

Sup Ct, Nassau County

Docket Number: 8956/10

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

-----X
**RYAN PIERCE GROUP, INC. and
TOWER WEST COMMUNICATIONS, INC.,**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiffs,

**Index No: 8956/10
Motion Seq. Nos: 2, 3 and 4
Submission Date: 3/3/11**

- against -

**MICHAEL BROWN, DONALD
JOHNSON, WILLIAM FURDOCK,
SHANNA SMITH, TIMOTHY DOWNS,
and THOMAS NYIRI,**

Defendants.

-----X

The following papers have been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Notice of Motion, Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Plaintiffs' Memorandum of Law in Opposition.....X**
- Plaintiffs' Memorandum of Law in Opposition.....X**
- Affidavit in Opposition and Exhibits.....X**
- Supplemental Affidavit and Exhibits.....X**
- Notice of Cross Motion, Affidavit in Support and Exhibits.....X**
- Affirmation in Opposition.....X**
- Reply Affirmation.....X**
- Reply Affidavit in Support/Opposition and Exhibits.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on 1) the motion filed by Defendant William Furdock ("Furdock") on December 22, 2010, 2) the motion filed by Defendant Michael Brown ("Brown"), Donald Johnson ("Johnson") and Timothy Downs ("Downs") on January 7, 2011,

and 3) the cross motion filed by Plaintiffs Ryan Pierce Group, Inc. (“RPG”) and Tower West Communications, Inc. (“TWC”) (collectively “Plaintiffs”) on January 26, 2011, all of which were submitted on March 3, 2011, following oral argument before the Court. For the reasons set forth below, the Court 1) grants Furdock’s motion to dismiss the Complaint against him; 2) grants the motion by Brown, Johnson and Downs to dismiss the second, third and fourth causes of action in the Complaint, but denies their motion to dismiss the first cause of action in the Complaint as well as their application for sanctions; and 3) denies Plaintiffs’ cross motion.

BACKGROUND

A. Relief Sought

Defendant Furdock moves for an Order, pursuant to CPLR § 3212, granting summary judgment dismissing this action against Furdock, together with any and all cross claims.

Defendants Brown, Johnson and Downs move for an Order 1) pursuant to CPLR § 3211(a)(7), dismissing the causes of action as against these moving defendants; 2) pursuant to CPLR § 3212, granting summary judgment dismissing the causes of action against these moving defendants; and 3) pursuant to CPLR § 8303-a, imposing sanctions against the Plaintiffs for filing and/or refusing to discontinue this allegedly frivolous action.

Plaintiffs move to open disclosure, in light of the applicable provisions of CPLR § 3214(b).

B. The Parties’ History

The parties’ history is set forth in detail in a prior decision of the Court dated June 18, 2010 (“Prior Decision”) (Ex. C to Marafioti Aff. in Supp.) and the Court incorporates the Prior Decision herein by reference. In the Prior Decision, the Court, with minor exceptions, denied Plaintiffs’ application for injunctive relief (“Prior Motion”) and vacated the temporary restraining order previously issued. The Prior Decision provided the following background of this action.

The Verified Complaint (“Complaint”) alleges as follows:

RPG and TWC are Florida corporations with their principal places of business at 60 Cutter Mill Road, Great Neck, New York. RPG and TWC are wholly owned subsidiaries of Juniper Group, Inc (“Juniper”). Plaintiffs are engaged in the business of constructing and

upgrading cellular communications towers. They act as contractors and subcontractors to cellular communications providers and to other companies engaged in the business of constructing or upgrading telecommunication towers. Clearwire, a cell communications upgrade and construction project contractor, is RPG's largest account.

Brown is Vice President for Operations of RPG who allegedly attempted to terminate his position without notice, purportedly in violation of an oral contract, and "cease[d] to act in the interests of RPG, on April 2, 2010" (Compl. at ¶ 6). Johnson is a Construction Project Manager for RPG. Furdock was a Construction Project manager for RPG. Defendant Shanna Smith ("Smith") was employed by RPG as a Project Coordinator. Downs was a Construction Project Manager for RPG. Nyiri is the principal of Nyiri and Associates, an entity that provides information technology consulting and development services to RPG.

The Complaint alleges improper conduct by Defendants including but not limited to: 1) Brown permitted RPG to start work on several Clearwire projects ("Projects") without first securing required Purchase Orders ("POs"); 2) Brown improperly stopped work on the Projects, instead of directing a slowdown as directed by RPG, thereby alienating the Clearwire Project Manager; 3) despite accepting RPG's compensation package and agreeing to continue work for RPG, Brown abruptly resigned from his position with RPG; 4) Brown improperly deleted information from a Blackberry smartphone belonging to RPG; 5) Brown and Johnson solicited an RPG work crew to abandon a Project; 6) Brown and Johnson solicited RPG employees and project managers, including Furdock and Smith, to leave RPG and work for a new company operated by Brown; and 7) Nyiri expressed his intention to permit Brown to use a computerized training program regarding the installation and use of Dragon Wave cellular technology that was developed for RPG.

The Complaint contains four (4) counts¹ alleging 1) tortious interference with employment relations by Brown and Johnson, 2) breach of fiduciary duty by all Defendants, 3) breach of the covenant of good faith and fair dealing by all Defendants, and 4) unfair competition by all Defendants. While the first cause of action is titled "Tortious Interference with Employment Relations," the final paragraph of that cause of action alleges that Defendants

¹The Complaint mistakenly labels the second cause of action as the third cause of action; there are only four (4) causes of action.

are liable to RPG for their “[tortious] interference with RPG’s prospective economic advantage” (Compl. at ¶ 95).

In the Prior Decision, the Court denied Plaintiffs’ application for injunctive relief based on numerous factors including 1) the absence of any non-compete or restrictive employment agreement between Plaintiff and any of the Defendants, 2) the factual disputes regarding the circumstances under which Plaintiffs’ work force for Clearwire Projects was reduced, and documentary evidence suggesting that Vlado proposed and implemented that work force reduction, 3) the numerous affirmations by Defendants regarding the reasons for their departure from Plaintiffs, including concerns about salary and newly-implemented requirements that employees execute restrictive employment agreements, 4) the absence of an affidavit from any employee of Plaintiffs attesting to improper solicitation by Defendants, 5) the press releases submitted by Defendants reflecting Plaintiffs’ financial viability, and 6) Plaintiffs’ failure to demonstrate Defendants’ improper possession of proprietary information of Plaintiffs, particularly in light of Defendants’ extensive experience in the cellular communications field which provided Defendants with access to relevant information from sources other than Plaintiffs.

In his Affirmation in Support, counsel for Furdock annexes and relies on supporting documentation including 1) the Affidavits of Vlado and Brown submitted in connection with the Prior Motion, which were discussed in the Prior Decision, and 2) an Affidavit of Furdock dated December 13, 2010 (Ex. F to Marafioti Aff. in Supp.). In his Affidavit, Furdock affirms, *inter alia*, that 1) his employment with RPG was not pursuant to any contract and not subject to any non-compete clause; 2) after he began working for RPG, he was advised that he would be presented with a non-compete and confidentiality agreement but never received any such agreement; 3) he stopped working for RPG for reasons including concerns about its financial viability, potential litigation in which he might become involved, other employees not receiving paychecks and Plaintiffs’ requiring him to pay for certain expenses that they previously advised him would not be his responsibility; and 4) as a construction project manager, he never attended a sales meeting, formally solicited then-existing customers for additional business or provided price quotes or proposals to potential customers.

In his Affirmation in Support, counsel for Brown, Johnson and Downs annexes and relies on supporting documentation including Affidavits of Brown, Johnson, Downs and Furdock. In his Affidavit, Brown incorporates by reference the affidavit he submitted in connection with the Prior Motion. He affirms, further, that he no longer works for Maxton Technologies (“Maxton”), and is now working as a consultant/independent contractor for two companies, specifically U.S. Wireless, located in Rochester, New York and Giant Solutions, located in Amsterdam, New York. To the best of his knowledge, neither of the companies for whom he is currently employed competes with Plaintiffs in the geographical area serviced by Tower/RPG during the time that Brown was employed by RPG.

In his Affidavit, Johnson also incorporates by reference the affidavit he submitted in connection with the Prior Motion. He affirms, further, that he no longer works for Maxton and, as of December 6, 2010, is employed as a construction manager for U.S. Wireless located in Rochester, New York. To the best of his knowledge, U.S. Wireless is not in competition with work performed by the Plaintiffs in the geographical area serviced by Plaintiffs during the time that Johnson was employed by RPG. Downs, similarly, affirms that he no longer works for Maxton, has been employed since November 22, 2010 as Lead Technician for U.S. Wireless in Rochester and believes that U.S. Wireless is not in competition with work performed by the Plaintiffs in the geographical area serviced by Plaintiffs during the time that Downs was employed by RPG.

Plaintiffs have submitted Affidavits in Opposition of Jesse Wainwright (“Wainwright”), Jerome M. Baert (“Baert”), Philip E. Barak (“Barak”) and Christopher Hildreth (“Hildreth”) (Exs. A, B, C and D to McDaniel Aff. in Opp.)

Wainwright affirms that he was employed by RPG as a crew chief in the North Carolina area. On April 28, 2010, his crew was working as a subcontractor to Clearwire on a project in North Carolina. Downs, the RPG project manager for the North Carolina area, advised Wainwright that he was quitting RPG and going to work for Maxton, and asked Wainwright to join him, which Wainwright declined to do.

On April 29, 2010, Downs called Wainwright and voiced concerns about RPG’s financial viability, stating that RPG was “going under” (Wainwright Aff. at ¶ 4) and that funds for RPG’s employees’ paychecks would not clear. Although Wainwright had already declined Downs’

offer to join him at Maxton, Downs received an e-mail that afternoon containing a job application and other paperwork from Maxton. Wainwright was concerned about how these events would affect the North Carolina project.

On April 30, 2010, Wainwright went to the hotel where Downs was staying to pick up his paycheck. Downs again urged Wainwright to complete an employment application for Maxton, and Wainwright again refused. Downs called Wainwright that afternoon and advised him that 1) RPG was “going under” (Wainwright Aff. at ¶ 8); 2) the Chicago RPG crew, which was scheduled to work on that evening’s project, had quit *en masse* (*id.*); and 3) all members of Wainwright’s North Carolina crew had packed up their belongings and left for Rochester, New York to work for Maxton. This left Wainwright without a crew to work on the night shift of the Clearwire Project.

Wainwright advised Bob Tillbrook (“Tillbrook”), an RPG project manager in North Carolina, of the situation. Although Tillbrook told Wainwright that he would look into it and get back to him, he never did. In light of Downs’ comments regarding RPG’s financial viability, and Tillbrook’s failure to provide additional information, Wainwright filled out the Maxton employment application to ensure that he would remain gainfully employed.

On May 2, 2010, Downs contacted Wainwright to inquire whether he would be working for Maxton. Wainwright then received a call from Brown, former Vice President of Operations of RPG, who said that he was employed by Maxton and urged Wainwright to come work there. Brown also told Downs that “anything RPG or [Vlado] had to say was a lie” (Wainwright Aff. at ¶ 14) and reiterated that RPG was “going under” (*id.*). Wainwright then spoke with Vlado, who advised Wainwright that RPG was not going under and that all employee paychecks would be honored. Wainwright advised Vlado of his conversations with Downs and Brown.

Baert, an RPG project manager in Illinois, affirms, *inter alia*, that 1) on April 30, 2010, Johnson advised him that he was leaving RPG, taking men from RPG’s Chicago crew with him and they were all going to work for Maxton; 2) on May 1, 2010 Johnson advised him that he and Brown “were planning on putting RPG into bankruptcy” (Baert Aff. at ¶ 3); 3) on May 2, 2010, Brown asked him whether he was prepared to work for Maxton on Clearwire jobs in Rochester and “boasted” (*id.* at ¶ 4) that he had persuaded RPG workers to come work for Maxton; 4) on May 2, 2010, Johnson advised him that all of RPG’s employees were leaving RPG; and 5) on May 3, 2010, following Baert’s decision not to leave RPG, Johnson left Baert a message that he

had “burnt his bridges” (*id.* at ¶ 7) by not leaving RPG to work for Maxton. Baert reported these conversations to Vlado.

Barak, the Controller for RPG, affirms, *inter alia*, that 1) on several occasions, Brown was urged to request POs prior to beginning work, as required by Clearwire, but Brown insisted that working without POs was standard industry practice, and assured RPG that it would be compensated by Clearwire for all work performed; 2) Brown advised Barak and Vlado that he would discuss with Clearwire obtaining “blanket” POs against future work (Barak Aff. in Opp. at ¶ 3) but never advised them of any such discussions; 3) due to Brown, Smith and Furdock’s mishandling of the Purchase Order process, Barak and Vlado became proactive in securing the necessary POs for the Clearwire project; 4) there was never a delay in compensating RPG employees; and 5) payroll checks of the Defendants who left RPG were held in escrow, “to safeguard company asserts which were in the possession of the former [employees]” (*id.* at ¶ 9) and subsequently delivered to a representative of the Department of Labor.

Hildreth, the Director of Operations of RPG, affirms that on April 25, 2010, Downs advised him that he was leaving RPG and that the majority of the North Carolina personnel, who were expected to work on a job for RPG, were leaving as well. Downs did not have the authority to contact Clearwire, or address any other issues with Clearwire or any other RPG client.

In his Affidavit, which supplements the affidavit submitted in connection with the Prior Motion, Vlado 1) provides a copy of the RPG Organization Chart and outlines the backgrounds and responsibilities of the Defendants; and 2) explains the significance of the POs for the Clearwire project. Vlado affirms that in late March of 2010, Brown advised him of his intention to resign from RPG and TWC, at which time Vlado offered Brown a raise and stock options if he stayed an additional 90 days, which Brown accepted. Vlado provides a copy of a payroll register (Ex. B to Vlado Supp. Aff.) reflecting these payments. Vlado denies that he ever threatened Brown.

After Brown terminated his employment with RPG and TWC, he filed a claim for unemployment, falsely claiming that he was fired. Vlado provides a copy of correspondence from the New York State Department of Labor dated May 12, 2010 (Ex. C to Vlado Supp. Aff.) reflecting that no unemployment insurance benefits would be paid to Brown based on the determination that Brown had quit his job without good cause, and that his quitting was

considered to be for personal reasons and without good cause for unemployment purposes.

Vlado affirms, further, that Johnson and Furdock never communicated their resignations to RPG. Two weeks after Brown's resignation, and just after he reported that Clearwire had approved POs for RPG and TWC in the Baltimore-Washington market, there was a charge to RPG's corporate credit card from a hotel in Maryland where RPG crews had previously stayed. Two weeks after this charge, an entire crew abandoned a project in North Carolina without informing RPG or TWC, and the Chicago crew followed suit within hours.

With respect to Plaintiffs' damages, Vlado affirms that RPG and TWC's revenues dropped significantly in the second and third quarters of 2010, and they have not received any new significant work from Clearwire following the "mass defection of the crews" (Vlado Supp. Aff. at ¶ 17). Vlado submits that the press releases on which Defendants rely, in support of their claim that Plaintiffs have not proved damages, do not reflect the damages caused by Defendants' actions.

In his Affirmation in Support of Plaintiffs' cross motion, Plaintiffs' Counsel affirms that discovery in this matter is stayed, pursuant to CPLR § 3214(b), in light of the pending motions for summary judgment. Opposing counsel denied his request to open disclosure while the motions for summary judgment are pending. Plaintiffs' Counsel submits that Defendants filed these motions to foreclose Plaintiffs from obtaining disclosure, and affirms that Plaintiffs are ready to serve Defendants with their disclosure demands, of which they provide sample copies (Exs. B - F to McDaniel Aff. in Supp.). Plaintiffs' Counsel argues, further, that evidence crucial to the prosecution of Plaintiffs' case is in jeopardy of destruction while discovery is stayed.

C. The Parties' Positions

Furdock submits, *inter alia*, that 1) the cause of action for breach of fiduciary duty is not viable because, in light of his status as an at-will employee, Furdock owed no fiduciary duty to Plaintiffs; 2) the cause of action for breach of the covenant of good faith and fair dealing cannot survive because there was no contractual obligation between Furdock and RPG; 3) the cause of action for unfair competition is not sustainable given that a) there was no contract between Furdock and RPG; b) Furdock, a "low-level employee" (Furdock Memorandum of Law at Point III) did not possess special or unique qualifications or proprietary business information belonging to Plaintiffs; and c) there is no evidence to support the claim that Furdock acted in concert with other employees.

Brown, Johnson and Downs submit, *inter alia*, that 1) the cause of action for tortious interference with employment relations must be dismissed on the grounds that a) there is no cognizable cause of action in favor of an employer for tortious interference with employment relations; b) there were no employment agreements between RPG and the employees allegedly solicited by Brown, Johnson and Downs; c) Plaintiffs have provided no support for the premise on which this allegation is based, specifically that Brown and Johnson were subject to employment contracts with restrictive covenants; and d) Brown and Johnson have refuted Plaintiffs' allegations that they formed a competing company; 2) a cause of action for tortious interference with prospective economic advantage is not viable in light of the fact that a) the Complaint fails adequately to allege dishonest, unfair or improper conduct of Brown, Johnson and Downs; b) the Complaint does not allege that economic pressure was exerted against Plaintiffs' customers; and c) Plaintiffs have provided no evidence of injury or damage; and 3) the causes of action alleging breach of fiduciary duty and breach of the obligation of good faith and fair dealing should be dismissed on the grounds that a) no fiduciary duty existed between Plaintiff and Defendants who were at-will employees; b) Brown, Johnson and Downs did not unfairly compete with Plaintiffs by, *e.g.*, diverting a corporate opportunity; c) none of these Defendants formed a competing entity while employed by RPG; and d) the sole remedy of RPG, as their employer, is termination of Defendants' employment.

Plaintiffs oppose Furdock's motion, submitting, *inter alia*, that 1) Furdock, despite his arguable at-will employee status and irrespective of the level of his position at RPG, owed duties of loyalty, and good faith and fair dealing, to Plaintiffs; and 2) the cause of action for unfair competition is viable in light of Furdock's alleged participation in the misappropriation of contracts from Plaintiffs, and Furdock's removal of tools and equipment after he abandoned the Chicago job site. Plaintiffs submit that they should be permitted to conduct discovery to develop the factual basis for these claims.

Plaintiffs oppose the motion of Defendants Brown, Johnson and Downs, submitting, *inter alia*, that 1) the cause of action for tortious interference with existing contracts, for solicitation of at-will employees, is viable where, as here, the solicitors use tortious means or have malicious motivation and notwithstanding Defendants' at-will status; 2) Plaintiffs have properly pled a cause of action for tortious interference with prospective economic advantage by alleging Defendants' interference with Plaintiffs' business relationship with Clearwire by means that

were dishonest, unfair and improper; 3) Defendants owed duties of loyalty, good faith and fair dealing to RPG and TWC, their employers, notwithstanding their at-will status, which they breached in the manner outlined by Plaintiffs; and 4) Plaintiffs have sufficiently pled a cause of action for unfair competition by alleging that Defendants misappropriated Plaintiffs' relationship with Clearwire. Plaintiffs also submit that the Court should deny Defendants' motion for sanctions, submitting that Plaintiffs' decision not to settle and pursue this action was not frivolous.

Plaintiffs request that the Court grant their cross motion to open discovery, to ensure that Plaintiffs have access to evidence necessary to the prosecution of their case. Furdock opposes Plaintiffs' motion, submitting that there is no merit to the action against Furdock, and Furdock should not be required to incur additional expense in defending this action. Defendants Brown, Johnson and Downs oppose Plaintiffs' motion, submitting that Defendants have demonstrated their right to summary judgment, and Plaintiffs have not demonstrated that these Defendants are in exclusive possession of any evidence necessary to the prosecution of this action.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference

which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

C. Relevant Causes of Action

A plaintiff claiming tortious interference under New York law must establish four elements: 1) a valid contract, 2) knowledge by a third party of the contract, 3) conduct by the third party to intentionally and improperly procure the breach of the contract, and 4) damage to the plaintiff as a result of the breach.

To state a cause of action alleging tortious interference with prospective contractual relations, the plaintiff must allege that the defendant engaged in culpable conduct which interfered with a prospective contractual relationship between the plaintiff and a third party. *Adler v. 20/20 Companies*, 2011 N.Y. Slip Op. 1962, * 2 (2d Dept. 2011). As a general rule, such culpable conduct must amount to a crime or independent tort, and may include wrongful means, defined as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. By contrast, mere knowing persuasion is not sufficient. *Id.*, quoting *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980).

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). Employment relationships do not create fiduciary relationships. *Rather v. CBS Corp.*, 68 A.D.3d 49, 55 (1st Dept. 2009), *lv. app. den.*, 13 N.Y.3d 715 (2010), citing, *inter alia*, *Schenkman v. New York Coll. of Health Professionals*, 29 A.D.3d 671, 672 (2d Dept. 2006) (cause of action for breach of fiduciary duty properly dismissed where employees failed to plead facts demonstrating how arm's-length, employer-employee relationship gave rise to fiduciary duty).

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). The implied covenant of good faith and fair dealing embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the

fruits of the contract. *Moran v. Erik*, 11 N.Y.3d 452, 456 (2008), citing *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (additional citations omitted).

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 Dochrermann & Epstein, Inc. v. Home Box Office*, [citations omitted], (S.D.N.Y. March 31, 1999). A cause of action based on unfair competition may be predicated on the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets. *Out of the Box Promotions, LLC v. Koschitzki*, 55 A.D.3d 575, 578 (2d Dept. 2008), citing *Beverage Mktg. USA, Inc. v. South Beach Beverage Co., Inc.*, 20 A.D.3d 439, 440 (2d Dept. 2005), quoting *Eagle Comtronics v. Pico Prods.*, 256 A.D.2d 1202, 1203 (4th Dept. 1998).

D. Application of these Principles to the Instant Action

The Court grants the motions of Defendant Furdock, and Defendants Brown, Johnson and Downs, to dismiss the second, third and fourth causes of action in the Complaint alleging breach of fiduciary duty, breach of the covenant of good faith and fair dealing, and unfair competition. The Court dismisses the second, third and fourth causes of action against Furdock, Brown, Johnson and Downs based on the Court's conclusion that 1) no fiduciary relationship existed between Plaintiffs and the Defendant-employees; 2) as there existed no contract between Plaintiffs and the moving Defendants, there is no basis for the cause of action for breach of the covenant of good faith and fair dealing; and 3) Plaintiffs have not established that the moving Defendants misappropriated the fruit of Plaintiffs' labors and expenditures through means constituting unfair competition.

The Court denies the motion to dismiss the first cause of action against Defendants Brown and Johnson based on the Court's conclusion that Plaintiffs have sufficiently alleged that these Defendants engaged in culpable conduct which interfered with Plaintiffs' relationship with Clearwire by, *inter alia*, 1) contacting Plaintiffs' employees and encouraging them repeatedly to leave an ongoing project and join a competing company; 2) advising the employees, possibly

falsely, that Plaintiffs were in dire economic straits and were unable to meet their payroll obligations; and 3) impugning the integrity of Plaintiffs by, *e.g.*, claiming that statements by Vlado and RPG were not worthy of belief.

The Court denies Defendants' motion for sanctions because the allegations against Defendants, including those upon which Defendants have successfully sought relief in the present motions, are not frivolous as to warrant sanctions. Plaintiffs' cross motion to open discovery is denied as moot.

All matters not decided herein are hereby denied.

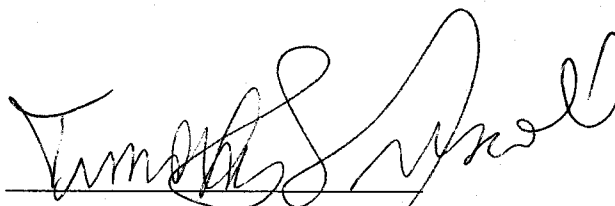
This constitutes the decision and order of the Court.

The Court directs counsel for the remaining parties to appear before the Court for a Preliminary Conference on June 1, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

April 27, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

APR 29 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**